

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of )  
)  
SUFU Network Services, Inc. ) ASBCA No. 55306  
)  
Under Contract No. F41999-96-C-0057 )

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OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal filed on 5 January 2006 arose from the contracting officer's (CO) deemed denial of appellant's 1 July 2005, \$131,169,649.62 claim under the captioned non-appropriated funds (NAFI) contract with the Air Force Non-Appropriated Funds Purchasing Office, San Antonio (AFNAFPO). Disputes under this contract have spawned several prior Board decisions: *SUFU Network Services, Inc.*, ASBCA No. 54503, 04-1 BCA ¶ 32,606, 04-2 BCA ¶ 32,714, *recon. denied*, 04-2 BCA ¶ 32,788 (*SUFU I*); ASBCA No. 55306, 06-2 BCA ¶ 33,444, 07-1 BCA ¶¶ 33,485, 33,535 (*SUFU II*); ASBCA No. 55948, 08-1 BCA ¶ 33,766 (*SUFU III*).

We will not repeat our findings in the above-cited decisions regarding contract terms and course of performance, except as needed to understand the present issues. The Board's jurisdiction to decide this appeal arises from the contract's Disputes Clause. *SUFU I*, 04-1 BCA at 161,366. The appeal record in *SUFU II* consists of the Rule 4 documents and exhibits (27 volumes), transcripts (23 days) of hearings in Falls Church, VA, and Ramstein Air Base, Germany, the documents (6 volumes) and hearing

transcripts (4 days) in *SUFII* (tr. 1/7<sup>1</sup>) and the parties' post-hearing and reply briefs. The Board is to decide both entitlement and quantum (tr. 1/8-9).

## FINDINGS OF FACT

### General

1. Contract F41999-96-D-0057 (the contract) was awarded by AFNAFPO to USFI Network Services, Inc. (hereinafter SUFI) on 26 April 1996 to install and operate transient lodging telecommunications systems (LFTS) at three U. S. Air Force bases in Europe, for a not to exceed period of 10 years (R4, tab 1 at B-1, H-5). Modification No. 008 on 29 March 2000 extended the foregoing contract term by "FIVE (5) YEARS, EFFECTIVE APR 26, 1996 THRU APR 25, 2011," which term "shall not exceed a period of 15 years" from site acceptance (R4, tab 11 at 1, H-5).

2. The contract incorporated by reference the FAR 52.243-1, CHANGES – FIXED-PRICE (AUG 1987) and 52.243-1, ALT-I (APR 1984) clauses, which authorized "changes within the general scope of this contract" to the "descriptions of services to be performed," and included NAFI clauses providing for issuance of delivery orders (DO) for services SUFI was to furnish, an "INDEFINITE QUANTITY (APR 1984)" clause very similar to the FAR 52.216-22 clause, a "DELIVERY ORDER LIMITATIONS (APR 1984)" clause providing that both the minimum and the maximum order SUFI was required to honor was "one system per base" the NAFI Disputes clause (SUFII I, 04-2 BCA at 161,859, finding 5) and the following Legal Status clause (R4, tab 1 at I-1, -8, -10, -11):

4. LEGAL STATUS (1973 JUL) – The NAFI is an integral part of the Department of Defense and is an instrumentality of the United States Government. Therefore, NAFI contracts are United States Government contracts; however, they do not obligate appropriated funds of the United States.

The contract did not incorporate or refer to the FAR Subpart 31.2 cost principles as the basis for pricing changes and other contract modifications, nor did it include or incorporate the FAR 52.245-15, STOP WORK ORDER clause or the equivalent.

3. Contract §§ G.1 and H.2 provided (R4, tab 1 at G-1, H-1):

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<sup>1</sup> In this opinion all citations to transcripts and to documents refer to the transcripts, Rule 4 file and appellant's hearing exhibits (designated "ex. B\_") in ASBCA No. 55306, except that citations to the transcripts, Rule 4 documents and appellant's exhibits (designated "ex. A\_") in *SUFII* will be prefixed by "*SUFII*."

[§ G] . . . 1. CONTRACTING OFFICER’S TECHNICAL REPRESENTATIVE (COTR):

The COTR is responsible for performing all administrative functions necessary to ensure performance of this contract.

Wayne P. Sellers....

....

[§ H]...2. CONTRACTING OFFICER’S AUTHORITY

The Contracting Officer is the only person authorized to approve changes in any of the requirements under this contract and not withstanding [sic] any provisions contained elsewhere in this contract, the said authority remains solely in the Contracting Officer. In the event the Contractor effects any such change at the direction of any person other than the Contracting Officer, the change will be considered to have been without authority and will not be recognized for payment by the Government.

COTR Wayne Sellers and successor COTR Claudette “Sam” Adams were employees of United States Air Forces Europe (USAFE) (R4, tab 23 at 1; tab 28 at 1; tr. 7/52). Successor COTR SMSGT Shelly Yaeger was a non-commissioned officer assigned to USAFE (tr. 6/15-16; R4, tab 27 at 1).

4. SUFI constructed the telephone infrastructure at each Air Force base at no cost to the Air Force. The only compensation SUFI received under the contract was paid by guests who placed local or long distance telephone calls from base lodging facilities, whose charges were collected by the Air Force and paid over to SUFI. (*SUFII*, 04-1 BCA ¶ 32,606, finding 3)

5. The CO issued the following DOs by number, date, air base location and number of lodging guest rooms:

<u>No.</u>	<u>Date</u>	<u>AB Location(s)</u>	<u>No. Guest Rooms</u>
1	5/1/96	Ramstein	602
2	5/1/96	Rhein Main	266
3	5/1/96	Aviano	53
4	6/3/96	Landstuhl/ Vogelweh/Kapaun	275 361
5	[not issued]		

6	7/10/98 Spangdahlem/ Eifel West (Bitburg)	180
7	8/25/98 Sembach Annex	563

DOs 1, 2 and 3 were issued for their respective locations with the statements of work in Appendices A, B and C of the contract. DOs 4, 6 and 7 were issued with the statements of work AFNAFPO solicited from SUFI subsequent to award of the contract pursuant to § H.3 thereof. (R4, tabs 16-20; *SUFII*, R4, tab 13 (Aviano))

6. SUFI's 25 August 2004 letter notified CO Cedric Henson that SUFI intended to cancel the contract due to the material breach held in *SUFII* and to stop work (R4, tab 42).

7. On 1 April 2005 SUFI's attorney Frederick Claybrook and CO Hollins-Jones executed a "Partial Settlement Agreement" (PSA) that provided, *inter alia*, that SUFI's performance would end not later than 31 May 2005 and respondent would thereupon assume ownership and operation of the LFTS theretofore under the contract (ex. B-70).

8. On 1 July 2005 SUFI submitted to the CO 28 monetary claims under the contract and under the PSA (R4, tab 57).

9. Subsequent to the docketing of ASBCA No. 55306, on 17 April 2006 CO Henson issued a final decision denying all SUFI's claims except the Calling Cards claim, on which he offered \$132,922 as breach damages (R4, tab 209 at 12).

10. The Board's 8 November 2006 decision on the parties' motions for partial summary judgment held, *inter alia*, that SUFI had not waived any of its damage claims or its right to stop work by continuing to perform during the 17 August 2004 to 31 May 2005 Transition Period before respondent took over performance of the guest lodging telephone services; the PSA provisions providing for interest on SUFI's claims were valid and not void *ab initio*; none of SUFI's claims was barred for failure to provide notice under the contract's Changes clause; and the parties genuinely disputed the material facts with respect to whether SUFI could prove that it would have serviced new facilities to be opened at Ramstein and Spangdahlem ABs, had it continued performance. 06-2 BCA ¶ 33,444 at 165,775-80.

11. We find that the annual salaries (including bonuses and education allowances) and hourly rates in U.S. dollars/hr. (annual salary / 2080 hours) for SUFI's employees and consultant whose "extra work" hours appear in many of its claims are as follows:

<u>Name</u>	<u>An. Salary</u>	<u>Rate/hr.</u>	<u>Record Cite</u>
Carl Stephens	\$139,000	\$66.83	Tr. 2/220-22
Jeff Holzapfel	\$ 70,000	\$33.65	Tr. 2/222

Cecilia Ansola	\$ 55,000	\$26.44	Tr. 2/222-23, 5/135-37
Fred Broyles	\$ 44,000	\$21.15	Tr. 6/220-21
Allan Smith	\$ 56,755	\$27.29	Tr. 5/136-37; ex. B205, tab 17D at 445-46
R. Congalton	\$ 85,567	\$41.14	Tr. 5/136-37; ex. B205, tab 17D at 445-46
Brian Tapley	[unknown]	[unknown]	Tr. 1/146, 167-69, 2/71-72, 88, 172, 250

We find that the record contains no evidence that SUFI paid the foregoing individuals more than the foregoing yearly salaries (including bonuses and allowances).

12. We find that SUFI’s employees generally estimated the “extra work” dates and hours for claim damages in July 2006 based not on contemporaneous time sheets of their work and hours, but rather on review of claim correspondence and calendars, except Mr. Stephens estimated the dates and hours for his subordinates Tapley and Holzapfel (tr. 1/156-62, 2/72), Mr. Congalton used his 2001-2005 time sheet entries (tr. 12/25-26; ex. B132) and Mr. Smith began to record his work hours in 2004 (tr. 13/6, 117-18); Smith’s record is not in evidence. DCAA stated on 12 February 2007 (R4, tab 106 at 27):

[W]e requested ... supporting timesheets to verify the claimed labor hours. The contractor informed us that daily hours were prepared in an employee log contemporaneously.... We were unable to verify the claimed hours to supporting timesheets. We were also unable to determine when the supporting employee logs were prepared.

FINDINGS ON THE 13 OCTOBER 2006 SETTLEMENT AGREEMENT

13. On 12-13 October 2006, the parties met to negotiate a settlement of ten of SUFI’s 28 claims. Attorneys Claybrook and McLaughlin represented SUFI. AFNAFPO CO Browning and AFNAFPO legal counsel Gedraitis represented the government. Mr. Gedraitis was the lead negotiator for the government at the discussion, but he was not a warranted contracting officer. At the outset of the discussions, Mr. Gedraitis stated that any negotiated agreement at the meeting “would be finalized in a [contract] modification.” (Tr. 13/252, 15/73-74, 76, 79-83, 120-23, 129, 23/205-06) On the afternoon of 13 October 2006, Messrs. Gedraitis and Claybrook prepared a handwritten summary of matters agreed upon during the negotiations. While this document was being prepared, Mr. Claybrook said to CO Browning “why do we even need a [contract] modification?” CO Browning replied: “we said there will be a modification.” (Tr. 15/133)

14. When the document was completed and ready for signature, Mr. Claybrook expressly asked CO Browning “why aren’t you signing this document?” CO Browning



15. After the foregoing document was signed, Mr. Claybrook asked Mr. Gedraitis whether the Air Force was “going to want the modification to be bilateral or unilateral.” Mr. Gedraitis replied “it would be bilateral.” (Tr. 19/198) As the parties were preparing to depart, they jointly drafted and signed the following handwritten addendum to their agreement:

Ramstein AB, Germany

13 October 2006

The parties to the ASBCA Case No. 55306 hereby agree to an addendum to the 13 October 2006 Settlement Agreement. The purpose of this addendum is to state that the settlement of claims hereby will affect the Lost Profits claims by applying to the lost profit evaluation a pro rata reduction based on the discounts in the claims that were negotiated from the total amount claimed (including revenue reduction, extra work and out of pocket expenses/costs).

Pete F. Gedraitis  
FOR THE NAFI

Rick Claybrook  
FOR SUFI

(Ex. B83 at 2)

16. CO Browning understood the 13 October 2006 agreement to be a “handwritten summarization of the negotiations,” and he believed the settlement negotiations concluded “[a]s far as the amount to be settled,” but not regarding the terms (tr. 15/94, 133, 159).

17. On 16 October 2006, Mr. Claybrook sent CO Browning an email suggesting the following language for the settlement contract modification:

1. The purpose of this modification is to implement the attached settlement agreement of October 13, 2006 including its addendum of the same date.
2. Pursuant to the attached settlement agreement, the NAFI will pay by wire transfer within three (3) business days of the execution of this modification one million eight hundred nineteen thousand forty seven dollars (\$1,819,047.00).
3. Pursuant to the attached addendum to the settlement agreement, the following amounts are the agreed amounts to be used by SUFI in its calculation of lost profits, tab 17A,

note 4, of its “Lost Profits” claim (ASBCA 55306 Rule 4 File, page SCL002997):

[Table of Amounts]

(Ex. B153)

18. Starting 30 October 2006, the parties exchanged drafts for the settlement modification. After a number of exchanges, in which SUFI repeatedly asserted that the 13 October 2006 agreement was a complete and final settlement agreement by itself, the parties were unable to agree on the terms of the settlement modification. In these exchanges, the government did not seek to change the settlement amounts for the ten claims agreed upon in the 13 October 2006 negotiation, but did seek to add a settlement of the Count X Kapaun shutoff claim for \$5,907.56. The disagreements leading to impasse were over SUFI’s demand for payment within three business days, and over how an ASBCA decision on the unsettled lost profits claim would affect the settled claims. (Exs. B154-59, B161-62)

#### DECISION ON SETTLEMENT AGREEMENT

SUFI contends that the government is legally bound to the 13 October 2006 handwritten agreement because (i) that agreement was a completely integrated contract finalizing the settlement of the parties; (ii) the government intended to be bound by that agreement; (iii) no contract modification was required to implement the agreement; (iv) the government negotiator executed the agreement with full authority from the contracting officer; and (v) the CO approved the settlement agreement. SUFI also argues that even if the 13 October 2006 settlement agreement was not legally binding as a final settlement agreement, the government violated a good faith duty by attempting to alter its terms. (App. br. at 104-27)

We do not agree with any of appellant’s reasons for holding the 13 October 2006 settlement agreement and addendum of the same date to be a legally binding final settlement agreement. The government’s CO and contract negotiator expressly stated at the beginning and at the end of the negotiations that any agreements would be finalized in a bilateral contract modification. (Findings 13, 15) When requested by a SUFI representative to sign the 13 October 2006 agreement, the CO expressly refused and stated that the negotiator would sign it. (Finding 14) None of the cases cited by SUFI of implied consent or subsequent ratification involved a contracting officer who was present at the negotiation, stated at the end of the negotiation that a contract modification would be necessary, expressly refused to sign a summarization of the agreements at the negotiation, and expressly designated an unwarranted negotiator, to sign the summarization. *Cf. AAR Corp.*, ASBCA No. 16439, 74-1 BCA ¶ 10,602 at 50259-60) (contracting officer signed the letter to the contractor summarizing the negotiated

agreement); *Federal Electric Corp.*, 82-2 BCA ¶ 15,862 at 78,656 (“The [settlement] agreement was signed by the contracting officer on behalf of the Government”); *Helene Barbier dba Encanto Gifts*, ASBCA No. 26418, 82-2 BCA ¶ 15,820 at 78,408 (contracting officer’s letter notice of award sufficient to constitute contract).

The contracting officer considered the 13 October 2006 handwritten agreement and its addendum to be conclusive as to the amount to be settled, but not conclusive as to other terms (finding 16). His understanding is consistent with the document itself. It does not state that it is a final settlement agreement. It lacks time of payment, accord and satisfaction, and mutual release provisions common to such agreements. It expressly leaves open the issue of attorney fees.<sup>2</sup> (Findings 14-15) Moreover, three days after the 13 October 2006 documents were signed, SUFI itself proposed two additional terms for the settlement modification – a time of payment provision and a provision specifying “the agreed amounts to be used by SUFI in its calculation of lost profits.” (Finding 17) Finally, there is no credible evidence of lack of good faith on the part of CO Browning in negotiating the terms of the settlement modification. He did not at any point renege on the amounts agreed upon in the 13 October 2006 negotiation for the ten claims negotiated. The issues creating the impasse as to the contract modification were issues that had not been agreed upon in the earlier 13 October 2006 negotiations, including how the amounts of the pro rata discounts of the 10 settled claims were to be applied to SUFI’s lost profits claim. (Finding 18)

We conclude that there was no meeting of the minds as to the 13 October 2006 agreement being a final and complete settlement agreement for the ten claims specified therein. Accordingly, we decide those claims *de novo* on both entitlement and quantum below.

#### FURTHER FINDINGS ON SUFI’s CLAIMS

19. To aid in understanding SUFI’s 28 claims and the defenses to them, and to isolate duplicate damages due to alleged government conduct that affected SUFI’s LFTS under two or more claims, we analyze and decide those claims in the following approximate chronological order, designated by the count number in SUFI’s amended complaint, not in their numerical sequence used in SUFI’s claim and in the parties’ briefs:

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<sup>2</sup> The totality sentence in the 13 October 2006 agreement does not state that it is the totality of all terms and conditions for final settlement of the 10 claims. It states only that it is the totality of the issues agreed upon at the negotiation and that “no other issues have been agreed upon by the Parties at this settlement negotiation.” (Finding 14)

<u>Count</u>	<u>Claim Designation</u>
XX	Aviano Misrepresentations
XIX	Base Installations
XVIII	SIMS/LTS Interfaces
VI	Early DSN Abuse
III	Hallway/Lobby DSN Phones
VIII	Prime Knight Lodgings
XXI	Coordinated Message
XII	Missing Rooms
V	Other Operator Numbers Patching
XIII	Temporary Shutdowns
IX	Sembach/Kapaun Line Charge
VII	Delta Squad
XXII	Change of Air Force Switches
XVII	New Hotel Assistance
IV	A&B Bed Switch, Use of PINs, and LTS Switch
XI	German Troops Housing
II	Front Desk Patching
X	Kapaun Phone Shutoff
XXIII	Security Inspection
I	Calling Cards
XIV	AT&T Trailer
XXIV	Severance and Shutdown Personnel Costs
XXV	Office Lease
XXVI	Extra Transition Work
XXVII	Spare Parts
XXVIII	Miscellaneous Shutdown Costs
XV	General Lack of Cooperation
XVI	Lost Profits

#### FURTHER FINDINGS ON COUNT XX – AVIANO MISREPRESENTATIONS

20. Solicitation No. F41999-96-R-0022 (the RFP), dated 2 February 1996, upon which the contract was awarded, stated in § B.5, “Prospective Offerors are encouraged to attend site visits at Aviano Air Base, Italy [and Rhein Main and Ramstein Air Bases] (reference Section L, Para 15)” and in § C, Statement of Work (SOW):

3.7 Distribution System. Government furnished outside (black) cable that is available for contractor use to interconnect billeting buildings to the Main Distribution Frame shall be identified by the base Communications Squadron....

....

3.8.2 Site Survey. The contractor shall accomplish a building by building site survey of effected lodging/billeting facilities after contract award.

(SUFII, ex. A2 at B-4, C-23, C-26)

21. COTR Wayne Sellers' 20 February 1996 memorandum of the 13 February 1996 site visit at Aviano, attended by SUFI's Carl Stephens, included the following question and answer (R4, tab 23 at 1, 2):

Question: Are there conduits between the buildings and can they be used by the contractor?

Answer: IAW with [sic] Section C, all of Par. 3.7., existing wiring, cables, conduits, etc. may be used.

22. During the 13 February 1996 site visit at Aviano: (a) TSgt Marlon Scott, 31<sup>st</sup> Communications Squadron, told Mr. Stephens that conduits were in place between the main building and several outlying buildings, one of which buildings was a great distance from the main lodging facility, and checked base records to confirm that such cable had no installation use (tr. 1/245-46), and (b) Air Force representatives represented to Mr. Stephens that there would be approximately 50 guest rooms requiring telephone service (tr. 1/250).

23. RFP Amendment No. A002, issued 7 March 1996, set forth questions and answers, including (R4, tab 3, after § J at 14):

76. Question: Are any of the lodging facilities identified in the RFP scheduled to be closed for any period of time for rehabilitation, upgrade etc.? If so, should the installation of the LFTS be integrated into that upgrade or rehabilitation schedule?

Answer: Yes. Reference is made to Section C SOW, para. 2.1.2.1. Currently Building 256 at Aviano AB, It. is being refurbished. Its completion is scheduled for Jun. 96.

24. SUFI's proposal, which was included in the contract, stated that (R4, tab 1 at C-32, C-33; tr. 1/247-48):

3.2 The US Government will provide the following at no charge to the bidder:

.....

### 3.2.4 Aviano

#### 3.2.4.1 Use of existing **Government** cable to all buildings.

25. DO No. 3, issued 1 May 1996, listed 53 guest rooms in lodging Building Nos. 230, 232, 255, 256 (including 19 rooms), 273 and 274 at Aviano AB (*SUFII*, R4, tab 13 at 3-4; tr. 1/249-52).

26. Mr. Elias Branham, General Manager of Lodging at Ramstein from 1977 through 2002, testified that the normal planning cycle for major lodging renovations was “years out” (tr. 12/241, 249).

27. Performance at Aviano was delayed due to renovation of Building No. 256. Once that renovation was completed, Mr. Stephens and SUFI’s subcontractor McNicholas went to Aviano in February 1997 for a pre-installation site survey. Present were COTR Wayne Sellers, lodging manager Ms. Strayhorn and the communications squadron’s chief of operations. Mr. Stephens learned that Building No. 256’s rooms had been converted to administrative offices, SUFI could not use the Air Force cable between lodging buildings and it would have to install cable for about one-half mile through a paved road to service the remaining 32 rooms in five buildings. Mr. Stephens told COTR Sellers that those significant changes made DO No. 3 invalid and SUFI’s site visits wasted effort. (*SUFII*, ex. A36, ¶ 4; tr. 1/252-58)

28. SUFI’s 26 February 1997 e-mail to CO Janice Jones stated:

The room count at Aviano has changed from 55 to 32 because the main building (256) was converted to office space rather than guest rooms. This alters the economics of Aviano significantly from the requirements as originally submitted and from our solution proposed in the contract.

(R4, tab 97A at 4089) The CO did not disagree or rescind that change (tr. 1/258-59).

29. In early 2002, the parties discussed LFTS services at Aviano AB, but did not resolve, *inter alia*, differences in designated lodging facilities, DSN access and lower rates, SUFI told the CO that it was not “economically feasible” to service Aviano in

March 2002 (*SUFII*, 04-2 BCA at 161,864 (finding 44)) and on 6 May 2002 the CO unilaterally cancelled DO No. 3 at no cost to the government (*SUFII*, R4, tab 13 at 7).

30. SUFI's claim, updated on 13 February 2007, included the following damages:

A. Extra work for 3/96 and 3/97 site surveys	\$ 3,510.00
(including Stephens' 4/97, 12 hr. @ \$90/hr = \$1,080.00)	
Interest through June 2005	<u>2,133.46</u>
Subtotal:	\$ 5,643.46
 B. Out-of-pocket costs	
3/96 SUFI trip expenses	1,675.00
3/96 McNicholas site visit	500.00
3/97 SUFI trip expenses	1,675.00
3/97 McNicholas site visit	4,782.53
7/1/05 Stephens consultation fee for claim preparation	50.00
Profit at 25%	2,170.63
Interest through June 2005	<u>5,574.31</u>
Subtotal:	\$16,427.47
 Total of A (\$5,643.46) + B (\$16,427.47) =	\$22,070.93

(Ex. B205, tab 1 at 1, tab 2A at 32, tab 21A at 489-90, tab 21B at 491, ex. B135 at 17; R4, tab 97B at 4092; tr. 2/11-13) SUFI used "3/96" and "3/97" or "4/97" for its two site visits, but the actual dates were "2/96" and "2/97" (R4, tab 23 at 1, tab 85A at 2700). So SUFI adjusted the two interest amounts by \$23.01 and \$647.08, respectively, to \$2,156.47 and \$6,221.39, and the total to \$22,741.02 (\$22,070.93 + \$23.01 + \$647.08) (app. br. at 390-92). We find that the "3/97 McNicholas site visit" charge was Euros 2,956.74 (R4, tab 97B at 4095), and on 14 February 1997 the Euro to dollar exchange rate was 1.1525 (internet "x-rates.com"), which converts to \$3,407.64 (2,956.74 x 1.1525).

### DECISION ON COUNT XX

SUFI argues that respondent materially misrepresented the number of rooms and availability of government cabling at Aviano specified in the contract and in DO No. 3, and SUFI "with the consent of the Contracting Office, exercised its right to cancel the Aviano delivery order due to those material misrepresentations and breaches of contract" (app. br. at 386). Respondent argues that it did not misrepresent the number of rooms or availability of government cable at Aviano and SUFI cannot recover expenses allegedly incurred for DO No. 3 "that SUFI agreed to cancel" (gov't br. at 177-78).

The only record evidence SUFI adduced with respect to its allegation of material misrepresentation about the number of rooms in Building No. 256 and the availability of government cable at Aviano AB was the statement of Elias Branham, General Manager of Ramstein Lodging, that the normal planning cycle for major lodging renovations was “years out” (finding 26). Such evidence did not establish any pre-award government knowledge that the number of lodging guest rooms in Building No. 256 and the availability of government cable at Aviano Air Base would be changed in February 1997. Thus, SUFI’s allegations of misrepresentation before contract award fail for lack of proof.

However, the radical reduction in the number of guest rooms, the absence of available conduit between the facilities for SUFI’s use, and the government’s ultimate cancellation of the delivery order amounted to a constructive change that rendered SUFI’s post award site visit a wasted effort.

Since respondent made no pre-award misrepresentation, SUFI is not entitled to recover its 13 February 1996 site visit costs. However, SUFI’s February 1997 wasted site visit was the result of the constructive change. We determine SUFI’s February 1997 site survey equitable adjustment as follows:

SUFI (Stephens) 2/97 work, 12 hrs at \$66.83/hr	\$ 801.96
" " " trip expense	1,675.00
McNicholas’ 2/97 survey costs	<u>3,407.64</u>
Subtotal:	\$5,884.60
Profit @ 10%, which we find reasonable	<u>588.46</u>
Total:	\$6,473.06

Our 8 November 2006 decision on the parties’ motions for partial summary judgment set forth ¶ 4 of the PSA (06-2 BCA at 165,773):

4. The Air Force agrees to the following concerning any claims filed by SUFI with the AF concerning the contract and this Agreement:

(a) The Air Force will be liable to pay interest on any amounts paid or recovered by . . . judgment from the earlier of (i) the date of receipt of the claim or (ii) the date damages are actually incurred, until payment.

We granted SUFI partial summary judgment on the issue of interest. 06-2 BCA at 165,777-78. Since the PSA did not specify the interest rate to be applied, SUFI’s claim calculated interest on the basis of the Federal Reserve Board (FRB) prime interest rate

(app. br. at 70). Respondent argued that interest was payable only on Count I, decided in *SUFII*, but did not object to use of the FRB prime interest rate (gov't br. at 184). We conclude that SUFI is entitled to interest on \$6,473.06 at the FRB's monthly prime rate for the period 15 February 1997 until payment of the \$6,473.06 is made pursuant to this decision. We do not decide here Mr. Stephens' \$50.00 claim preparation costs for claim XX, but instead *infra* in this decision.

FURTHER FINDINGS ON COUNT XIX--BASE INSTALLATIONS

31. SUFI's proposal, as incorporated in the contract, contained the following pertinent provisions:

3.2.1 General

3.2.1.1 Utilities.

3.2.1.2 Equipment rooms identified in site surveys on February 13, 15 and 16 for PBX [private branch exchange] and [SUFII] network equipment installations.

3.2.2 Ramstein:

3.2.2.1 Use of existing manhole/conduit system to install cables from building 305 to all other billeting facilities on Ramstein [AB], with the exception of building 1018.

....

4.8.1 Ramstein:

4.8.1.1 Exterior Cabling:

4.8.1.1.1 [SUFII] will install two 100 pair cables from building 305 to building 2409/2408 through existing Government underground/duct system....

(R4, tab 1 at C-32-33, C-38)

32. The contract stated the following Ramstein lodging requirements in § J:

1.10 Switching System Location: The switching system shall be located in Building 305, Room 1. Approximately 225 sq. feet of floor space has been reserved for housing switching equipment including the UPS, IDF, and other necessary miscellaneous equipment/bays....

1.11 Utility Support: The government will provide 220 VAC, 50 Hz, three-phase power with a 30 Amp breaker on each phase for the LFTS and terminate the power cables at one location.... The contractor shall provide and terminate the power distribution system to all LFTS equipment.

(R4, tab 1, § J, Attach. 4, Appx. A at 2 of 10)

33. Contract § H provided in pertinent part (R4, tab 1 at H-2, H-5):

9. SITE PREPARATION

a. Equipment space and environmental specifications for site preparation shall be furnished in writing by the Contractor. These specifications shall be in such detail as to ensure that the equipment to be installed shall operate efficiently from the point of view of environment.

....

c. The Government shall prepare the site at its own expense and in accordance with the specifications furnished by the Contractor....

....

25. RELOCATION

The Contracting Office, after approval of Installation Commander shall negotiate with the contractor to relocate switch.

34. For the Ramstein “switching system,” SUFI proposed to install a Nortel “Meridian SL-1” PBX in Building 305 (*SUFII*, ex. A4 at 12, ¶ 3.2.1). The record contains no evidence that SUFI submitted any space and environmental specifications for its proposed switching system at any lodging facility ordered under the contract.

35. DO No. 1 depicted a cable route in “existing duct” between Ramstein AB buildings 305, 2408 and 2409 (R4, tab 16 at 1, 10).

36. SUFI installed a Nortel Meridian SL-1 PBX switch in building 305, between August and November 1996. Pursuant to its proposal, ¶ 4.1, that it could “provide functionally equivalent equipment from another manufacturer,” SUFI replaced that Nortel switch with a Siemens “HICOM PBX” switch. (Tr. 10/15-18, 20; *SUFII*, ex. A1 at C-35 n.1) The Siemens switch did not affect the switch power required (tr. 2/29).

37. In October 1996 respondent refused to allow SUFI to use the designated duct between Building No. 305 and Building Nos. 2408 and 2409 at the south side of the base, a distance of about 3/4 of a mile. For that route respondent allowed SUFI to use another duct containing “dead cable,” which had to be removed before SUFI could install its new cable. (R4, tab 16 at 10; *SUFII*, ex. A36, ¶ 1.a; tr. 2/16-17)

38. SUFI estimated, with no documentary substantiation, that its subcontractor McNicholas charged \$15,000 to remove such dead cable (R4, tab 96B at 4080).

39. Respondent did not provide SUFI the “220 VAC, 50 Hz, three-phase power with a 30 Amp breaker on each phase for the LFTS” that the contract required for Ramstein Building No. 305 (Finding 36; tr. 2/19). Mr. Stephens so notified COTR Wayne Sellers (tr. 2/20).

40. Respondent located a local contractor to supply the missing electrical power supply for Ramstein Building No. 305, requested SUFI to pay for that work on the promise to reimburse it, but did not reimburse SUFI (*SUFII*, ex. A36, ¶ 3; tr. 2/20-29).

41. SUFI paid Dieter Stolz Elektro to install electrical power at Ramstein Building No. 305, shown in its invoice No. 400722 of 14 November 1996 for 9.130,31 DM, and No. 400751 of 28 November 1996 for 1.762,09 DM (R4, tab 96B at 4084, 4085; ex. B205, tab 20B at 486; tr. 2/22-26). We find that at the DM to dollar exchange rate of 1.7 in November 1996, 10.892,4 DM equaled \$18,517.08 (10.892,4 x 1.7).

42. On 10 May 2002, bilateral Modification No. 002 to DO No. 1 for Ramstein added thereto Kapaun Air Station Building Nos. 2778, 2790 and 2794 (R4, tab 16 at 12).

43. In May-June 2004 during its refurbishment of Kapaun Building No. 2794 respondent relocated SUFI’s switch to a room in which there were other electrical panels generating heat, nearby a hot boiler room. Ms. Ansola, SUFI’s manager in Germany, asked David White, Ramstein Customer Services Coordinator, to put air conditioning in the room to avoid overheating the switch, but learned from Ramstein Lodging Manager Frank Klemm that the Air Force lacked funds to do so. Therefore, she got permission for SUFI to install an air conditioner in the room. (Tr. 4/265-66, 15/198; *SUFII*, tr. 3/139)

44. SUFI purchased that air conditioner and its installation from Fink & Merz Cooling and Climate Technology on 23 July 2004, shown in its invoice no. 04-0617, for 3,712 Euros, which was equal to \$4,582.46 at the \$1.2345 to 1 Euro exchange rate of that date (R4, tab 96B at 4082-83; ex. B205, tab 20B at 486; tr. 4/268-69).

45. The 1 April 2005 PSA did not mention government electrical power provided to Ramstein Building No. 305 (ex. B70).

46. SUFI's claim, updated on 13 February 2007, included the following damages:

A. Extra work on need for air conditioner	
Ansola in 5/04, 2 hrs., \$90/hr.	\$ 180.00
Ansola in 6/04, 3 hrs., \$90/hr.	270.00
Smith in 6/04, 3 hrs., \$68/hr.	204.00
Interest thereon through June 2005	<u>35.04</u>
Subtotal:	689.04
B. Out-of-pocket Costs	
10/96 McNicholas changed ductwork	15,000.00
12/96 Siemens charge for electric power	10,000.00
7/04 SUFI purchased air conditioner for Kapaun 2794 switch	4,582.46
7/1/05 Stephens consulting fee, claim prep.	<u>25.00</u>
Subtotal:	29,607.46
Profit at 25%	<u>7,401.87</u>
Subtotal:	37,009.33
Interest thereon through June 2005	<u>18,456.82</u>
Subtotal:	55,466.15
Total of A (\$689.04) + B (\$55,466.15) =	\$56,155.19

(Ex. B205, tab 20 at 483-87) In damage item B, SUFI reduced the \$10,000 Siemens charge to \$6,500.00 on the basis of the Fink & Merz's July 2004 invoice (finding 48), thus reducing the \$37,009.33 subtotal to \$32,634.33 and the \$18,456.82 interest to \$15,947.76 (app. br. at 386), for a revised subtotal of \$48,582.09. Thus, SUFI's post-hearing, adjusted damages amount is \$49,271.13 (\$689.04 + \$48,582.09).

#### DECISION ON COUNT XIX

SUFI argues that respondent failed to make available the specified conduit at Ramstein AB and to supply adequate electrical power for the Ramstein switch room in 1996, failed to provide a properly ventilated room for the switch in renovated Kapaun Building No. 2794 (app. br. at 381), and contract § H.9 required respondent to provide

necessary air conditioning in Building No. 2794 (app. reply br. at 93). Respondent argues that any alleged oral promise to use existing ductwork at Ramstein was not made by an authorized CO; respondent is not liable for SUFI's choice of the Siemens HICOM switch; and the 1 April 2005 PSA price respondent paid for SUFI's equipment included the costs of providing electrical power to the switch room in Ramstein Building No. 305 and of the air conditioner installed in Kapaun Building No. 2794 (gov't br. at 175-76).

Respondent failed to provide the Ramstein Building No. 305 duct to Building Nos. 2408 and 2409 that was specifically specified in contract ¶¶ 3.2.2.1 and 4.8.1.1.1 (finding 31). Any pre-award statements allegedly made to SUFI about such duct are immaterial to respondent's liability. Respondent failed to provide the specified "220 VAC, 50 Hz, three-phase power with a 30 Amp breaker on each phase" that the contract required for Ramstein Building No. 305, room 1 (findings 32, 39). Respondent's argument that its duty to provide power was nullified by SUFI's decision to replace the Nortel switch with a Siemens switch is invalid, since there was unopposed evidence that the Siemens switch did not affect the foregoing switch power requirement (finding 36). Its contention that the April 2005 PSA purchase price for SUFI's LFTS equipment included providing electrical power to Building No. 305 is invalid, because the PSA did not mention government electrical power provided to Building No. 305 (finding 45); PSA ¶ 5 expressly provided that the PSA did not waive or affect any pre-existing rights either party might have, in particular SUFI's rights to collect damages for the breaches declared by the ASBCA; and we have held that SUFI's cancellation of the contract and continued performance under the PSA did not waive its rights to recover breach damages by virtue of that ¶ 5. 06-2 BCA at 165,776.

SUFI argues that contract § H.9 required respondent to provide air conditioning at Kapaun Building No. 2794. Contract § H.9 required respondent to prepare each site in accordance with the equipment and environmental specifications furnished by SUFI, and did not expressly mention providing air conditioning (finding 33). Furthermore, the record contains no evidence that SUFI submitted to respondent equipment space and environmental specifications for any of the bases serviced under the contract (finding 34). Contract § H.25 required the "Contracting Office" to negotiate with SUFI "to relocate switch" (finding 33). Messrs. White and Klemm, with whom SUFI dealt regarding air conditioning in Kapaun Building No. 2794, even if considered field representatives of AFNAFPO in Germany, plainly did not promise to fund or to provide an air conditioner for the relocated switch (finding 43). Therefore, we conclude that SUFI has proven constructive changes regarding Ramstein Building Nos. 305/2408/2409 duct and electrical power, but not for the Kapaun Building No. 2794 air conditioner.

We next determine the following equitable adjustment for these changes, rejecting the McNicholas ductwork charge for lack of substantiation by invoice, paid check or the like:

Dieter Stolz electrical power installation	\$18,517.08
11/14/96 (DM:\$ conversion, finding 45)	
Profit @ 10%	<u>1,851.71</u>
Total:	\$20,368.79

SUFI is entitled to interest on the foregoing \$20,368.79 at the FRB's monthly Prime Rate for the period from 14 November 1996 until payment thereof pursuant to this decision. We do not decide here Mr. Stephens' \$25.00 claim preparation costs, but instead *infra* in this decision.

#### FURTHER FINDINGS ON COUNT XVIII--SIMS/LTS INTERFACES

47. Contract § C, ¶¶ 3.2.4.1 and 3.2.4.2, required the LFTS to collect, sort, store, display and print out "call data recording" (CDR), including telephone call time interval, room/extension number, number called, toll/non-toll calls, time originated and completed, duration, authorization code and toll charge (*SUFII*, ex. A1 at C-6, C-7).

48. Contract § C, ¶ 3.2.5, required LFTS hardware and software to provide a call billing/room status Subsystem (CBRSS) function that "may be installed" on the contractor's switch (PBX). The CBRSS was required to transmit call account and room status records to a printer and to the existing Air Force "SIMS" (Services Information Management System), used to check guests in and out of lodging rooms and to generate a guest folio (bill) for all charges. (Tr. 2/33-34; *SUFII*, ex. A1 at C-7) SUFI's LFTS provided a CBRSS (tr. 2/35).

49. Contract § C stated in ¶ 3.2.6:

SIMS Interface Requirements. The contractor shall provide the necessary interface and connections between the [CBRSS] and the SIMS system or its replacement. SIMS interface specifications... provided by the government in the delivery order... will include the necessary message formats and software handshaking protocols necessary to interface the CBRSS to SIMS or its replacement.

The contract required SIMS interfaces at two locations at Ramstein and one location at Rhein-Main (*SUFII*, ex. A1, appx. A at 1, B at 1). SUFI's proposal, included in the contract, stated with respect to ¶ 3.2.6: "System will meet or exceed requirements... [and] will meet all industry standard handshaking protocols for interfacing to a property management system." (*SUFII*, ex. A1 at C-8, C-21, C-25) The contract's Equipment Performance Specification (EPS), ¶ 3.1.1, provided: "The LFTS shall be compatible with ... government furnished equipment (GFE). The contractor shall provide an

asynchronous RS-232C port to interface to a GFE property management system” (*SUFII*, ex. A1, § J, Attach. 1 at 2 of 21).

50. The parties understood ¶ 3.2.6’s term “SIMS system or its replacement” to require a one-time CBRSS interface with SIMS or a replacement government system (tr. 2/65-67).

51. SUFI’s proposal, included in the contract, stated that SUFI “will install a complete turn-key communications system which will interface with existing and planned Government equipment at each facility designated in the RFP” (¶ 4.1) and SUFI’s “billing system ... will be fully interactive with the Government SIMS system” (¶ 4.1.8) whose interface was a “Type RS-232 GFE Computer Serial Port” (*SUFII*, ex. A1 at C-35, C-43). SUFI used “GC-DOS” computers to send CDR data to the SIMS RS-232 Serial Port, which had a 9-pin female connector to attach to the GC-DOS cable (tr. 2/38-39).

52. Contract § C included the following provisions (R4, tab 1 at C-18):

3.9.1 Service Outages. The contractor, upon notification of a service outage from the LFM [Lodging Facility Manager] through the [CO], shall restore all outages on a priority basis IAW the following subparagraphs. The contractor shall provide verbal notification to the LFM through the [CO] immediately after service has been restored.

3.9.2 Major Failures. If a major failure as described in EPS paragraph 3.1.9.1 occurs, the contractor shall perform an emergency service call. The contractor’s personnel shall arrive at the lodging facility within two (2) hours after notification. Restoration/repair shall begin immediately and continue until the system failure(s) are repaired and service is restored.

3.9.3 Minor Failures. If a minor failure as described in EPS paragraph 3.1.9.2 occurs, the contractor shall ...restore all minor failures no later than three (3) workdays after notification.

53. The EPS, ¶ 3.1.9.1, defined a “major” failure as a loss of call processing on the greater of 10 or 10% or more equipped lines or trunks, or a failure of the billing system or subsystem, or a major alarm, and ¶ 3.1.9.2 defined a “minor” failure as a loss of call processing on the greater of 2 or 2% to 10% of lines or trunks, any abnormal hardware or software condition that requires maintenance to restore the LFTS to normal

operation, or a minor alarm. The EPS did not define major and minor alarms. (R4, tab 1, Attach. 1 at 4 of 21) The Board interprets the foregoing service outage repair duties to pertain to the contractor's LFTS and its components.

54. DO No. 1 for Ramstein, specified:

[SIMS] is a Wang computer located at . . . Building 2408, that shall be used for the Ramstein South area. All other SIMS interfaces shall be to the SIMS computer located in Building 305 at Ramstein AB.

DO No. 2 specified one SIMS at Rhein Main Building 600. DO Nos. 1 and 2 each stated: "The [SIMS] Wang equipment will be replaced by the government with a UNIX open architecture system. Interface is required." (R4, tab 16 at 2, tab 17 at 2) DO No. 4 for Landstuhl and Vogelweh, ¶ 5.3.1, required SUFI's CDR to pass all telephone call charges to, and to interface with, respondent's SIMS computer system or its replacement at Vogelweh and at Landstuhl (R4, tab 18 at B-3; tr. 2/42). In July 1998 DO No. 6 specified an interface to the government SIMS computer in Spangdahlem Building 38, also used for Eifel West (Bitburg) AB Building 3 (R4, tab 19 at 9). In August 1998 DO No. 7 for Sembach AB specified in § II, ¶ 1.1, an interface to government SIMS computer at one location, and in § II, ¶ 5.1.9.1, government responsibilities to prepare SIMS, "[i]ninstall correct software," to provision RS-232 port to specification and to ensure SIMS "software is running correctly" (R4, tab 20 at 6, 7). The government provided the software handshaking protocols needed to interface the CBRSS to SIMS (tr. 2/36-37).

55. The SIMS computers at Ramstein North, Ramstein South, Prime Knight, Landstuhl, Vogelweh and Rhein Main had differing configurations (R4, tab 3, following § J at 5, 15; tr. 2/41-42, 8/187, 9/63-64, 10/75).

56. From October 1996 through September 1997 SUFI encountered delays in achieving interfaces between the PBX/GC-DOS units and SIMS because: (a) respondent required SUFI to interface its PBX with SIMS at Ramstein Prime Knight Building No. 541 (tr. 2/41; R4, tab 16 at 4, tab 85A at 2700); (b) SIMS' RS-232 serial ports had non-matching interconnect pins, sporadically malfunctioned or were missing (tr. 2/40-42, ex. B5 at 1); (c) SIMS' RS-232 serial ports were missing at Vogelweh, Landstuhl and Prime Knight as late as May 1997 (R4, tab 95A at 3121); (d) SIMS could not post CDR data to guest folios and print them for guests; (e) on 12-13 December 1996 COTR Sellers told SUFI to provide a separate phone bill at guest check-out "at no cost to the government" and so advised CO Janice Jones and (f) to accomplish this Mr. Stephens offered a temporary back-up billing system by diverting two CD-ROMs scheduled for Vogelweh and Landstuhl to Ramstein Building Nos. 541 and 2408 (ex. B5; R4, tab 95A at 3112-13; tr. 2/47-48, 54).

57. In mid-December 1996 respondent's SIMS administrator, Sgt. Rufus Parker, acknowledged that the SIMS interface problems of non-matching interconnecting pins and call billing control for dual-occupancy rooms were "on the government side" (ex. B5 at 1, ex. B6 at 2). On 10 February 1997 SUFI tested the ability of its RS-232 cable to transmit CDR records with a protocol analyzer to verify that it performed the specified functions, and COTR Sellers accepted SUFI's GC-DOS system with the tested RS-232 cable as meeting contract requirements (tr. 2/48-50, 151, 3/256-57, 10/74).

58. COTR Sellers advised the CO that on 21 March 1997 the parties had "solved" the SIMS interface problem at Ramstein, and SUFI should "undo the 'work around' they made to operate the 2 [GC-DOS] terminals at the desk clerk position" (ex. B11).

59. Further SIMS interface problems arose at Vogelweh on 17 April 1997 when the SIMS had no RS-232 port, and at Rhein Main on 5 June 1997 when respondent was unable to configure the SIMS RS-232 port so as to establish a signal between the GS-DOS and SIMS, as SUFI reported to the CO on that date (exs. B13, B14; tr. 2/58-60; R4, tab 95A at 3122; *SUFII*, ex. A21 at 50).

60. SUFI's 15 June 1997 letter to the CO stated that since the contract required one week's technical assistance on the SIMS computer link after cut-over, and respondent was going to replace the Wang with UNIX-based computers, SUFI would take "no further action to interface to the Wang hardware" (tr. 2/63-64; *SUFII*, ex. A13 at 20).

61. In 1996-97 SUFI, due to COTR Sellers' 13 December 1996 request that SUFI provide a separate phone bill at guest checkout (finding 60(e)), provided six GC-DOS units for use at Ramstein (three locations), Landstuhl, Vogelweh and Rhein Main, in addition to the GC-DOS units in their switch rooms to overcome delays in attaining an operational CDR-SIMS interface connection and to satisfy the need to bill guests for telephone usage (tr. 2/55, 61).

62. SUFI's 17 and 19 February 1998 e-mails to AFNAFPO contract specialist Charlotte Guilmenot and CO Cedric Henson, respectively, reported that SUFI had incurred about \$144,000 in subcontractor costs to interface with SIMS in excess of contractual requirements and requested reimbursement for such work. The claimed work included the cost, at \$22,000 each, of the six GC-DOS billing systems SUFI provided for front desk staffs to determine phone charges for guests while the SIMS at Ramstein, Landstuhl, Vogelweh and Rhein-Main were not operating. (Exs. B17, B18)

63. In 1998 COTR Sellers asked Mr. Stephens to find a way to avoid loss of time by its front desk clerks' use of GC-DOS, and to print guest charges for room and telephone on a single bill (tr. 2/70-71, 3/233-34, 4/255). In July 1998, at its own expense, SUFI replaced the GC-DOS with a "Tiger" billing system that produced a single bill, and

trained respondent's attendants to use the new system. SUFI told Ms. Guilmenot of such actions; CO Jones denied knowledge thereof. (Tr. 2/70-74, 3/266, 4/255-56, 12/100-01)

64. Until its replacement in 2002-03, SIMS chronically failed to post telephone calls to guest folios for billing, and delayed posting, which caused billing to the wrong guest, and occasionally crashed, which required manual posting and re-posting to SIMS once restored to operation (tr. 2/268-69, 4/255, 5/144, 6/124, 8/241-46, 12/42-44, 291, 13/75-77, 197-98, 232; R4, tab 95A at 3129-32, 3160-61, 3164, 3166-67; ex. B205, tab 19A at 463; *SUFII*, ex. A49 at 1547).

65. In November 2000 respondent told SUFI that a Lodging Touch System (LTS), made by Hotel Information Systems (HIS), would be installed at European lodgings in the next two years to replace SIMS, and would need to interface with SUFI's system, the cost of which interface would be Air Force responsibility (tr. 12/45; *SUFII*, ex. A60 at 1).

66. On 13 May 2002 Ms. Ansola urged the Air Force to deal with RBS, a New Jersey-based firm which had installed LTS at other military bases, to perform the Siemens HICOM-Tiger-LTS interface, because Jeff Richard (or another Air Force person) had said that RBS would install the LTS and SUFI had provided its Tiger interface software requirements to RBS (tr. 4/259-61, 5/93-94, 9/49, 88, 12/45-46, 20/233).

67. In June-July 2002 respondent issued, cancelled, reissued and finally rescinded, due to its cost, a purchase order with RBS for call accounting software to interface with the LTS. On 6 August 2002 respondent issued purchase orders to HIS and Tiger for the Siemens HICOM switch interface with LTS. (Tr. 4/261-62, 9/51-56, 59-61)

68. Respondent installed LTS at Spangdahlem in August and at Rhein Main in September 2002 and at Ramstein, Vogelweh and Landstuhl from January to March 2003 (tr. 9/76-77, 138).

69. In early 2003 CO Henson restated respondent's interface responsibility:

The original contract does state that SUFI will be responsible for the interface to SIMS and any future Property Management System (PMS)... [H]owever, SUFI deemed this part of the contract problematic due to their exposure. The issue was addressed and changed during contract clarifications to read that SUFI is responsible for interfacing with SIMS or other Unix based PMS... LTS is not a Unix based PMS.... in talking w/Janice Jones (CO at the time of contract award), the clarification was made so that SUFI was

responsible for interfacing w/the PMS at the time of each install; however, was not meant to cover developing subsequent interfaces due to Air Force migration to a new PMS.... USAFE should bear the cost of the interface between the CAS and LTS (new PMS).

(Ex. B34 at 2)

70. SUFI's C. Ansola, R. Congalton, F. Broyles and A. Smith worked with Air Force, HIS and Tiger technicians and engineers during the LTS installation to reconfigure the Tiger computers, devise personal identification numbers (PINs), test interfaces and troubleshoot interface problems (ex. B205, tab 19A at 463-66; tr. 4/262-65, 5/144,45, 6/219, 9/71-72, 12/46-51, 13/44-48, 138-40).

71. After the LTS was installed at the air base lodging sites, SUFI troubleshot LTS posting problems, *e.g.*, "refreshes" that affected SUFI's HICOM PBX and Tiger, until its performance ended 31 May 2005 (R4, tab 95A at 3401-02, 3786-4013).

72. SUFI's claim, updated on 13 February 2007, included the following damages:

A. Extra work for SIMS/LTS interfaces	\$130,205.00
Ms. Ansola's added 200 hours, five bases	18,000.00
Interest thereon through June 2005	<u>38,992.50</u>
Subtotal:	187,197.50
 B. Out-of-pocket costs	
Estimated subcontractor labor, 30 days	51,500.00
6 additional GC-DOS computers	132,000.00
1/04 Myers' trip to Ramstein	524.48
7/1/05 Stephens consulting fee, claim prep.	75.00
Tiger call management and maintenance	<u>145,338.00</u>
Subtotal:	329,437.48
Profit at 25%	82,359.37
Interest thereon through June 2005	<u>140,788.00</u>
Subtotal:	552,584.85

Total of A (\$187,197.50) + B (\$552,584.85) = \$739,782.35

(Ex. B205, tab 19 at 462, tab 19A at 469, 478-81, tab 19B at 479-82; ex. B17; tr. 4/253-54)

73. With respect to SUFI's Count XVIII claim for "EXTRA WORK" (ex. B205, tab 19A at 463-69), the Board reviewed all documentary and testimonial evidence

supporting the hours claimed for Messrs. Stephens, Holzapfel, Broyles, Smith, Congalton and Tapley and Ms. Ansola. We find such evidence substantiates the following hours for each of the foregoing persons, and find the dollar amounts for each such person at their respective hourly rates (finding 11):

<u>Name</u>	<u>Total Hours</u>	<u>Dates/(Hours)</u>	<u>Rate</u>	<u>Amount</u>
Stephens	124.5	11/96-6/97 (120.0); 7/11/97 (2.0) 2/17, 19/98 (1.5); 2/10/03 (1.0)	\$ 66.83	\$8,320.34
Holzapfel	2.0	2/6/98 (1.0), 9/9/98 (1.0)	33.65	67.30
Ansola	150.75	03/97-04/97 (22.0); 7/98 (41.0); 7/9/99 (1.0); 2/01-3/01 (28.0); 2002: 1/15 (.25), 3/8 (1.0), 5/02 (6.0), 5/13, 21,23 (2.0), 6/21, 28 (3.75), 7/29 (1.0), 8/6, 19-20, 22, 28 (4.75), 9/6, 25 (3.5), 10/1, 14, 29 (1.0), 11/4 (.5), 12/19 (2.0) 2003: 1/7, 10, 14 (2.25), 2/10, 12, 25 (1.25), 3/7-8, 10-11, 13-14, 24-25 (5.25), 4/21, 23, 29 (2.75), 5/15-16, 19, 21-22, 27, 30 (7.75), 6/17 (1.25) 7/3, 14 (3.5), 8/4 (1.0), 9/30 (1.5), 10/15, 17 (1.5) 2004: 1/28 (4.5), 4/5 (.5)	26.44	3,985.83
Broyles	56.0	2003: 3/13, 17 (2.0), 4/25, 28 (2.75) 6/13 (.25), 7/17-18, 24-25, 29 (5.75), 9/8, 10, 12, 15 (4.0), 10/30 (1.25) 2004: 1/8 (.5), 3/10 (1.5), 4/23, 29 (3.25) 5/3 (2.25), 6/1, 5, 25-26 (6.75), 8/8-9, 25 (2.25), 9/13 (.25), 10/1, 4, 19, 22, 25 (4.5), 11/6, 12, 17, 29 (5.75), 12/10, 20 (1.25) 2005: 1/6-7, 12-13, 18, 28 (9.5), 3/2 (2.25)	21.15	1,184.40
Smith	38.0	12/16-17/02 (16.0), 2/24/03(8.0), 8/15-20/03 (12.0), 2/17/04 (2.0)	27.29	1,037.02
Congalton	106.75	2000: 6/26-29 (8.0), 7/2-3, 11-12 (19.5)	41.14	4,391.70

2002: 5/24 (4.0), 6/4 (6.0), 7/4-11 (11.75)  
 2003: 2/3, 8, 22 (17.25), 4/9-10 (12.0),  
 6/23-25 (22.5), 9/8-9 (1.25)  
 2004: 1/28 (4.5)

Tapley <u>50.48</u>	1.5	12/16/96 (0.1), 5/19, 26/97 (1.4)	33.65*
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Total Amount: \$19,037.07

\* Mr. Tapley’s salary is not in evidence, but his work was like that of Mr. Holzapfel, whose rate we use for Mr. Tapley. (Exs. B4-B8, B11-B18, B34, B205 at 2700, 3115-3744; tr. 2/45-78, 4/255-58, 6/128-34, 12/43-60, 13/44-50; *SUFII*, exs. A13, A37)

74. With respect to the Count XVIII claim for “OUT-OF-POCKET EXPENSES” (ex. B205, tab 19B at 479-80), SUFI identified no subcontractor work by name and date. SUFI’s Stephen Myers presented unopposed testimony that he met in Germany from 24-29 January 2004 with CO Henson about calling cards and LST interface, and so split his trip expenses half to Count I and half to Count XVIII (tr. 14/43-44). SUFI’s 21 September 1998 internal memorandum stated that the six GC-DOS systems cost “@\$20,000” each (*SUFII*, ex. A36 at 84).

### DECISION ON COUNT XVIII

SUFI argues that it incurred extra work related to the interfaces of its equipments with respondent’s SIMS and LTS systems, respondent breached its obligation to provide accurate interface “handshake” protocols for SIMS and its implied obligation to cooperate with SUFI (app. br. at 349-50), and it had no duty to “fix service outages and major and minor failures” of government equipment (app. reply br. at 90-91). Respondent argues that the contract required SUFI to perform whatever effort was needed to accomplish the specified interface with SIMS, its addition of the Tiger system resulted from its own ineptitude, not shortcomings of SIMS, the contract required the GC-DOS, respondent purchased the GC-DOS and Tiger systems by the 1 April 2005 PSA and the contract’s repair duties in ¶¶ 3.9.2 and 3.9.3 required the claimed extra work (gov’t br. at 173-74).

The record shows that respondent required SUFI to interface its LFTS with a SIMS at Prime Knight Building 541, though it was not specified in the contract or in DO No. 1 (findings 54, 56(a)), and the RS-232 serial ports for respondent’s SIMS at Ramstein, Landstuhl, Vogelweh and Rhein Main had non-matching interconnect pins, were missing or malfunctioned (findings 49, 56(b)(c)).

SUFI provided six GC-DOS computers “temporarily” at Ramstein, Landstuhl, Vogelweh and Rhein Main, because on 13 December 1996 COTR Sellers had requested SUFI to provide a separate phone bill for checkout “at no cost to the government” (finding 56(e)). Although CO J. Jones knew or had reason to know by early 1999 that such phone charge billing via the GC-DOS computers was caused by respondent’s SIMS computer failures, she did not countermand COTR Sellers’ direction to SUFI. We conclude that the CO ratified the COTR’s direction to provide such extra-contractual work.

With respect to the replacement of GC-DOS computers with the “Tiger” system, SUFI did not notify the CO of COTR Sellers’ direction in July 1998 to print all guest charges on a single bill and SUFI’s replacement of GC-DOS by the Tiger system (finding 63). SUFI argues that it told contract specialist Guilmenot of such events, so CO Jones must have known of them. But CO Jones denied knowledge of such events (finding 63). Therefore, the replacement of the GC-DOS computers with the Tiger system is not a breach or compensable change.

We agree with SUFI’s interpretation of contract SOW ¶¶ 3.9.2 and 3.9.3 to require it to repair system failures and restore service after outages arising from the LFTS and its components, but not those arising from respondent’s interconnected equipments (findings 52-53). We hold that SUFI has established entitlement under this count XVIII to the extent set forth in this and the three preceding paragraphs.

Consistent with our foregoing findings and holdings, we determine the following equitable adjustment for Count XVIII:

Extra work for SIMS/LTS interfaces (finding 73)	
\$19,037.07	
Out-of-pocket costs:	
• Subcontractor labor	0
• Additional GC-DOS computers	120,000.00
• Myers’ 1/04 trip (finding 78)	524.48
• Tiger call management & maintenance	0
Profit @ 10%	<u>12,052.45</u>
Total:	\$151,614.00

SUFI is entitled to interest on each element of said \$151,614.00 at the FRB’s monthly prime rate for the period from the date of each item of extra work (see finding 77) and from 26 January 2004 for Mr. Myers’ trip, until the date of payment thereof. We do not decide here SUFI employees’ claim preparation costs incurred from 9 March through 22 April 2005 and Mr. Stephens’ consulting fee, but instead *infra* in this decision.

FURTHER FINDINGS ON COUNT VI – EARLY DSN ABUSE

75. The solicitation and resulting contract required SUFI to provide lodging rooms with three network interfaces, including the Defense Switched Network (DSN), which links worldwide Defense Department facilities (tr. 1/94, 135-38; ex. B107 at 2).

76. In reply to AFNAFPO's questions about SUFI's proposal, on 27 March 1996 SUFI stated that it would make efforts to prevent circumvention of its system to avoid long-distance toll charges (*SUFII*, ex. A6 at 2, 5):

2. Para. 3.4.1.3 Please clarify what is meant by "...providing there is a clear means of allocating any applicable toll charges."

A: ...Our intent is to offer the fullest possible range of services. We also intend to protect both the Government and ourselves from fraud and abuse. We will not make any arbitrary system restrictions, but will work with the full concurrence of the [COTR] to ensure all parties are fully protected.

3. Para 3.4.2.3 This paragraph of the SOW requires that the attendant transfer trunk calls to and from any station line of conference circuit. The bidder [sic] cannot selectively block this feature. If tolls are incurred the Government will be responsible for collecting the charges.

A: Our response was intended to address the identical concerns we have, as in Para 3.4.1.3 above....

....

16. Para 4.1.3 Please clarify what is meant by "adequate controls."

A: The "adequate controls" refer mainly to attendant-extended calls, which the Government has addressed in Question 3 above.... We intend to block any unauthorized network access which would result in unrecoverable toll charges, whether that access is from the DSN or the public network.

SUFI's foregoing answers were incorporated into the contract SOW (tr. 1/135-38; *SUFI I*, 04-2 BCA at 161,858-59, findings 3, 7).

77. After using SUFI's commercial network for four months in Ramstein guest rooms, on 23 May 1997 SUFI added DSN call service, limited to the local area. According to Mr. Stephens, within a few weeks he noticed a 50% reduction in long distance call revenues and a pattern of calls to the DSN information operator, some from one to four hours or more. (Tr. 1/133-34; *SUFI I*, tr. 1/201-02; ex. A21)

78. SUFI suspected the DSN operators were patching long distance calls to circumvent the commercial tolls for using the SUFI network, and so notified CO Janice Jones and Ms. C. Guilmenot on 28 May and 15 June 1997 (*SUFI I*, ex. A14 at 1-3, ex. A-13 at 1-2; tr. 1/203-05, 2/43-45, 4/182-83).

79. USAFE rejected AFNAFPO's suggestion to monitor outgoing guest calls (*SUFI I*, tr. 3/306-07). With the knowledge and approval of CO Tom Miller and COTR Sellers, on or about 1 August 1997 SUFI blocked access from lodging guest rooms to the DSN information/operator numbers "0", "112" and "113." Upon such blockage, SUFI's toll call revenues returned to their January-May 1997 level. (Tr. 1/134-36, 138-39; *SUFI I*, 04-2 BCA at 161,860, finding 17; exs. A16-A18, A21; tr. 1/205-07, 2/49-51)

80. From May 1997 through September 1998 SUFI's Carl Stephens and Jeff Holzapfel continued to monitor DSN calls weekly and found that guests who encountered blocked operator numbers "0", "112" and "113" learned other direct operator numbers from the lodging front desk staff by which the guest could circumvent the SUFI long distance trunk line. SUFI so notified COTR Sellers and CO Miller and blocked those other operator lines. (Tr. 1/139-42, 162-66, 207-08, 210-12; ex. B205, tab 7B at 346; *SUFI I*, ex. A21 at 3, ex. A22 at 2)

81. Total long distance revenues (in \$) from Ramstein North Side, Prime Knight and South Side from January through August 1997 were:

Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.
30,073	24,484	33,692	32,475	34,303	38,934	35,820	32,534	32,534

Thus, SUFI's total long distance call revenues for January-May 1997 were \$155,027, averaging \$31,005/month. During the period of alleged DSN call abuse in June-July 1997, SUFI's revenues were \$74,754, averaging \$37,377/month. (R4, tab 92A at 2986)

82. The parties continued to discuss uncontrolled DSN access v. limited access to local DSN calls, which eventually led to contract Mod. 5, signed by CO Janice Jones on

26 March 1999 and by SUFI on 9 June 1999 (R4, tab 8; *SUFII*, 04-2 BCA at 161,860-63, findings 19-33).

83. As revised on 13 February 2007, SUFI's Count VI included the following damages:

A. Lost Revenues

- Estimated by Carl Stephens for May, June and July 1997 from call detail records of calls 30 minutes or longer only and showing five hour phone calls made from the same room for 10 consecutive days (*SUFII*, ex. A36, ¶ 5). \$ 75,000.00
- Interest thereon through June 2005 39,877.50
- Subtotal: \$114,877.50

B. Extra Work

- C. Stephens, J. Holzapfel, run and analyze monthly call records for toll skipping and abuse, May-July 1997
  - 20 hrs. /mo. @ \$90/hr. for Stephens \$ 5,400.00
  - 20 hrs./mo. @ \$90/hr. for Holzapfel 5,400.00
- C. Stephens, J. Holzapfel, run and analyze monthly call records for toll skipping and abuse, August 1997 - September 1998
  - 20 hrs. /mo., 14 months @ \$90/hr. for Stephens 25,200.00
  - 8 hrs./mo., 14 months @ \$90/hr. for Holzapfel 10,080.00
  - Claim research and recording by Ansola, 11/17/04, 1 hr. @ \$90/hr 90.00
  - 2/16/05, .25 hr. @ \$90/hr. 22.50
  - Subtotal: 46,192.50
- Interest thereon through June 2005 22,376.66
- Subtotal: \$ 68,569.16

C. Out-of-pocket costs,

- Appio, 3-day trip to Germany, 12/1/98 \$ 1,300.00
- Stephens' 7/1/2005 consulting fee 100.00
- Profit @ 25% thereon 350.00
- Interest thereon through June 2005 931.94
- Subtotal: \$ 2,681.94

Total of A (\$114,877.50) + B (\$68,569.16) + C (\$2,681,94) = \$186,128.60

(Ex. B205, tab 7 at 343-49; tr. 1/143-45, 162-64, 170-71) DCAA questioned SUFI's lost revenue calculation because it could not be verified by supporting documentation (R4, tab 106 at 12-13). Mr. Appio was not a witness and the record does not explain why he traveled to Germany in December 1998.

## DECISION ON COUNT VI

SUFI argues that it lost revenues and performed extra work due to user abuse of DSN calls from 1996 to 1998, and it adduced “conservative” estimates of its damages (app. br. at 253-54). Respondent contends that SUFI’s revenues did not drop by at least 50% after the DSN interface was connected in late May 1997, as it alleges, but rather such revenues increased after the DSN interface connection (gov’t br. at 150). SUFI counters that the May-June 1997 revenue increases do not undercut Mr. Stephens’ recollection that shortly after DSN activation call volume dropped in half, and but for the May-June abuses its revenues would have been \$18,000 higher (app. reply br. at 61).

SUFI’s total long distance call revenues for January-May 1997 were \$155,027, averaging \$31,005/month. During the period of alleged DSN call abuse in June-July 1997, SUFI’s revenues were \$74,754, averaging \$37,377/month. (Finding 81) Such facts conflict with SUFI’s assertion that its revenues decreased significantly or at least by 50% after the 23 May 1997 activation of local area DSN call service. SUFI did not cite any evidence to substantiate that, but for the alleged DSN abuse, its mid-1997 revenues would have been \$18,000 higher. Therefore, we hold that SUFI has not established that alleged 1997 DSN abuse caused a reduction in its long distance call revenues, and deny the appeal with respect to SUFI’s Count VI.

### FURTHER FINDINGS ON COUNT III - HALLWAY/LOBBY DSN PHONES

84. SUFI offered DSN network service subject to the condition, “once adequate controls are developed with safeguards against fraud and toll skipping” and clarified “adequate controls” in replying to AFNAFPO’s pre-award question 16 (*SUFII*, ex. A6 at 5).

16. Para 4.1.3 Please clarify what is meant by “adequate controls.”

A: The “adequate controls” refer mainly to attendant-assisted 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.

Solicitation Amendment 002 included the following question and answer:

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 booked through the DSN operator. Toll free numbers requiring long distance charges [sic] should incur the user fee for international connectivity. [Italics in original.]*

The foregoing SUFI condition and Q&A 29 were incorporated in the contract. (R4, tab 3, after §J at 5; *SUFII*, 04-2 BCA at 161,858-59, finding 3)

85. Prior to 1993, to “book” a long distance DSN call, Air Force Instruction (AFI) 33-111 required proof to a telephone control officer that the call was for official purposes and issuance of a “control number” therefor (tr. 1/200-02). At contract award in April 1996, such requirements had been eliminated (tr. 13/210-11, 17/155-59, 230, 18/102).

86. AFI 33-111 of 1 November 1995, ¶ 12.1, Authorized Actions, provided: “12.1.2. Placing an official call to a DSN operator from a DSN number and having the operator extend the call to a local commercial number (off-netting)” and ¶ 12.2, Prohibited Actions, provided: “12.2.1. On-netting to the DSN from a non government commercial network number, riding the DSN, and then off-netting to a commercial number (toll skipping)” (R4, tab 232 at 5). The 1 May 1998, 1 June 2001 and 13 May 2004 editions of AFI 33-111 omitted the foregoing ¶ 12.2.1 prohibition and changed ¶ 12.1.2 to another number (R4, tabs 233-35). The contract did not incorporate by reference AFI 33-111 or require respondent to verify that calls made from hallway/lobby DSN phones were only official calls (*SUFII*, ex. A1).

87. During the pre-award, February 1996 site surveys, SUFI’s Carl Stephens saw government DSN phones in the hallways and lobbies of lodging facilities at Ramstein and Rhein Main ABs. When Mr. Stephens’ inquired about those phones, COTR Wayne Sellers stated that those phones were “Class C,” local area access and base operator (tr. 3/215-17), but would not be needed once the contractor supplied phones in every room. (Tr. 1/95-96)

88. Section E.2 in the solicitation and resulting contract provided:

2. Inspection and Performance Testing. Shall be in accordance with para 3.8.4.1 of Section C.

....

2. [SUFI] requests clarification on this issue at post-award. Since there is no existing system, there will be no true cutover. System activation will only take place upon full Government acceptance of the entire LFTS. *Government telephones and secure telephones currently exist in some of*

*the lodging facilities. These phones provide Government service to the rooms and must be left operational until an agreed upon cutover date has been established. New telephone sets shall be provided for these facilities and any secure telephones shall be left in place and operational.*  
[Italics added.]

(Tr. 1/97-100, 8/182; *SUFII*, ex. A1 at E-1, ex. A2 at E-1)

89. Section E.2's italicized sentences were drafted by USAFE Command Lodging Officer, Karen O'Shaughnessy Draper and COTR Sellers. AFNAFPO sent them to SUFI on 27 March 1996. (Tr. 3/218, 8/158, 166-67; *SUFII*, ex. A6 at 4) Ms. Draper did not discuss those sentences with SUFI before award. At trial she asserted the phrase "phones provide Government service to the rooms" meant that "room phones that were in some facilities at that time," not hallway phones, because she thought that there were hallway phones in all facilities and secure phones were never in the hallways but were in guest rooms. (Tr. 8/167-68, 174-75, 179-80). Ms. Draper admitted that there were no hallway phones in an Aviano AB lodging and possibly others (tr. 8/176-78, 11/92-93). There was credible evidence that Ramstein AB lodging Buildings 303 and 304 had no hallway and lobby phones until 1997 (R4, tab 122 at 1-4, 7-14; tr. 4/73-75, 10/57-58, 65-68).

90. COTR Sellers and USAFE Director of Services, COL James Startin, and Mr. Stephens stated that government hallway and lobby phones provided service "to the rooms" before SUFI installed its LFTS (tr. 2/132, 3/69-70, 214-15). James Pearson, SUFI's President, before signing the contract read § E.2 and understood that government telephones were to be removed and it would be improper to add more government phones after contract execution (tr. 3/8).

91. In 1997 USAFE changed the service level of some hallway/lobby DSN phones from Class C (local) to Class A (worldwide) (tr. 1/115, 12/265-66, 13/85-86, 189).

92. The 1999, 2002 and 2004 Ramstein telephone directories, stated under "CUSTOMER SERVICE INFORMATION" (exs. B107 at 3, B108 at 3, B109 at 3):

Off-netting is the procedure of extending an incoming call from a military telephone system to a civilian telephone number. Off-netting results in a substantial savings to the US Government. For example, to make a commercial phone call from Ramstein to a civilian number ...near Langley AFB would be very expensive. However, the same call placed over the military system from Ramstein to Langley, then off-netted by the operator, would only cost the price of a local

call from Langley. Off-netting can be used to connect to toll-free numbers in the CONUS as well as commercial numbers in other countries.... Off-netting is for Official Calls Only....

93. From mid-December 1996 through 8 August 2003, SUFI's Carl Stephens, Cecilia Ansola and Stephen Myers periodically asked USAFE's Startin, Fortuna, White, Branham, Pritchard, Moyd, Moore, Roberts, Brunfeldt, Payne, Layman and Swinehart; AFNAFPO's Guilmenot; COs Miller, J. Jones, Henson and Browning; and COTRs Sellers, Yaeger and Adams, orally and in writing, to remove the hallway/lobby DSN phones from the guest lodgings at Ramstein, Landstuhl, Vogelweh, Rhein Main, Sembach and Spangdahlem ABs. Some of the foregoing government personnel looked into the request. (Tr. 1/104-08, 117-18, 120-25, 197-99, 210-11, 2/134-35, 273-74, 3/144-53, 220-22, 225, 4/46-49, 55-68, 87-92, 5/64-68, 6/23-24, 34-35, 40-41, 48, 51-55, 238-41, 7/28, 59-72, 97-98, 104-05, 8/102-05, 12/247-49, 309-12, 13/74-75, 153-57, 227-30, 14/50-57, 59-60, 15/61-67, 70, 107-20, 16/21-26, 161-65; exs. B25-B27, B29-B30, B206 at 70-71, 108-09; R4, tabs 25, 80A at 1731-36, tab 82B at 2575, tab 117; *SUFII*, tr. 4/119-20; exs. A20 (31 July 1997 e-mail from Stephens to CO Jones stating that contract § E required DSN phones to be removed at cutover), A22, A62, A136 at 359).

94. Messrs. Stephens, Holzapfel and Broyles and Ms. Ansola periodically tested hallway/lobby DSN phones and found that they could call the base operator, who would extend (transfer) them to a long distance call (tr. 1/111-13, 4/50-52, 59-61).

95. Mr. Stephens and Ms. Ansola learned that they could dial directly to U.S. installations from hallway DSN telephones at Ramstein and at Rhein Main (R4, tab 80A at 1727; ex. B205, tab 4A at 160-62, ex. B215), from which one could be extended (transferred) to a non-DSN number (tr. 1/113-15, 5/68-72, 13/85, 247), including an AT&T calling card 1-800 number (tr. 4/59-61, 5/69-70; R4, tab 80A at 1733).

96. On 8 December 1998 Ms. Ansola requested lodging facility managers Branham and White to limit hallway/lobby DSN phones to local area calls (R4, tab 80A at 1727-28; tr. 4/50-54, 16/18-24, 162-64).

97. In March-June 1999 when contract Mod. 5 was executed, the parties understood that SUFI's "base level" DSN service in guest rooms did not include access to operator numbers "0" and "113", which SUFI continued to block thereafter (R4, tab 8 at 1; *SUFII*, ex. A46 at 1; tr. 2/118-21, 3/57, 65-67).

98. In March 2000 Ms. Ansola offered to Mr. Branham to replace government hallway/lobby DSN phones with SUFI DSN phones limited to local area and emergency calls (tr. 4/55-57; R4, tab 80A at 1729-30).

99. Respondent added hallway and lobby DSN phones in Rhein Main in May-June 2001 (R4, tab 80A at 1733-34; ex. B25 at 4; tr. 4/69-73).

100. At Sembach AB in August 2001, Ms. Ansola, with Mr. Broyles present, showed Ms. Guilmenot how she could dial a DSN call and be extended to her home telephone in San Antonio (ex. B206 at 81, 83-86; tr. 4/79-86, 6/225-26).

101. From 2 February 1998 through 18 December 2003, respondent removed 97 hallway/lobby DSN phones from Rhein Main, Spangdahlem/Bitburg, Landstuhl and Vogelweh AB lodgings (ex. B205, tab 4A at 122-210).

102. By 31 May 2005 there were 43 hallway/lobby DSN phones remaining in guest lodgings, including 34 DSN phones in Ramstein Building Nos. 303, 304, 305, 306, 540, 2408 and 2409; 5 in Sembach Building Nos. 110, 215, 216; 2 in Kapaun Building No. 2790; 1 in the Rhein Main Building No. 600 lobby and 1 in the Spangdahlem Building No. 38 lobby (ex. B110 at 1-8, 11, 14, 24-26, 36-37, 46-47, 54, 59-61, 65, ex. B205, tab 4A at 122-210).

103. Mr. Broyles and Ms. Ansola prepared charts showing all DSN phones known to be in place in lodging hallways/lobbies, floor by floor, when SUFI's performance ended on 31 May 2005, and identified such phones by their telephone numbers (ex. B110; tr. 4/93-94, 6/82-85, 163-66). SUFI designated as "unknown" (e.g., "480-xxxx") all hallway/lobby DSN phones whose telephone number was not known and which were removed some time before 31 May 2005 (tr. 4/93-94, 99-112, 6/31-32, 171-73, 223-25).

104. At trial, Mr. Broyles corrected four phone numbers and data shown on exhibit B110: (1) Landstuhl Building No. 3754, 3rd and 4<sup>th</sup> floors were mislabeled 2nd and 3rd floors (ex. B110 at 31; tr. 6/85); (2) Ramstein Building No. 303, 3rd floor, phone number 480-6534 was wrong, it should have been 480-6539 (ex. B110 at 2; ex. B109 at 103, R4, tab 107 at E-4c-4, tab 119 at 1, tab 122 at 5; tr. 18/86, 175, 177); (3) Ramstein Building No. 540, phone number 480-7521 was wrong and was redesignated 480-xxxx (ex. B110 at 14; R4, tab 122 at 29; tr. 18/86); and (4) Ramstein Building No. 2409, 1st floor, phone number 480-5802 was reinstalled elsewhere in 2006 and was redesignated 480-xxxx (ex. B110 at 25; R4, tab 122 at 135; tr. 18/179-80, 23/55, 181-82).

105. Some of the Ramstein lodgings under the contract had DSN phones installed at the two ends of a hallway, both with the same telephone number, which SUFI designated phone "A" and phone "B" (exs. B110, B205, tab 4A; tr. 4/94, 5/76, 14/63-64).

106. SUFI introduced proof that "A" and "B" phones were not extensions or party lines, but rather were independent in that two persons concurrently could call and speak separately to persons at different destination numbers (tr. 4/94-96, 14/63-64). Such proof included: (1) random testing by Ms. Ansola and systematic tests by Mr. Broyles to call

one DSN number on an “A” phone and, while that call was on hold, call another DSN number such as Mr. Broyles’ home office DSN number on the “B” phone (tr. 4/95-96, 5/76-78, 6/88-90, 167-68); (2) CDR data from SUFI’s Ramstein “switch” showing overlapping calls to different destination numbers from 15 pairs of “A” and “B” phones, viz., Nos. 480-6521, -6532, -6180, -6176, -6530, -6663, -2442, -7058, -7102, -6058, -5545, -5802, -5825, -2443, -6539 (finding 109(2); ex. B213 at 1, ex. B227; tr. 23/78-82, 133-34, 140-42); (3) observing two callers speaking simultaneously on “A” and “B” phones (tr. 6/88, 12/30-31, 13/243-45, 248-49, 22/134); and (4) evidence that Ramstein DSN phones could be wired and programmed for “multiple call arrangements” (tr. 23/134, 141-42).

107. Mr. Margarito Castanon, technical specialist in the 435<sup>th</sup> Communications Squadron at Ramstein AB, testified that, based on his investigation of hallway DSN phones and their “CAIRS” (cable assignment and information record system) data showing 480- and 489- prefix phone numbers at Ramstein AB building locations, authorized class of service and installation date, simultaneous or overlapping calls to different destination numbers from DSN “A” and “B” phones was not possible because between December 2006 and April 2007 he tried, but was unable to make simultaneous calls from such phones, and such phones had a single line to the switch, rather than the separate lines needed for “multiple call arrangement” (tr. 18/9-13, 68-73, 151-52, 171). Mr. Castanon examined 8 December 2006 “CAIRS” data which contained one record for a given telephone number and in December 2006 created DSN data (R4, tabs 122-23). He did not explain how his 2006 data, DSN phone examinations and CAIRS data showing 17 May 2006 government activity on each DSN phone, were probative of the configuration and capability of the Ramstein switch and DSN phones during 1996-2005.

108. As revised on 13 February 2007, SUFI’s Count III alleged the following damages (ex. B205, tab 4 at 121, tab 4A at 213-14):

A. Lost Revenues, July 1997 through May 2005	\$53,692,407.91
• Interest thereon through June 2005	<u>13,720,137.80</u>
Subtotal:	\$67,412,545.71
 B. Extra Work	
• Ansola, 04/01-04/29/05, 17.25 hrs. @ \$90/hr.	\$ 1,552.50
• Broyles, 05/01-04/29/05, 71.25 hrs. @ \$68/hr.	4,845.00
• Smith, 11/15/04-05/24/05, 22.75 hrs. @ \$68/hr.	<u>1,547.00</u>
Subtotal:	\$ 7,944.50
• Interest thereon through June 2005	<u>483.64</u>
Subtotal:	\$ 8,428.14
 Total of A (\$67,412,545.71) + B (\$8,428.14) =	\$67,420,973.85

109. To calculate the foregoing \$53,692,407.91 lost revenues from July 1997 through May 2005, SUFI used the following methodology:

(a) SUFI determined the period of use of each hallway/lobby DSN phone--beginning from the date of cutover of SUFI LFTS service for pre-existing DSN phones, and the mid-point in the year of installation of DSN phones subsequently installed, as shown in directory records and SUFI's CDR data, and ending on the earlier of 31 May 2005, when SUFI's performance ceased, or the date the phone was removed from the lodging (R4, tab 122; ex. B88; tr. 4/100-12, 6/90-92, 14/62-63, 19/178-81, 23/154-55).

(b) By 2007 respondent's call records for hallway/lobby DSN phones were incomplete (ex. B98; R4, tab 107, 07c-1 at 2-3; tr. 4/98, 18/88-90, 159-62). SUFI considered Defense Information Systems Agency (DISA)'s DSN phone records, SUFI's records of phone 489-4619 (x.4619) with worldwide DSN service that it installed and wired to its switch in Landstuhl Building No. 3754 and DSN Nos. 496-6998 and -6999 in Sembach Building No. 210 (tr. 4/98, 6/221-22, 8/100, 22/52; ex. B205, tab 8A at 357). DISA call records lacked local base operator and commercial calls, were collected on a "best efforts" basis, had data gaps due to transmission and processing outages and did not identify completed and attempted calls (R4, tab 107, E-4d-3 at 1, tab 326.1 at 1-2; tr. 11/45-46, 50-51, 58-64, 17/89, 96-97, 105, 186-88, 192-96, 214, 241-42, 20/129-30, 22/298-300, 324-28, 340-55; exs. B91-94, B208, B218-221). SUFI used phone x.4619 calls average of 10,135 minutes/month to compute lost revenues because it was more "conservative" than Sembach phone averages of 15,161 and 11,232 minutes/month (ex. B205, tab 4A at 122-204, 206-07, 212; tr. 4/97-99, 5/78, 8/101, 14/60-66).

(c) SUFI assumed that the monthly usage rate of each hallway/lobby DSN phone, throughout its period of use, was the same as the average monthly usage rate of phone "x.4619," which was not among the 41 known DSN phone numbers in SUFI's claim and whose call data were not in evidence (R4, tabs 326.1, 326.2, 326.3; exs. B88, B205, tab 4A at 122, 211).

(d) SUFI calculated the average monthly rate of x.4619 by dividing by 12 the total minutes (excluding local DSN numbers) recorded for that phone from September 2003 through August 2004, without ascertaining whether such calls were official or not (exs. B88, B205, tab 4A at 122, 212; tr. 3/161-62; R4, tab 209 at 4):

Long distance minutes	107,272 ÷ 12 =	8,939 min./mo.
Operator call minutes	<u>14,350</u> ÷ 12 =	<u>1,196</u> min./mo.
Total:	121,622	10,135 min./mo.

(e) To determine a DSN phone's total usage for each year of use, SUFI multiplied 10,135 by the ratio of months in use to 12-months. To derive "Gross Lost Rev[enue]" SUFI multiplied a phone's total usage by SUFI's "WEIGHTED AVERAGE LONG-

DISTANCE RATES” in \$/minute (R4, tab 78D, column G at 388-403; ex. B205, tab 4A at 122).

(f) SUFI multiplied a phone’s total usage by the difference between its weighted average long-distance rate and its weighted average cost rate paid to selected long-distance carriers for the relevant period, converting Deutschmarks or Euros to dollars at the applicable exchange rates (R4, tab 78E at 404, 452, 524, 701, 830, 1000, 1156, 1341, column [G]; ex. B205, tab 4A at 122, 212).

110. (a) SUFI’s lost revenues calculation assumed that all of its estimated 10,135 monthly minutes of calls on each of the government’s hallway/lobby DSN phones would otherwise have been made from SUFI’s commercial network, not its DSN network (tr. 8/109-12). (b) At the hearing on 28 February 2007, the following colloquy between SUFI’s attorney and CO Henson occurred (tr. 3/164-65):

Q Your final decision [R4, tab 209] you also reference ... phone calls that exceeded 10 minutes in duration.

Was it your understanding when you wrote your final decision that [SUFI] was only claiming for DSN and lobby hallway phone calls that exceeded 10 minutes in duration?

A It was my understanding that [SUFI] was taking exception to calls exceeding 10 minutes in duration.

Q Do you know at this point that [SUFI] is claiming compensation for hallway and lobby phones no matter what their duration?

A No. It’s not my understanding. Not as of when I wrote this decision and not now.

The Count III call selection data queries in SUFI’s 1 July 2005 claim and 13 February 2007 update for phone x.4619 do not exclude calls fewer than 10 minutes (R4, tab 80A at 1726, ex. B205, tab 4A at 212). Compare Count V data query: “INDIRECT CALL PATCHING ANNUAL ACTUAL USAGE CALLS GREATER THAN OR EQUAL TO 10 MINUTES” (R4, tab 82A at 2544; ex. B205, tab 6A at 241, 329).

111. At trial SUFI introduced evidence to correct the Ramstein Building No. 303 DSN phone start date from October 2000 to October 1999 (ex. B205, tab 4A at 206; R4, tab 80A at 1734; tr. 4/74-75, 100-01), and corrected the 10,135 average monthly rate to 10,609 min./mo. due to double counting of numbers 110, 112, and 113, and a .6 month

gap in the call records for the 12-month period used (ex. B223; tr. 23/62-64). SUFI's foregoing corrections were:

A.	Lost revenues, known numbers:	
	Principal: \$35,371,528.03 X 10,609 ÷ 10,135* =	\$37,026,915.54
	Interest: \$5,985,218.60 x 1.0468	+ <u>6,265,326.83</u>
	Subtotal:	43,292,242.37
B.	Lost revenues, unknown numbers:	\$32,482,173.22
	Ramstein 303, 3 mos. 1999	22,302.07
	Ramstein 303, 9 mos. 2000	<u>75,553.38</u>
	Subtotal:	97,855.45
		+ <u>97,855.45</u>
	Revised subtotal:	32,580,028.67
	\$32,580,028.67 x 1.0468	34,104,774.01
	Interest	7,734,919.20
	Additional interest:	<u>29,275.56</u>
	Subtotal interest:	7,764,194.76
	\$7,764,194.76 x 1.0468	<u>8,127,559.07</u>
	Revised subtotal:	42,232,333.08
	Revised subtotal for Lost Revenues (\$43,292,242.37 + \$42,232,333.08) =	85,524,575.45
	Plus Extra Work costs:	+ <u>8,428.14</u>
	Revised Total, Count III:	\$85,533,003.59

\* 10,609 ÷ 10,135 = 1.0467686, which SUFI rounded to 1.0468.

112. DCAA's February 2007 supplemental audit report: (a) verified SUFI's "methodology used to calculate lost revenues," rejected use of incomplete DISA call record data and adopted the appended recommendations of Stephen Mabie (Mabie-1), to adjust SUFI's x.4619 call data by using a 20-month data segment and substituting (1) 624 median average min./mo. for DSN phone usage, (2) \$0.15 per minute long distance revenue rate taken from Mod. 5 and (3) 35% discount to exclude "B" DSN phones of the same number (R4, tab 106 at 10-11, 33-38). On 7 May 2007, DCAA recalculated Count III damages as \$1,056,769.67, using SUFI's methodology and Mr. Mabie's 1,110 min./mo., revenue rate and discount figures (Supp. R4, tab 343; tr. 21/154-56).

113. Dr. Edward White, respondent's expert in statistics, opined that SUFI's assumption that the monthly usage rate of each hallway/lobby DSN phone, during its period of use, was the same as the average monthly usage rate of lobby phone x.4619, was invalid, because it failed to consider the number of people using a DSN phone and assumed a constant relationship between phones and call minute usage, rather than applying the "law of diminishing returns" that says that as one adds more input to a system, output will diminish over time (tr. 22/219-22).

114. To show that the number of phones available for use diminishes the usage rate of those phones, Mr. Mabie's updated technical report (Mabie-2) suggests that the ratio of guest-nights per DSN line x.4619 available for Landstuhl Building Nos. 3751, 3752, 3753, 3754 and 3756 was 119,823:1, while the ratios of guest-nights to DSN phones in 15 other lodging buildings, having from one to four DSN lines, ranged from 6,451:1 to 73,112:1 (R4, tab 337 at 3). We find that those Mabie-2 ratios were invalid because: (a) Mr. Mabie said he derived the guest-night data in Mabie-2 from R4, tabs 127-28 (tr. 22/91), but the guest-night data in tabs 127-28 differ from the data in Mabie-2, without explanation of the discrepancies; (b) the Mabie-2 data encompassed 20 months, whereas SUFI used 12 months for x.4619 phone calls (ex. B205, tab 4A at 122), and the use of a 20-month period can skew the results since lodging guest usage had an annual, cyclical pattern (tr. 11/82-83, 16/146-47, 22/249); (c) the number of DSN phones listed for some of the 15 other lodgings in Mabie-2 differs from DSN phone counts made by respondent (R4, tabs 119, 121) and by SUFI (ex. B110) and (d) Mr. Mabie had no first-hand knowledge of the circumstances of lodging guests affecting their likelihood to travel to an available telephone, did not consider the availability of telephones other than those he listed, and assumed that his groupings of lodgings formed a valid universe of DSN phones available to lodging guests (tr. 22/135-43).

115. According to respondent, the revenue records for all SUFI telephones at Landstuhl, Vogelweh and Sembach lodgings show no significant increases following the removal of 52 hallway/lobby DSN phones of unknown numbers at Landstuhl Building Nos. 3752, 3754 and 3756, Vogelweh Building Nos. 1002 and 1003, and Sembach Building Nos. 110, 212, 215, 216 and 219. The foregoing statement ignores nine unknown DSN phones at Vogelweh Building Nos. 1004 and 1034 and the DSN lobby phone x.4619 at Landstuhl Building No. 3754. (Ex. B205, tab 4A at 206-07 (51 DSN unknown phones), tab 16A at 431-36 (all SUFI phone revenues)).

116. Mr. Castanon compared an April through August 2001 sample of phone call data from DISA records (R4, tab 326.1) and from respondent's Ramstein "UCALL" data (R4, tab 326.2; tr. 22/19), and found 11,367 DISA calls, 1,510 calls in UCALL but not in DISA, and 1,168 calls in DISA but not in UCALL. (R4, tab 346 at 4) Rule 4, tabs 326.1 and 326.2 are compact disks in evidence. Mr. Castanon did not explain whether and how the five months of call data he selected were representative of the call data in the 102-month period of the alleged breach, December 1996 through May 2005. He stated that there were missing days in those five months and the DISA and UCALL data generally had days, months and years of lost data due to discarded, corrupted data for 1996-2000 and a PC crash in 2003 (tr. 17/59-60, 285-86, 18/92, 154-58; ex. B98).

117. During the hearing on 13 April 2007, the presiding judge instructed the parties, and they agreed, that he would not attempt to search for and decipher data from Rule 4, tabs 326.1 and 326.2 and other such compact disks, and if such evidence was

important to a party, it had to introduce it in hard copy into the record (tr. 15/16-24). Some hard-copy extracts derived from Rule 4, tabs 326.1 and 326.2 are in the record (e.g., R4, tabs 336A, 346; exs. B105, B106; tr. 18/39-47, 145-46). Neither R4, tab 346, nor any other such extract, sets forth contemporaneous April-August 2001 call data, but rather texts prepared (and sometimes modified) in 2006-07.

118. Mr. Mabie derived a “mathematical formula” for the percentage of missing DISA call data in April-August 2001 --  $10.3\% + (10.3\% \times 13.3\%)$  -- where the 10.3% was UCALL data not among the April-August 2001 DISA data, and 13.3% was DISA data not among the April-August 2001 UCALL data (tr. 22/19-27, 223-24).

119. Mr. Mabie was not offered or accepted as an expert in mathematics, data algorithms or in any other field (tr. 1/36-50, 18/213, 219-25), the factual terms in his formula were not shown to include the total universe of missing data (tr. 22/26), there may be calls missing from both DISA and UCALL data bases (tr. 22/27), DISA data include both completed and incomplete calls (due to busy trunk or destination numbers) with no way to distinguish them (tr. 17/192-95) and the five-month data sample was not shown to be representative of the 102-month period of the alleged breach. We find that Mr. Mabie’s formula is not competent, probative evidence of the total number of DISA data calls pertinent to Count III.

### DECISION ON COUNT III

SUFI argues that contract § E-2 required respondent to remove hallway/lobby DSN phones from guest lodgings at cutover to SUFI service; Ms. Draper’s interpretation of § E-2 was unpersuasive and was irrelevant because not communicated to SUFI before contract award; SUFI’s damages calculation via the x.4619 average monthly usage figure is “conservative” and approximates improper DSN phone usage, considering that much of such data were significantly “deflated” when calling card access was unblocked, the subject of Count I (app. br. at 213-18); and the Board should use the two DSN phones installed in the Delta Squad orderly room (under Count VII) rather than the 20-month sample of DISA data respondent proposes (app. reply br. at 50).

Respondent argues that the contract did not address hallway/lobby DSN phones, SUFI never raised the issue of removing such phones, SUFI’s own revenue data prove that it suffered no damages, SUFI’s quantum assumptions are unreasonable, inconsistent with contemporary records and violate statistical law, SUFI did not prove that it was physically possible to call simultaneously from two hallway DSN phones and the DISA records are the best evidence of hallway/lobby DSN phone usage (gov’t br. at 133-40).

There are three principal questions we must decide. (1) Did the contract require respondent to remove hallway/lobby DSN phones from the guest lodgings once SUFI’s LFTS was cut over? (2) Could two concurrent phone calls be made from “A” and “B”

DSN phones in the Ramstein lodgings? (3) Did SUFI sustain its burden of proving quantum for lost revenue and for extra work?

(1) Considering the information about DSN phones in lodging hallways/lobbies known to SUFI before contract award (finding 87), the clear and ordinary meaning of clause § E-2 (“Government telephones ... currently exist[ing] in some of the lodging facilities... provide Government service to the rooms and must be left operational until an agreed upon cutover date has been established” (finding 88)) included hallway/lobby and any other government DSN phones in guest rooms, which would become non-operational after such cutover. Ms. Draper’s interpretation excluding hallway/lobby phones from § E-2 is strained, was not shown to have been pre-contractual, and in any event was not communicated to SUFI before contract award (finding 89). Hence her view cannot resolve any putative ambiguity in § E-2. *See Anderson Consulting v. United States*, 959 F.2d 929, 934 (Fed. Cir. 1992), citing *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 984 (Ct. Cl. 1975) (party’s unexpressed intent plays no role in interpreting a contract).

Respondent’s assertion that SUFI never notified respondent that the hallway/lobby DSN phones had to be removed is baseless: not later than 31 July 1997 Mr. Stephens stated to CO Jones that contract § E required DSN phones to be removed at cutover (finding 93). Moreover, the undisputed fact that from February 1998 through December 2003 respondent removed 97 hallway/lobby DSN phones from lodgings (finding 101) confirms that respondent’s contemporaneous understanding of § E-2 was not different from SUFI’s, and hence “must be given great, if not controlling weight.” *Max Drill, Inc. v. United States*, 427 F.2d 1233, 1240 (Ct. Cl. 1970). Such evidence trumps other evidence urged by respondent that the parties from time to time discussed modifying the contract to require removal of hallway/lobby DSN phones. Therefore, we hold that § E-2 required respondent to remove or make non-operational such DSN phones.

(2) SUFI’s strongest evidence of overlapping calls from “A” and “B” DSN telephones in Ramstein lodgings was its contemporaneous random and systematic testing of such overlapping by Ms. Ansola and Mr. Broyles, and its CDR data recording instances of overlapping calls from those “A” and “B” DSN phones (finding 106). Respondent’s evidence that such overlapping calls were not possible is considerably weakened because Mr. Castanon’s investigations and CAIRS data examinations were in 2006-07, some 18 months after the Ramstein telephones, switch and call data records were transferred to respondent’s ownership and control (finding 107). We hold, by the preponderance of the evidence, that overlapping calls from Ramstein lodging “A” and “B” DSN phones from December 1996 through May 2005 were possible and were made.

(3) SUFI’s evidence of lost revenues presents many difficulties. Government long distance call data for the hallway/lobby DSN phones exist for measuring lost revenue damages during some but not all of the 102-month period of breach (December

1996 through May 2005), its DISA and UCALL data for DSN phones contain numerous time gaps and such data do not distinguish completed and attempted calls (findings 109(b), 116). The parties propose different baseline call data to measure lost revenue damages. SUFI used calls from September 2003 through August 2004 on phone x.4619 SUFI installed in Landstuhl Building No. 3754 with worldwide DSN service (finding 109(b)). Respondent proposes the August 2003 through March 2005 period of x.4619 call data and a five-month sample (April through August 2001) of adjusted DISA DSN call data (findings 116, 118). The parties disagree whether the demand for, and volume of, calls from DSN phones in lobby, 1<sup>st</sup> floor and other locations were constant or diminishing (findings 109(c), 113-14). We need not resolve the foregoing difficult issues, because one crucial, material fact is fatal to SUFI's lost revenues damage calculation.

Respondent was not required to, and did not, verify that hallway/lobby DSN calls were for official business (finding 86). The call data SUFI used for phone x.4619 to calculate lost revenue damages did not distinguish between official and non-official calls (finding 109(d)). SUFI's lost revenues calculation assumed that all 10,135 monthly minutes of calls on phone x.4619 would have been made on SUFI's commercial long distance network (finding 110(a)). Those 10,135 monthly minutes did not exclude official calls.

SUFI contends that, since respondent was required to remove all hallway/lobby DSN phones, failure to segregate and exclude official DSN calls defeats respondent's defense (app. reply br. at 4). That contention fails because baseline phone x.4619 was not a government DSN phone but a SUFI-installed phone for which it accumulated CDR data from its own switch, which was not among the 41 DSN hallway/lobby phones of known numbers which SUFI contends respondent was required to remove at cutover of SUFI services, but whose call data are not in evidence (finding 109(c)). Thus, the record affords the Board no basis on which to find that 100% of the DSN calls in issue were unofficial, as SUFI assumes, nor, more importantly, a basis by which we can reasonably determine the extent of official and non-official calls in the baseline phone x.4619 call data SUFI used. The Board declines to speculate about such a critical, material fact.

Accordingly, we hold that SUFI has not sustained its burden of proving that the hallway/lobby DSN phones caused a reduction in its long distance call revenues, and deny the appeal with respect to Count III.

#### FURTHER FINDINGS ON COUNT VIII - PRIME KNIGHT LODGINGS

120. "Prime Knight" designated the strategic airlift crews transiting Ramstein AB on flight status whose stays at Ramstein Prime Knight Building Nos. 538 and 540-42 were relatively brief (R4, Tab 16 at 4; tr. 1/172-73, 3/77-80).

121. During the pre-award February 1996 site survey (finding 91), Mr. Stephens saw DSN telephones in every Prime Knight room he looked at (tr. 1/172-73). He asked Prime Knight Lodging Manager Fred Roberts about the phones; Roberts said that they were an intercom system allowing the front desk clerk to call the rooms about flight information and changes (tr. 1/173-74; *SUFII*, tr. 1/204-05; ex. A15 at 1).

122. According to Ms. O’Shaughnessy Draper, pursuant to contract § E.2, which she co-drafted (findings 92-93), government DSN phones in Prime Knight guest rooms were to be replaced by SUFI phones at cutover (tr. 8/166-67, 184-85).

123. When SUFI prepared to install phones in Prime Knight lodgings in December 1996, Mr. Roberts told Mr. Stephens that the guest room government DSN phones had Class A worldwide service, which fact Stephens confirmed by calling Communications Squadron’s SGT Payne in January or February 1997 (tr. 1/175-77; *SUFII*, tr. 1/205; ex. A15 at 1).

124. Mr. Stephens’ 26 February 1997 e-mail to CO J. Jones stated with respect to Prime Knight, “the government-provided phone system ... allows guests the unrestricted ability to call around our system” (R4, tab 85A at 2700).

125. On 15 June 1997 Mr. Stephens notified COs J. Jones and C. Henson of the Prime Knight worldwide DSN phone capability, stated that the average May 1997 revenues for four Prime Knight lodgings was \$1,533.80 and for six other Ramstein lodgings was \$6,410.63, Mr. Roberts refused to remove the government DSN phones until SUFI provided worldwide DSN service and COTR Sellers was unable to get USAFE personnel to remove the government DSN phones (tr. 1/185-87; *SUFII*, ex. A13). We find that SUFI’s alleged revenue averages are misleading because they did not consider the number of rooms in each of the buildings.

126. Throughout 1997 and until autumn 1998, SUFI repeatedly requested USAFE and AFNAFPO officials and COs Jones and Henson to remove the government DSN phones from the Prime Knight guest rooms; respondent finally removed those phones shortly after 30 September 1998 (tr. 1/177-84, 188-95, 202-05, 208-11, 216, 2/90, 142, 189-92, 3/13-14, 85-86, 229-31, 266-70, 4/187-88; exs. B10, B20, B21 at 2; *SUFII*, exs. A15, A16 at 4-5, A20, A21 at 2-3, A22 at 1, A34, A36 at 1-2).

127. As revised on 13 February 2007, SUFI’s Count VIII included the following damages, with lost revenues based on Mr. Stephens’ 1 August 1997, \$18,000/mo. estimate (*SUFII*, ex. A21):

A. Lost Revenues, December 1996 through September 1998	\$188,260.20
• Interest thereon through June 2005	<u>90,190.84</u>

Subtotal:	\$278,451.04
B. Extra Work	
• Stephens, 1/97 – 9/98, 215 hours @ \$90/hr.	\$ 19,350.00
• Ansola, 3/10/05, 1 hr. @ \$90/hr.	\$ 90.00
• Broyles, 3/10/05, 1 hr. @ \$68/hr.	68.00
• Smith, 5, 13, 19, 21 Apr. 2005, 9 hrs. @ \$68/hr.	<u>748.00</u>
Subtotal:	\$ 20,256.00
• Interest thereon through June 2005	<u>9,916.45</u>
Subtotal:	\$ 30,172.45
C. Out-Of-Pocket Expenses	
• Stephens, consulting fee, 7/1/05	\$ 25.00
• Profit at 25% thereon	<u>6.25</u>
Subtotal:	\$ 31.25

Total of A \$278,451.04 + B \$30,172.45 + C \$31.25 = \$308,654.74

(Ex. B205, tab 9 at 366-72)

128. SUFI's long distance call revenue from the 176 Prime Knight guest rooms from January 1997 through September 1998 was \$117,400, or \$667.05/room. For the same period revenue from the other 426 Ramstein guest rooms was \$578,350, or \$1,357.63/room. (Ex. B205, tab 16A at 430-31) Those 426 rooms had local DSN access only (finding 91).

129. Respondent's negotiator for Mod. 5 was COTR Yaeger, who was aware of SUFI's complaints of DSN phone abuse by toll skipping and its blocking of calls to DSN operators from SUFI phones both before and after execution of Mod. 5, but she did not ask SUFI during negotiation of Mod. 5, to release any monetary claims for DSN phone abuse, nor did any CO ask COTR Yaeger to include release language in Mod. 5 (tr. 6/16-19; *SUFII*, tr. 2/105-06, 112-13, 116-20; ex. A46). CO J. Jones, who executed Mod. 5, was not aware of any available AFNAFPO release language and did not testify about any Mod. 5 release (tr. 3/267-83, 8/211-20, 11/99-118).

130. SUFI's negotiator for Mod. 5 was Cecilia Ansola, who confirmed that she did not discuss any release of damage claims during Mod. 5 negotiations (tr. 4/34-36, 38). Stephen Myers, who signed Mod. 5 for SUFI, confirmed that there was no discussion of reserving, releasing or "giving up" any SUFI claim for damages during Mod. 5 negotiations (tr. 8/112-13, 14/82-83).

131. Contract Mod. 5, executed in March and June 1999 (*SUFII*, finding 33, 04-2 BCA ¶ 32,714 at 161,863), did not mention any prior SUFI claim regarding Prime

Knight DSN phones, or any other DSN phone claim, and contained no release of any SUFI claim (R4, tab 8). Respondent's answer raised the affirmative defense of accord and satisfaction, asserting that Mod. 5 "resolved all DSN issues relating to Prime Knight Lodging from the beginning of the contract to June 1999" (gov't answer at 54).

### DECISION ON COUNT VIII

SUFI argues that respondent mislead SUFI with respect to the class of DSN phones in Prime Knight guest rooms, contract § E.2 plainly required respondent to remove the government DSN phones from Prime Knight guest rooms at cutover to SUFI service, respondent's delay in removing such phone was a "willful breach" and SUFI's damage calculations were not countered (app. br. at 269). Respondent contends that SUFI waived its right to Count VIII damages by contract Mod. 5, lower Prime Knight revenues were due to the unique mission of their guests and the alleged damages are based on Mr. Stephens' speculative estimate (gov't br. at 153-55).

The parties do not dispute that, irrespective of their class of service, contract § E.2 required respondent to remove the government DSN phones from the Prime Knight lodging guest rooms (finding 122). Therefore, respondent's failure and refusal to remove those phones from Prime Knight guest rooms for 20 months after cutover of Ramstein lodging LFTS services in January 1997 was a breach of contract.

Our 8 November 2006 decision on the parties' motions for partial summary judgment stated in pertinent part (*SUFI II*, 06-2 BCA ¶ 33,444 at 165,775):

...[A]ppellant argues that Mod. 5 did not settle SUFI's 2005 monetary claims regarding DSN service within the guest lodging rooms, but only clarified how such DSN service was to be provided in the future; Mod. 5 did not state expressly that it was an accord and satisfaction; the record of the parties' negotiations for Mod. 5 discloses no apparent intent to release SUFI's foregoing claims; and there was no meeting of the minds of the parties that Mod. 5 was intended as an accord and satisfaction ....

...[R]espondent cites CO J. Jones' declaration that Mod. 5 "resolved the DSN issues that SUFI had from the beginning of the contract to the execution of" Mod. 5, and the 28 June 2001 e-mail of SUFI's Cecilia Ansola who stated that in "June [1999] – Modification was signed in regards to DSN. We all thought this would resolve the DSN issue"....

### **Decision on Accord and Satisfaction**

With respect to respondent's affirmative defense that Mod. 5 constituted an accord and satisfaction of respondent's actions prior to 9 June 1999 that lead to SUFI's July 2005 claim items for Early DSN Abuse, Delta Squadron and Prime Knight, the parties' opposing affidavits and declarations show a genuine dispute regarding the material fact of whether there was a meeting of the minds of the parties to resolve those claims in Mod. 5. Accordingly, appellant is not entitled to partial summary judgment on this issue ....

The 2007 hearing record establishes that there was no meeting of the minds with respect to the parties' intent to release SUFI's Prime Knight monetary claim shown in the parties' negotiations or in the provisions of Mod. 5 itself (findings 129-31). Mod. 5 confirmed that DSN calls were limited to the local area and SUFI was entitled to continue to block lodging guest access to the local base operator after June 1999 (findings 97, 129). We hold that the Mod. 5 accord and satisfaction defense to the Count VIII claim is unsound. *See Collazo Contractors, Inc.*, ASBCA No. 53925, 05-2 BCA ¶ 33,035 at 163,747, *recon. denied*, 06-1 BCA ¶ 33,212 (meeting of minds is "crucial prerequisite").

The strategic airlift flight crews who stayed at the Prime Knight lodgings were on flight status and their stays were relatively brief (finding 120). From such facts, however, one can draw no inference about the frequency of flight crew members' long distance, non-DSN calls. Respondent's "explanation" of the difference between Prime Knight and other guest lodging phone call incidence by their "unique mission" is untenable.

Mr. Stephens' \$18,000 estimate of monthly lost revenues due to worldwide DSN phones in Prime Knight guest rooms (finding 127) was not validly based on call revenue data. However, the record contains lists from January 1997 through September 1998 of revenues received from Prime Knight lodgings and from other Ramstein lodgings, none of which was shown to have worldwide DSN phone access. Those data show that SUFI received \$667.05 per room from the 176 Prime Knight lodging rooms, and \$1,357.63 per room from the 426 other Ramstein lodging rooms. (Finding 128) The difference between such revenues was \$690.58 per room (\$1,357.63 - \$667.05). \$690.58 times 176 Prime Knight lodging rooms produces a total revenue difference of \$121,542.08. We hold that \$121,542.08 validly measures SUFI's lost revenues under Count VIII.

We determine the following damages for Count VIII:

A. Lost revenues, January 1997 - September 1998	\$121,542.08
B. Extra work, Stephens, 105 hours* in Feb.-March, May-Sept 1997 and Sept 1998 @ \$66.83/hr.	<u>7,017.15</u>
Total:	\$128,559.23

\* Mr. Stephens' other hours claimed were not substantiated by the record.

SUFI is entitled to interest on \$128,559.23 at the FRB monthly Prime Rate from 1 January 1997 until payment of the \$128,559.23 amount is made pursuant to this decision. We do not decide here the \$906.00 in claim preparation costs of Ms. Ansola and Messrs. Broyles and Smith in 2005, and Mr. Stephens's \$25.00 consulting fee, but instead *infra* in this decision.

#### FURTHER FINDINGS ON COUNT XXI - COORDINATED MESSAGE

132. The contract contemplated that DOs other than the first three for Ramstein, Rhein-Main and Aviano ABs might be issued for other locations. Section C2.1.2.1 provided: "Appendices [for USAFE site/locations] may be increased or decreased depending on the USAFE mission requirements. Specifically, Spangdahlem Air Base...may be included at a later date." Section C3.3.3 provided: "[SUFI] offers to provide...LFTS services to the extended Ramstein area (Vogelweh, Landstuhl and Sembach)..." Section C4.12 provided: "LFTS Systems at Follow On locations: [SUFI] commits to providing a good-faith estimate for any future delivery orders..." (*SUFII*, ex. A1 at C-2, C-34, C-41)

133. In 1997-98 when there were unresolved issues between the parties about unrestricted DSN calls and use of calling cards of long distance carriers other than SUFI from lodging room guests over the LFTS (*SUFII*, 04-2 BCA ¶ 32,714, findings 11, 13-17) USAFE drafted a "coordinated message" in June 1997 to send to all European air bases to describe the SUFI contract services (*SUFII*, tr. 3/308-09; ex. A16 at 1-3).

134. USAFE addressed an 18 February 1998 version of its draft coordinated message to 28 Air Force communications and service activities at Aviano, Ramstein, Rhein Main and Spangdahlem ABs, as well as to Croughton, Fairford, Lakenheath, Mildenhall and Molesworth ABs in United Kingdom, Incirlik AB in Turkey and Moron AB in Spain. The draft, "Subject: Status of Lodging Facility Telephone System [LFTS] Installation," had four paragraphs, described the rationale for the SUFI contract, progress of installations at the Kaiserslautern Military Community (KMC) bases, including Ramstein, Vogelweh, Landstuhl and Sembach (*SUFII*, tr. 4/439), and plans for further installations and listed COTR Sellers as a USAFE point of contact. This draft said nothing about worldwide DSN access and calling cards. USAFE sent this draft to SUFI for "coordination." SUFI's Carl Stephens initialed his approval thereof. COTR Sellers sent that draft to AFNAFPO on 20 February 1998, noting Mr. Stephens' approval. (Ex. B19; tr. 2/79-83)

135. On 27 May 1998 at 9:31 AM COTR Sellers sent an e-mail, *inter alia*, to CO Janice Jones, "Importance: High," stating "The joint SC/SV [USAFE's communications

and services directorates] message has been coordinated by the Comm. folks. We are now ready to get on with business” (tr. 2/79; *SUFII*, ex. A27). On 27 May 1998 at 5:56 PM USAFE transmitted a five-paragraph coordinated message to the 28 activities listed on the draft message and others. USAFE added a new ¶ 4 with “guidance” to assist lodging and communications planners in implementing LFTS regarding (a) direct access to base operators for morale calls, (b) no cost access to local DSN numbers with official DSN service provided through local operators, and—

C. THE LFTS WILL ALLOW LODGING CUSTOMERS TO MAKE COMMERCIAL CALLS WITH THEIR OWN CALLING CARDS. THE CONTRACTOR MAY CHARGE A REASONABLE FEE FOR USING OTHER LONG DISTANCE SERVICES. THE CAPABILITY TO USE OTHER SERVICES AND THE SERVICE FEE SHOULD BE INCLUDED IN THE TELEPHONE INSTRUCTIONS PROVIDED IN EACH ROOM.

Paragraph 4 of the February 1998 draft message was renumbered 5. (*SUFII*, ex. A28) The record contains no evidence that CO Jones disavowed, or told USAFE to rescind, the 27 May 1998 coordinated message.

136. On 2 June 1998 USAFE’s David White sent the foregoing 27 May 1998 USAFE coordinated message to SUFI’s Carl Stephens, commenting, “I’m not sure of the calling card paragraph...need to talk with you” (tr. 2/83-84; *SUFII*, ex. A28 at 1). Mr. Stephens immediately determined that he had never seen before the added ¶ 4 in the 27 May 1998 message and that it was contrary to the contract terms and to his discussions with COTR Sellers and Mr. White about how to resolve the DSN access and calling card issues (tr. 2/84-86; *SUFII*, tr. 1/213-15).

137. On or about 3 June 1998 Mr. Stephens telephoned or met with COTR Sellers and Mr. White and complained that the 27 May 1998 message jeopardized SUFI’s ability to do any further LFTS work at any other Air Force installations around Europe (tr. 2/86; *SUFII*, tr. 1/214-15, 219-20).

138. When representatives of SUFI and respondent went to an air base in Turkey in June 1998 and to four U.K. air bases in February 1999, despite efforts of Air Force personnel to explain the inaccuracies in the 27 May 1998 coordinated message, local base personnel expected to receive direct access to base operators for official local and long distance DSN calls and to use calling cards of competing long distance carriers described in ¶ 4 of the May 1998 message, and did not want to receive the LFTS services specified in the contract (ex. B205, tab 22A at 494; tr. 2/88-89, 4/270-76; *SUFII*, exs. A42, A43).

139. In 2001 the Aviano AB had changed the lodging locations, increased the number of lodging rooms to 100 and planned to add a 100-room building in one to two years. When SUFI's Ms. Ansola and Mr. Congalton met with Aviano communications squadron representatives in August 2001, they asked if SUFI would provide worldwide DSN access and calling cards, to which SUFI replied that those services were not part of the contract. (Tr. 4/274-76) Thereafter, SUFI did not provide LFTS services at Aviano (finding 33). We find the foregoing evidence inadequate to link USAFE's 27 May 1998 coordinated message to the Aviano communications squadron's August 2001 questions about DSN access and calling cards and its reluctance to obtain SUFI's services.

140. SUFI's Count XXI included the following damages:

A. Extra Work of Messrs. Stephens, Holzapfel, Congalton and Ms. Ansola from January 1997 through 22 April 2005	\$32,625.00
Interest on the foregoing extra work	<u>14,190.37</u>
Subtotal:	\$46,815.37
B. Out-of-pocket expenses, including:	
• 1/97 Trip expenses of Mr. Stephens to England	\$ 2,545.50
• 6/23-26/98 Trip expenses of Mr. Holzapfel to Turkey	900.00
• 2/99 Trip expenses of Ms. Ansola to England	558.54
• 8/01 Trip expenses of Ansola and Congalton to Aviano	466.37
• 7/1/05 Consulting fee for Carl Stephens	<u>50.00</u>
Subtotal:	4,520.41
Profit at 25% thereon	<u>1,130.10</u>
Subtotal:	\$ 5,650.51
• Interest on out-of-pocket expenses	<u>2,682.44</u>
Subtotal:	\$ 8,332.95
Total of A. (\$46,815.37) + B. (\$8,332.95) =	\$55,148.32

(Ex. B205, tab 22 at 493-97) Messrs. Stephens and Congalton and Ms. Ansola verified the accuracy of their respective extra work hours and estimated trip expenses, and Mr. Stephens verified the hours he estimated for the work done by Messrs. Holzapfel and Tapley at Stephens' direction (tr. 2/87-90, 4/276-77, 12/60-61; R4, tab 98A at 4252-66).

#### DECISION ON COUNT XXI

SUFI contends that: (a) respondent violated its implied duty of good faith when, after coordinating a draft of the USAFE message with SUFI, it sent to all USAFE bases a final version of that message with an added paragraph that materially misrepresented what SUFI would do under the contract; (b) such action hindered and frustrated SUFI's

ability to expand its services to additional Air Force bases (app. br. at 392-93), as evidenced by the failure of its June 1998 and February 1999 efforts to expand LFTS to air bases in Turkey, UK and Aviano, and (c) USAFE listed COTR Sellers as a point of contact on the coordinated the May 1998 message (app. reply br. at 95-96).

Respondent argues that SUFI presented no evidence that anyone read or received the 27 May 1998 message, AFNAFPO did not issue the message, and that even if there were proof of its receipt and reading, SUFI has not shown that that message, rather than some other cause, affected any lodging facility's decision not to seek SUFI's LFTS services, because subsequent to the May 1998 message, SUFI installed LFTS at Spangdahlem, Eifel West/Bitburg and Sembach, so that message did not cause SUFI any harm, and proposal preparation expenses cannot be recovered (gov't br. at 178-79).

We reject respondent's argument that AFNAFPO is not responsible for USAFE's coordinated message. The contract clearly stated that it is a "United States Government contract" (finding 2). AFNAFPO chose to designate Wayne Sellers, an USAFE employee, as its COTR (finding 3). COTR Sellers was a designated as a point of contact on the coordinated message; he sent the 18 February 1998 draft coordinated message to ANAFPO and before its transmission sent the 27 May 1998 final coordinated message to CO Janice Jones (findings 134-35). The record contains no evidence that CO Jones disavowed, or told USAFE to rescind, the coordinated message (finding 135). SUFI presented unopposed evidence that in Turkey in June 1998 and in UK in February 1999 Air Force representatives attempted to explain the inaccuracies in the 27 May 1998 coordinated message to service squadrons (finding 139). Such evidence proves that those addressees had received and read the coordinated message.

Notwithstanding the foregoing conclusions, the record evidence does not establish whether the lodging management at U.S. Air Bases in Turkey and the U.K. already had decided, before the May 1998 coordinated message was sent, that their lodging guests must be able to use their calling cards for long distance calls, or whether they so decided after receiving such message. The record evidence also was insufficient to link the May 1998 message to the Aviano communications squadron's reluctance to obtain SUFI's telephone services (finding 139). Thus, we cannot conclude that USAFE's inaccurate 27 May 1998 message was the proximate cause of, or a significant factor in, the decisions of any of those bases not to use SUFI's LFTS. We deny the appeal with respect to SUFI's Count XXI.

#### FURTHER FINDINGS ON COUNT XII - MISSING ROOMS

141. The contract provided in §§ C, H and I (R4, tab 1 at C-2, C-42, H-2, I-10):

[§ C] 2.1.2 Total number of Sites and Drawings: Drawings and sketches will be provided for the contractor's information

....[Appendices A, B and C for Ramstein AB, Rhein-Main AB and Aviano AB].

2.1.2.1 Appendices may be increased or decreased depending on the USAFE mission requirements. Specifically, Spangdahlem [AB] may be included at a later date.

2.1.2.2 Note: The final room configurations may be slightly different than shown in the available drawings....

....

4.13.1 [SUFU] will modify the system to meet future Government requirements on a Time and Material basis at rates to be negotiated after contract award.

....

#### [§ H]9. SITE PREPARATION

a. Equipment space and environmental specifications for site preparation shall be furnished in writing by the Contractor....

....

c. The Government shall prepare the site at its own expense and in accordance with the specifications furnished by the Contractor.

....

e. The Contractor shall inspect the site within sixty (60) days from receipt of written notice from the Government that the site is ready for inspection and shall notify the Government in writing of any site deficiencies requiring corrective action within ten (10) days from the date of inspection. Such inspection shall not be construed to be acceptance of power and air conditioning facilities.

and § I.61, DELIVERY ORDER LIMITATIONS (APR 1984), which allowed SUFI to reject a DO exceeding the maximum quantity set forth in the contract, but not to reject a DO when the quantity delivered by respondent was less than the quantity ordered.

142. The contract did not include Air Force Instructions 34-601, 34-246, 34-247 on the 250 square foot minimum size of lodging facility rooms, and there is no evidence that they were published in the Federal Register or SUFI knew of them (tr. 16/107-08, 119).

143. DO No. 2 specified 186 rooms for Rhein Main AB Building No. 600 (R4, tab 17 at 3). At the 6 March 1997 cut-over for Building No. 600, that lodging had 126 guest rooms based on SUFI's room counts and call data records for telephone extensions (ex. B110 at 66-80; tr. 4/209, 5/124-26).

144. DO No. 7 specified 90 guest rooms for Sembach AB Building No. 110 (R4, tab 20 at 11). At the May 1999 cut-over for Sembach lodgings, Building No. 110 had 75 guest rooms (ex. B205, tab 13A at 393; tr. 4/208-09).

145. Effective 7 February 2000, bilateral contract Modification No. 007 added the following ¶ 3.11.2 to § C (R4, tab 1 at C-18, C-19, tab 10 at 1):

3.11.2 Facility Renovations. The LFM [lodging facility manager] must notify the contractor before an existing building is scheduled for renovation so the contractor may remove any existing telephones, frames, and other equipment. The LFM must notify contractor 60 days in advance for a major renovation (i.e. and [sic] entire building) and 30 days in advance for a minor renovation (i.e. individual rooms or floors). Contractor shall submit a proposal of no more than 25% over cost to LFM and AFNAFPO in three separate areas; 1) removal of equipment prior to renovation; 2) cost of reinstalling the system temporarily based on LFM requirements during renovation if so desired. 3) and full reinstallation of phone systems when the building is ready again for occupancy. AFNAFPO and [SUFI] Network Service will work together on a fair and reasonable cost plus price that is agreeable to both parties prior to the start of any work. [Punctuation in original.]

146. Respondent renovated several lodging rooms which eliminated a number of guest rooms due to their reconfiguration to meet the 250 square foot minimum size requirement, as shown in the following chart by AB, Building number, number of guest rooms eliminated and post-renovation period of the remaining number of guest rooms:

<u>AB</u>	<u>Bldg. No.</u>	<u>No. of Guest Rms. Eliminated</u>	<u>Period of Remaining No. of Guest Rooms</u>
Vogelweh	1004	32 (67–35)	11/10/99 through 5/05
Landstuhl	3756	36 (70–34)	12/1/00 through 5/05
Sembach	110	29 (75–46)	9/1/01 through 5/05
Landstuhl	3751	17 (33–16)	12/17/03 through 5/05

The number of guest rooms eliminated is the number of rooms specified (except it is the actual number for Sembach Building No. 110), less the remaining number. (Ex. B110 at 46-47, B205, tab 13A at 393; tr. 4/205-09)

147. We find no record evidence of any LFM notice to SUFI of any major or minor renovation prior to the renovations of Vogelweh Bldg. 1004, Landstuhl Bldg. 3756, Sembach Bldg. 110 or Landstuhl Bldg. 3751, nor any SUFI proposal to remove its equipment from, or to reinstall it in, the renovated rooms in those buildings.

148. As revised on 13 February 2007, SUFI's Count XII included the following damages:

A. <u>Lost Revenues</u>	\$734,251.87
Calculated by multiplying the ratio of missing rooms to rooms delivered times the actual annual or periodic revenues (producing "Gross Lost Revenue") and subtracting therefrom the added equipment costs (wiring and jacks (@ \$100), telephone handsets (@ \$80) and installation labor (@ \$20) per room for Sembach Bldg. 110 and Rhein Main Bldg. 600, totaling \$15,000, and carrier costs SUFI would have incurred to service the missing rooms (ex. B205, tab 13A at 393-94).	
• Interest thereon through June 2005	<u>115,013.46</u>
Subtotal:	\$849,265.33
B. <u>Extra Work</u>	
• Claim research and preparation by Ansola, Smith, Broyles	\$
2,534.00	
11/18/2004 through 5/4/2005	
• Interest thereon through June 2005	<u>49.90</u>
Subtotal:	2,583.90
C. <u>Out-of-pocket costs</u> , Stephens' 7/1/2005 consulting fee	\$ <u>31.25</u>
Total of A (\$849,265.33) + B (\$2,583.90) + C (\$31.25) =	\$851,880.48

In category A Lost Revenues, \$86,722.19 were for Sembach Building No. 110 and \$282,194.56 were for Rhein-Main Building No. 600. (Ex. B205, tab 13 at 392-98; tr. 4/209-20, 13/32-33, 14/92-95) DCAA took no exception to SUFI's methodology and calculation of lost revenue, and verified the actual revenue costs to SUFI's call data records (R4, tab 106 at 16).

## DECISION ON COUNT XII

SUFI argues that respondent breached the contract by (1) providing fewer rooms than specified by the DO Nos. 2 and 7 for Rhein Main Building No. 600 and Sembach Building No. 110, respectively, and (2) by reducing the number of lodging guest rooms for LFTS service during renovation of four lodgings (app. br. at 307-08).

Respondent does not deny that it provided fewer guest rooms at Rhein Main Building No. 600 and Sembach Building No. 110 than the number of guest rooms specified in their respective DOs (findings 143-44), and it reduced the number of guest rooms in Vogelweh Building No. 1004, Landstuhl Building No. 3756 Sembach Building No. 110 and Landstuhl Building No. 3751 during their renovations (finding 146). Respondent contends with respect to alleged breach (1) that SUFI failed to notify it within 10 days of inspecting the Rhein Main and Sembach sites of any deficiencies, or to reject DO Nos. 2 and 7 for missing rooms, and the IDIQ type contract did not guarantee any minimum number of guest rooms, but only one LFTS per base. With respect to alleged breach (2) respondent argues that SUFI waived its right to damages for room reductions by executing contract Mod. 7 and SUFI knew or should have known of the Air Force instructions requiring the 250 square foot minimum lodging room sizes (gov't br. at 156-59).

As to the first category of breach, respondent's defense of failure to receive notice within ten days after inspection of the Rhein Main and Sembach sites is unsound, because the § H.9 Site Preparation clause addressed notice of deficiencies in equipment space and environmental specifications for those sites, not missing guest rooms. Contract clause I.61, DELIVERY ORDER LIMITATIONS (APR 1984), did not permit rejection of a DO when the quantity to be performed was less than the quantity ordered. (Finding 141) Respondent's contention that this IDIQ type contract did not guarantee a minimum number of guest rooms, but only one LFTS per base (see *SUFII*, 04-2 BCA at 161,859, finding 5, and 161,868), is irrelevant to respondent's failure to provide the number of guest rooms specified in DO No. 2 for Rhein Main Building No. 600 and in DO No. 7 for Sembach Building No. 110 (findings 143-44).

It is troublesome that SUFI apparently first notified respondent of the missing guest rooms in Buildings 600 and 110 when its submitted its 1 July 2005 claim, more than eight years after Building 600's cut-over and over six years after Building 110's cut-

over, without explaining why it did not detect the missing rooms when it reviewed the call record data soon after cut-over. However, respondent has not shown any prejudice to it by such delay in receiving notice, and it has not argued, and it is not apparent to us, that the missing guest rooms were curable. See *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 733 (Fed. Cir. 1997) (existence of prejudice due to dilatory notice increases contractor's burden of persuasion, rather than to bar breach claim entirely); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1392 (Fed. Cir. 1987).

As to the second category of breach, on and after 7 February 2000 respondent gave SUFI no notice of scheduled renovations of any lodging buildings, and SUFI gave respondent no cost/price proposals for removing and reinstalling its equipment (findings 145, 147), so SUFI did not waive any damages arising from respondent's facility renovations. SUFI had no actual or constructive knowledge of Air Force Instruction 34-601, 34-246, 34-247 regarding the minimum size of lodging facility rooms because the contract did not incorporate them, the record has no proof that SUFI knew of them or that they were published in the Federal Register (finding 142).

With respect to breach category one, guest rooms in Rhein-Main Building No. 600 and Sembach Building No. 110 that respondent did not provide upon award of DOs 2 and 7 in May 1996 and August 1998 (findings 143-44), we determine lost revenue damages of \$368,916.75 (finding 148). With respect to breach category two, rooms eliminated due to guest lodging renovations, SUFI's remedy was a time and materials cost adjustment pursuant to contract § C4.13.1 (finding 141). Since SUFI submitted no guest lodging renovation proposal to the government (finding 147) and the appeal record provides no cost information from which the Board can approximate the costs SUFI incurred due to such room eliminations, we decline to speculate on the amount of recovery for breach category two. We hold that SUFI is entitled to recover \$368,916.75, with interest thereon at the FRB's monthly Prime Rate from the first date of missing guest rooms per lodging building, until payment of the \$368,916.75 pursuant hereto. We do not decide here Messrs. Smith and Broyles and Ms. Ansola's November 2004 to June 2005 \$2,534 in claim preparation costs and Mr. Stephens' 1 July 2005 \$31.25 consulting fee, but instead *infra* in this decision.

#### FURTHER FINDINGS ON COUNT V - OTHER OPERATOR NUMBERS PATCHING

149. "Morale calls" were personal calls, limited to 15 minutes and every two weeks, to a local base operator that could be patched to a long distance number, including in the U.S.A., by troops on temporary duty for at least two weeks. SUFI did not discuss morale calls with respondent before contract award. (Tr. 2/31, 4/133-34, 17/150-55)

150. At some time before October 1998 USAFE personnel asked Mr. Stephens to allow "morale calls" over the SUFI DSN network (tr. 2/32).

151. In October 1998 USAFE established at KMC, and SUFI added to its switches, DSN phone numbers 480-4663 (480-HOME) and 480-1110 in Ramstein, Landstuhl, Vogelweh and Sembach AB lodging guest rooms for “morale calls,” which SUFI monitored (tr. 4/134; R4, tab 82B at 2595; *SUFII*, tr. 3/59-60).

152. SUFI found morale calls up to three hours long and “one call after another” from the same guest room. In December 1998 SUFI complained to COTR Sam Adams and Assistant General Lodging Manager White. SUFI submitted records showing such calls in January-March 1999 exceeding USAFE’s morale call limits by 3,046.5 minutes (50 hours, 46 minutes). (Tr. 4/161-69; R4, tab 82B at 2576, 2578-81, 2584-94, 2600 *SUFII*, tr. 3/60-61)

153. After learning that USAFE personnel would not monitor or control morale calls, in May 1999, with the knowledge of COTR Adams, KMC Lodging General Manager Branham and Mr. White, SUFI blocked morale calls from lodging guest rooms and installed lobby phones for morale calls that respondent’s front desk personnel were to monitor by sign-in logs (tr. 4/133-34, 169, 6/24-25, 49-50, 12/241, 17/21-22, 152-53; R4, tab 82B at 2596-97; *SUFII*, tr. 3/61-62, 240, 4/13-14, ex. A62). Mr. Branham did not instruct front desk personnel to request guests to sign a log for morale calls (tr. 17/22-23).

154. In its Count V claim component, “Direct Operator Access,” SUFI alleged that Ramstein operator numbers 480-1110 and 480-1113, and Sembach number 496-1113 had monthly usages from May 1999 through April 2005 varying from 1 minute to 13,059 minutes (ex. B205, tab 6A at 235, 237, 239).

155. When lodging guests asked local base operator to patch a call to a commercial number in the U.S.A. over SUFI’s DSN network, the DSN call record showed the originating operator number and the destination commercial number called (tr. 18/138-40; *SUFII*, 04-2 BCA ¶ 32,714 at 161,860, finding 14).

156. With respect to its Count V claim component, “Indirect Operator Access,” from her review of call records showing 70 or more calls to the same number and 10 minutes or more in length, Ms. Ansola discovered, and complained to COTR Adams, that lodging guests could call local DSN numbers (other than base operator numbers), ask the recipient of such call to patch the call to a local DSN operator, who then patched a long distance call (tr. 4/136-37, 152-53, 5/101-03, 6/100-03, 18/137-39).

157. The indirect operator access DSN telephone numbers in SUFI’s claim (R4, tab 77 at 39-40) were for Air Force organizations, chiefly at Ramstein AB, that lodging guests called for official business, some or many of which calls would not take less than 10 minutes (tr. 3/98-106, 10/111-13, 16/34-42).

158. In May 2001 a lodging guest showed SUFI technician Fred Broyles how she patched a call to her boyfriend in the USA via the Air Mobility Command (AMC) Terminal number. SUFI's 31 May 2001 e-mail to AFNAFPO reported that AMC number "problem." (Tr. 4/137-40, 6/101-02; R4, tab 80A at 1732).

159. Ms. Ansola saw front desk personnel at Landstuhl and Vogelweh lodgings provide guests a phone number by which they could get through to a DSN operator (tr. 4/153-55). Ms. Ansola's 22 April 2003 e-mail reported such Landstuhl front desk activity to Ramstein Lodging Manager David White, who told his staff not to give out phone numbers to circumvent the SUFI system, and Mr. Myers forwarded that e-mail to CO Henson (tr. 16/43, 17/20-21; *SUFII*, exs. A105 at 1, A106 at 1-2).

160. In mid-December 2003 SUFI discovered that respondent's front desk personnel at Ramstein gave guests the AMC passenger terminal number and suggested that they call that number for patching free calls over DSN lines to the USA. Ms. Ansola dialed that AMC number (479-4440), heard a recorded message with an option to transfer directly to the DSN operator, examined the call records for 479-4440 and found a great increase in use starting in mid-October 2003. (Tr. 4/156-57; *SUFII*, tr. 3/111-12) On 19 December 2003 Ms. Ansola reported the AMC number recorded message to COTR Adams (*SUFII*, ex. A168), went to the AMC Terminal and requested the "right person" there to remove the message option to dial the operator (tr. 4/157).

161. COTR Adams thereupon called the AMC number, heard the recorded message options and requested the AMC terminal superintendent to deactivate that option, since circumventing the SUFI system was inconsistent with respondent's contract obligations (tr. 4/156, 7/72-73; *SUFII*, ex. A169). Respondent "fixed" the AMC problem in mid-January 2004 (tr. 4/157; *SUFII*, tr. 3/119).

162. SUFI call data records of the number and duration of calls to AMC Terminal number 479-4440 during the following time periods showed:

<u>Time Period</u>	<u>Calls</u>	<u>Minutes</u>	<u>Average Min./Call</u>
1-31 May 2003	241	528	2.19 (528 ÷ 241)
1-31 Oct. 2003	621	1409	2.27 (1409 ÷ 621)
1-30 Nov. 2003	875	7,973	9.11 (7979 ÷ 875)
1-16 Dec. 2003	1,337	17,090	12.78 (17090 ÷ 1337)
1-23 Jan. 2004	1,577	14,243	9.03 (14,243 ÷ 1,577)
1-30 Apr. 2004	606	946	1.87 (946 ÷ 606)

(*SUFII*, ex. A205; tr. 3/113-18, 23/57-58) USAFE's call data for 479-4440 showed 11.22 minutes per call during November-December 2003, and 2.20 minutes per call from

May 2001 through May 2005, excepting 1 October 2003 through 31 January 2004 (tr. 23/57-62; ex. B202).

163. As updated 13 February 2007, Mr. Broyles prepared a list from SUFI call data records of 34 lodging guest room telephone numbers at Ramstein, Landstuhl and Sembach ABs with 70 or more calls of 10 minutes or more length. The number of minutes called from year to year to such phones varied from 10 to 166,225. (R4, tab 82A at 2529-39; ex. B205, tab 6A at 241-307, 314-24; tr. 6/102-03)

164. From DISA call records the average length of local DSN calls from phone 480-6534 in Ramstein Building No. 552, not a guest lodging, was 1.97 minutes (ex. B217).

165. As revised at the 2007 hearing, SUFI's Count V included the following damages:

A. Lost Revenues

• Direct Operator Access	\$ 333,471.84
• Indirect Operator Access	1,193,304.05
• AMC Terminal	<u>46,910.42</u>
Subtotal:	\$1,573,686.31
• Interest on foregoing thru June 2005:	<u>206,570.58</u>
Subtotal, Lost Revenues:	\$1,780,256.89

B. Extra Work

• Original hours, rates, cost	\$ 8,452.50
• Additional Ansola 52.5 hours @ \$90/hr.	<u>4,725.00</u>
Subtotal:	13,177.50
• Interest on original cost thru June 2005	448.88
• Interest on added Ansola costs	<u>1,025.38</u>
• Revised interest on Extra Work	1,474.26
Subtotal, Extra Work:	14,651.76

Total of A (\$1,780,256.89) + B (\$14,651.76) = \$1,794,908.65

(Ex. B205, Tab 6 at 228).

166. To calculate the foregoing lost revenues damages, SUFI: (a) applied its annual long distance revenue and cost rates to the total minutes called (actual usage) taken from SUFI's switches, to direct access operator numbers 480-6120, 480-4663, 480-1110, 480-1113 and 496-1113 (ex. B205, tab 6A at 229-39 (odd numbered pages),

311-12; tr. 13/28, 14/75-77) and (b) applied its annual revenue rates to the calculated minutes of calls of 10 or more minutes (which exceeded the average 1.97 or 2.20 minute DSN call) to the 34 indirect access numbers having 70 or more calls to such number (finding 163; ex. B205, tab 6A at 241-307 (odd numbered pages), 314-24; tr. 14/77-78, 247-52).

167. To calculate its lost revenues for AMC Terminal number 479-4440, SUFI derived “extra usage” during October 2003-January 2004 when callers could select option button five to dial the operator as follows (ex. B205, tab 6A at 309):

<u>Month</u>	<u>Usage minutes</u>	<u>Avg. usage minutes</u>	<u>Extra usage minutes</u>
10/03	1,933	1,094	839
11/03	8,651	1,094	7,557
12/03	31,432	1,094	30,338
1/04	16,056	1,094	14,962

SUFI allegedly obtained the foregoing 1,094 minutes average monthly usage from its August-September 2003 and February-March 2004 call records, which it summarized under tab 6A, stating (ex. B205, tab 6A at 325):

ACTUAL USAGE MINUTES

<u>Date</u>	<u>Total</u>
2003-10	1,812
2003-11	8,450
2003-12	31,354
2004-01	15,930

SOURCE DATA FOR AVERAGE USAGE CALCULATIONS MINUTES

<u>Date</u>	<u>Total</u>
2003-08	952
2003-09	861
2004-02	1,390
2004-03	1,173

SUFI did not explain the differences between the actual usage minutes on ex. B205, tab 6A, pages 309 and 325, or why those usages differed from the monthly usage data in *SUFII*, ex. A205 (finding 167). SUFI applied its applicable revenue and cost rates to the foregoing monthly “Extra Usage” minutes (tr. 14/78-80).

168. DCAA's audit reports verified SUFI's "methodology used to calculate lost revenues" and adopted the recommendations of Mabie-1 to substitute \$0.15 per minute long distance revenue rate taken from Mod. 5 (R4, tab 106 at 12, tab 108 at 11).

169. Neither SUFI's data query for lost revenues due to other DSN operator numbers, nor explanatory evidence, verifies that such query excluded local calls (ex. B205, tab 6A at 326-40). Long distance DSN calls to CONUS had a "312" prefix and to Europe had a "314" prefix (tr. 17/147, 18/190). From SUFI's call data records one cannot identify origin and destination numbers patched through other DSN operators (ex. B88).

170. Ms. Ansola and Messrs. Broyles and Smith confirmed the accuracy of their extra work descriptions and hours claimed (ex. B205, tab 6B at 341; tr. 4/158, 6/103-04, 13/28-29). Of the 52.5 hours and costs in Count V extra work SUFI added at trial, Ms. Ansola failed to include 3.5 hours monthly from December 1998 through May 1999 on the 480-4663 (HOME) access number, 16 hours in December 2003 on the AMC Terminal problem, 3 hours on or about 25 April 2003 dealing with front-desk attendants giving out numbers and 12.5 hours in May 2002 on Delta Squad patching (tr. 4/158-61, 169-70). We address those 12.5 hours under Count VII, *infra*.

#### DECISION ON COUNT V

SUFI argues that lodging guests circumvented its long distance network, with the active cooperation of Air Force personnel and their resistance to SUFI's requests for assistance, by getting patched by DSN operators directly or indirectly to long distance phone numbers. SUFI accounted for official DSN calls by claiming only for calls to a DSN number in over 70 instances and for over 10 minutes, since official calls average less than half that length and the uneven patterns of DSN call usage showed caller ingenuity to obtain call patching. (App. br. at 242-43)

Respondent contends that SUFI adduced no credible evidence that lodging front desk clerks gave guests numbers to call the base operator or encouraged guests to use other operator numbers to circumvent the SUFI phone system; AFNAFPO had no control over the AMC Terminal message allowing callers to transfer to the base operator; SUFI failed to prove that guest calls via DSN operators were not official, or abuses, or violated any Air Force regulations; its assumption that calls over 10 minutes in length must have been for personal business was unfounded and conjecture, since morale calls were authorized for 15 minutes and (incredibly) "fraud and toll skipping does not equate to alleged DSN abuse" and SUFI based its damage calculations on the false assumptions that calls exceeding 10 minutes were improper and the duration of DSN calls would equal the duration of SUFI commercial network calls (gov't br. at 145-48).

The first major issue is whether SUFI sustained its burden of proof that other DSN operator call patching breached the contract. We have found that from May 1997 through September 1998 SUFI learned that guests learned other direct operator numbers from the lodging front desk staff by which the guests could circumvent the SUFI long distance trunk line, so SUFI notified the CO and blocked those other operator numbers (finding 80), in March/June 1999 when Mod. 5 was executed, SUFI's DSN service in guest rooms did not include access to operator numbers "0" and "113" which numbers SUFI continued to block thereafter (finding 102), in May 2001 a guest showed a SUFI technician how she could make a personal call to the U.S.A. from the AMC Terminal number (finding 158) and in 2003 SUFI reported to respondent further instances of lodging front desk personnel providing phone numbers by which the guests could reach the DSN operator (findings 159-60).

The record contains unopposed evidence that front desk personnel gave guests base operator DSN telephone numbers. Whether such personnel intended for guests to circumvent the SUFI long distance network by use of the operator numbers is immaterial. There is persuasive evidence that the guests themselves had sufficient initiative and ingenuity to obtain patching of overseas calls through the DSN operator (findings 80, 102, 158-60), that respondent's lodging manager and COTR knew that such patching, if used for non-official calls, would circumvent SUFI's commercial network, and that respondent eliminated message option five from AMC number 479-4440 (findings 159-61). We reject respondent's argument that AFNAFPO was not responsible for the AMC Terminal message options for the reasons analyzed in our decision on Count XXI, *supra*.

Respondent asserts that SUFI presented no direct proof of any non-official calls patched by DSN operators. However, SUFI presented circumstantial evidence that sequential, personal morale calls exceeded 15 minutes (finding 152), not all other DSN operator calls were official: "widely varying call rates to base operators (findings 154, 163), a lodging guest's demonstration of patching via AMC Terminal number 479-4440 (finding 158), the decreased incidence of calls to the AMC Terminal number after respondent eliminated its message option five for an operator call (findings 161-63) and local DSN calls, presumably for official business (finding 86), from Ramstein Building No. 552 (not a guest lodging) averaged 1.97 minutes (finding 164). SUFI adduced sufficient proof that lodging guests could make unofficial calls via DSN operator patching.

The remaining question is whether guests in fact made unofficial long distance calls by DSN operator patching. There was testimonial evidence that DSN call records for guest lodgings showed the originating operator number and the destination commercial number called (finding 155). But SUFI's call data records do not identify destination numbers by "312" or "314" prefixes patched through other DSN operators. Neither SUFI's data query for lost revenues due to other DSN operator numbers, nor

other evidence, shows that such query excluded local calls. (Finding 169) SUFI's call usage for four of the five "direct operator access" DSN numbers, the 34 "indirect operator access" DSN numbers and AMC DSN number 479-4440, contains no direct or circumstantial evidence that any such calls were not patched to local phone numbers. To the extent any such calls, even if non-official, were to local phone numbers, they did not circumvent SUFI's commercial long distance phone network or result in any lost revenues thereby. Except for morale calls, this evidentiary lacuna is fatal to SUFI's proof of liability for lost revenues.

We found that morale calls to the local operator number 480-4663 exceeded USAFE's 15-minutes or 1 call per 14 day limits for such calls by a cumulative total of 3,046.5 minutes in January-March 1999 (findings 149, 151-52). We conclude that such facts adequately establish abuse by probable long distance calls during such period.

We determine the damages for such morale calls by use of SUFI's lost revenues formula (finding 166(a)) and Ms. Ansola's extra work on 480-4663 from December 1998 through May 1999 at 3.5 hours per month (finding 170):

<u>Usage</u>	<u>Rev. Rate</u>	<u>Gross Lost Profit</u>	<u>Cost Rate</u>	<u>Lost Revenues</u>
3,046.5	0.8966	\$2,731.49	0.1631	\$2,448.91
Ansola's extra work, 21 hours @ 26.44/hr.				<u>555.24</u>
Total:				\$3,004.15

We hold that SUFI has established that alleged other operator patching caused a damages in the amount of \$3,004.15. We determine that SUFI also is entitled to interest on such \$3,004.15 at the FRB's monthly Prime Rate from 14 February 1999 until payment of the \$3,004.15 pursuant hereto. We disallow SUFI's alleged Extra Work incurred in 2001--2003 and do not decide here Messrs. Smith and Broyles and Ms. Ansola's 16 November 2004 through 24 May 2005 data research and claim preparation costs (\$6,361.50), but instead *infra* in this decision. We deny the balance of the appeal with respect to Count V.

FURTHER FINDINGS OF FACT ON COUNT XIII – TEMPORARY SHUTDOWNS

171. The parties knew that for the hotel industry generally, and for the USAFE lodging facilities in Europe in particular, it was normal for the owner to schedule periodic renovation, refurbishing, maintenance and cleaning of rooms (tr. 2/211, 3/244, 20/227-28, 21/106, 23/313; *SUFII*, tr. 3/244). The contract, as originally awarded, was silent with respect to which party bore the financial consequences of down time for such activities. Contract Modification No. 7, on 7 February 2000, added § C3.11.2 which provided that SUFI was entitled to reimbursement for its costs to remove and reinstall its telephone equipment before and after major and minor renovations (finding 150).

172. Beginning on 3 February 1998 and continuing from time to time thereafter, respondent shut down entirely the following lodgings in which SUFI had installed LFTS, during which shutdowns SUFI generated no telephone revenues:

<u>Dates of Shutdown</u>	<u>Building No.</u>
3-7-00 to 3-16-04	Ramstein 538
4-17-00 to 2-28-02	Ramstein 541
3-31-00 to 12-11-01	Ramstein 542
12-18-02 to 12-16-03	Landstuhl 3751
1-24-04 to 5-31-05	Landstuhl 3752
1-1-00 to 11-30-00	Landstuhl 3753
6-21-98 to 11-30-00	Landstuhl 3756
2-3-98 to 11-9-99	Vogelweh 1004
12-16-99 to 5-1-00	Vogelweh 1034
12-19-03 to 5-31-05	Kapaun 2778
4-17-01 to 3-18-03	Kapaun 2794

SUFI derived the foregoing shutdown periods from its building call records. (Ex. B205, tab 14A at 400; tr. 4/211-12, 16/68-73, 20/227-28, 23/312-13)

173. Pursuant to contract § C3.11.2, added on 7 February 2000 by Modification No. 007 (finding 150), respondent paid SUFI for its work to remove its telephone equipment from those of the foregoing buildings whose renovations commenced after that date; but in all but two instances respondent refused to pay for SUFI's extra work to reinstall its telephone equipment after the building renovations were completed, including Ramstein 541-42 and Kapaun 2794 (tr. 4/218-20, 6/116-17, 12/37-40, 118-23; R4, tab 90B at 2930, 2948).

174. According to SUFI, respondent shut down parts of lodgings in Ramstein, Sembach and Landstuhl for refurbishment, during which time SUFI generated no

telephone revenue from the guest rooms that were shut down (tr. 4/214-15, 217-18). The record does not identify which lodgings were partially shut down and when.

175. Respondent's contractor Deutsche Telekom AG changed its cabling near Vogelweh Building No. 1034 from copper to fiber optic and installed new equipment to accommodate the new cable in SUFI's equipment room therein, which acts disrupted telephone service in that building from about 15 May to 30 June 2004 (tr. 4-213-14, 216-17, 12/115-17, 13/39-42, 116-17, 136-37, 145-46).

176. On 1 December 2002 when respondent's contractor damaged the main cable link from SUFI's Vogelweh switch to Kapaun Building Nos. 2778, 2790 and 2794, SUFI lost telephone service and revenues in those Kapaun lodgings until SUFI restored service on 2 December 2002 (finding 176; tr. 13/35-38, 135; R4, tab 90B at 2905).

177. On 4 May 2005 respondent's water pipe in the basement of Landstuhl Building No. 3756 leaked onto SUFI's equipment and required SUFI to replace its modem and to reestablish telephone service on 5 May 2005 (tr. 6/118, 12/39, 13/38-39; R4, tab 90B at 2905).

178. SUFI's claim, as updated on 13 February 2007 and amended at the hearing, to add 16 hours of extra work in mid-May 2004 for Ms. Ansola and 16.5 hours of extra work in June-July 2004 for Mr. Congalton, included the following damages for Count XIII (ex. B205, tab 14 at 399-409; tr. 4/220-21, 12/35-36):

A. Lost Revenues		
• Complete shutdowns		\$536,274.59
• Partial shutdowns, estimated		50,000.00
• Interest thereon to 5/05		<u>151,461.94</u>
Subtotal:		\$737,736.52
B. Extra Work		
		\$ 32,668.00
(including Ansola and Congalton added hours and 48.5 hours on claim preparation)		
• Interest thereon to 5/05		<u>3,224.75</u>
Subtotal:		35,892.75
C. Out-of-pocket Costs		
• RJ45 patch panel wiring frames	\$1,567.80	
• Modem for Landstuhl	<u>699.82</u>	
Subtotal:	2,267.62	
• 25% profit thereon	566.91	
• Interest thereon to 5/05	<u>215.88</u>	
Subtotal:	3,050.41	3,050.41

Total: A (737,736.52) + B (35,892.75) + C 3,050.41) \$776,679.68

179. SUFI calculated net lost revenues per lodging by deriving its annual gross lost revenues, multiplying the downtime durations by its revenues for the *prior* year in service (generally) and deducting carrier costs. However, SUFI used revenues for three months and one month, respectively, of the *shutdown period* for Ramstein 538 and 541 and used revenues for the *following* year in service for Landstuhl 3756, Vogelweh 1004 and Vogelweh 1034 (R4, tab 90A at 2883, 2894-98) SUFI adduced invoices and payments for RJ45 frames and modem (R4, tab 90B at 2950; ex. B141 at 37)

### DECISION ON COUNT XIII

SUFI argues that, since the contract included no Stop Work Order clause, each time respondent shut down all or a part of a lodging facility it breached the contract (app. br. at 310). Respondent contends that it had the implicit contract right to shut down a certain portion of the lodging facility rooms, its temporary shutdowns did not breach the contract and Modification No. 7 constituted an accord and satisfaction of the extra work SUFI performed due to facility renovations (gov't br. at 165-66).

Respondent's brief does not address its liability for complete shutdowns of lodging facilities, tacitly conceding that those were breaches. Its accord and satisfaction defense is invalid because it post-dated those shutdowns that occurred before 7 February 2000, neither party followed the procedures specified in §C.3.1.2. added by Modification No. 7 (finding 147) and Modification No. 7 contained no release or accord and satisfaction provision (finding 145), consistent with our analysis in Count XII, *supra*. We conclude that respondent's shutdowns described in findings 172, 175-77 were breaches of contract, and that the alleged partial shutdowns described in finding 174 fail for lack of proof of which and when any lodgings were partially shut down.

We adjust SUFI's claimed \$536,274.59 net lost revenues by subtracting \$65,559.02 for Ramstein Buildings 538 and 541 because their "prior" year revenues included portions of the shutdown period (finding 179) without other data by which we can establish the correct prior year's revenues. We determine that SUFI is entitled to recover the following on Count XIII:

A. Lost Revenues	\$470,715.57
B. Extra Work	
• Ansola, 41.5 hrs. @ \$26.44/hr. =	\$ 1,097.26
• Broyles, 39 hrs. @ \$21.15/hr. =	824.85
• Congalton, 193.5 hrs, @ \$41.14/hr.	7,960.59
• Smith, 62.25 hrs. @ \$27.29/hr. =	<u>1,698.80</u>

Subtotal:	\$ 11,581.50
C. Out-of-Pocket Costs for RJ45 patch panel wiring frames J45 and modem	\$ 1,567.80
Total: A (\$470,715.57) + B (11,581.50) + C (1,567.80) =	\$483,864.87

We disallow profit on breach damages, *see H.H.O. Co. v. United States*, 12 Cl. Ct. 147, 154, n.1 (1987), and hold that SUFI is entitled to recover \$483,864.87, with interest thereon at the FRB’s monthly Prime Rate for the period 1 September 2001 (mid-point of the February 1998 to May 2005 lodging shutdown period) until payment of the \$483,864.87 amount pursuant to this decision. We do not decide here the 48.5 claim preparation hours of Ansola, Broyles, Smith and Congalton from 20 April 2004 through 8 March 2005, but instead *infra* in this decision.

FURTHER FINDINGS ON COUNT IX - SEMBACH/KAPAUN LINE CHARGE

180. The guest lodgings specified in DO No. 4 for Landstuhl and Vogelweh ABs and Kapaun Air Station included the Non-Commissioned Officer (NCO) Academy Building Nos. 2778, 2790 and 2794 (“dormitories”) at Kapaun AS (finding 5; R4, tab 18 at 11, 34-36). Kapaun AS is co-located with Vogelweh AB (tr. 3/237)

181. SUFI’s 31 May 1996 quote to AFNAFPO on DO No. 4 to install LFTS for Landstuhl and Vogelweh included the three Kapaun dormitories (R4, tab 86A at 2777; tr. 1/220-21, 8/231).

182. Contract § G.2 provided that “[t]he Lodging Manager at each base location will serve as the QAE” (Quality Assurance Evaluator) (*SUFII*, ex. A1 at G-1; tr. 8/230-31). Mr. Donal Hall, KMC “Community Lodging Officer” from 1996 to January 1997, was not a CO, COTR or QAE (tr. 2/96, 103; R4, tab 86A at 2751).

183. Mr. Stephens testified that in late 1996 Mr. Hall told Stephens that the Kapaun NCO Academy would close and so SUFI should withdraw Building Nos. 2778, 2790 and 2794 from the Vogelweh DO (tr. 1/222-23, 6/45). Mr. Hall denied that he directed Mr. Stephens to delete those Kapaun buildings (tr. 2/103). According to Mr. Stephens, at an unidentified time he notified COTR Sellers and AFNAFPO of Mr. Hall’s alleged statements, they did not countermand him and respondent issued no modification to remove those buildings from DO No. 4 (tr. 1/224-25). AFNAFPO’s 18 March 1997 e-mail to Mr. Stephens noted, “The Vogelweh input [to SUFI’s LFTS Installation Plan] did not include information relating to Kaprun [sic] (NCO Academy)” (R4, tab 86A at 2782-83).

184. SUFI's subcontractor McNicholas performed trenching and cabling to install telephone service concurrently at Ramstein, Landstuhl and Vogelweh ABs but not the Kapaun dormitories, of which facts COTR Sellers was aware, after which McNicholas returned to England in 1996 (tr. 1/225-27, 3/240).

185. In early 1998 COTR Sellers and Ramstein Lodging Manager Branham spoke to Mr. Stephens about servicing the Kapaun buildings, and requested SUFI to submit proposals to service Kapaun AS and Sembach AB lodgings. Mr. Stephens' initial reaction was that SUFI did not want to service Kapaun because its three buildings were not true lodging facilities, but rather a residential military school whose students were not transient but were there for six weeks of education, and because SUFI's installation costs would increase due to the need to remobilize its installation crew. (Tr. 1/227-29)

186. In early March 1998 Mr. Stephens met with COTR Sellers, Mr. John Fortuna of USAFE Services, Mr. Kosmatka of USAFE, and an NCO Academy representative. Government personnel "wanted to restart Kapaun" service, and said that unless SUFI did so, they would not "deliver" Sembach AB or any other military installation to SUFI. According to Mr. Stephens: (i) he reached a compromise with respondent for SUFI to install LFTS services for an additional \$1.00 per day per room line fee for the Kapaun and Sembach facilities that were for "contingency operations," rather than short-term lodging guests, (ii) the government asked him to prepare pricing proposals, (iii) on the next day AFNAFPO's Ms. Guilmenot requested from SUFI proposals for Kapaun and Sembach LFTS services, (iv) Mr. Stephens discussed the \$1.00 line fee with her and (v) she said if USAFE had agreed to it she would approve it. (Tr. 1/230-31, 6/46-48; *SUFII*, ex. A36, ¶ 12) Ms. Guilmenot did not testify about this conversation (ex. B206).

187. SUFI's 11 March 1998 letters to Ms. Guilmenot proposed: (a) \$1.00 per day per room line fee plus \$.85 per minute for Kapaun NCO Academy and for "Sembach Contingency Operations" and (b) \$.85 per minute only for "Sembach Lodging Operations" (R4, tab 86A at 2784-85, 2791, 2793; tr. 1/232-34).

188. USAFE's 12 March 1998 memorandum recounted a meeting that date with Mr. Stephens, COTR Sellers, Mr. White and other USAFE representatives to resolve issues regarding the expansion of the current KMC LFTS to the USAFE NCO Academy at Kapaun and other lodgings. Consensus was reached that the Air Force would provide and allow SUFI to use cable pairs for the expansion of system connectivity between Kapaun AS and the Ramstein Inns-Vogelweh Lodging Office. (R4, tab 25; tr. 1/234-35)

189. According to Mr. Stephens, COTR Sellers urged SUFI to proceed promptly with the Kapaun LFTS before starting the Sembach LFTS, since DO No. 4 had never been modified to rescind the Kapaun buildings. On 18 March 1998 Mr. Stephens reported to SUFI's Joe Appio (his supervisor) that the contracting office would issue no additional DO for Kapaun NCO Academy since it was already under the Vogelweh DO

requirement, and would issue a DO for Sembach once SUFI showed a good-faith start at Kapaun (R4, tab 86A at 2790; tr. 1/235-38).

190. In March-April 1998 SUFI started the Kapaun LFTS installation. When AFNAFPO did not issue a Sembach DO promptly, Mr. Stephens inquired and was told not to worry, they were working on it. (Tr. 1/239)

191. Mr. White's 8 April 1998 e-mail to COTR Sellers asked whether USAFE was to pay the added \$1.00 per room per day line charge at Kapaun. COTR Sellers' 9 April 1998 e-mail to Mr. White said that SUFI's "recommended line charge is out. Kapaun is under the Ramstein/Vogelweh/Landstuhl umbrella for 85 cents per minute call. I've already coordinated this with the Agency." Neither message was disclosed to SUFI at the time. (R4, tab 184 at 2-3; tr. 1/239)

192. COTR Sellers' 27 May 1998 e-mail to CO J. Jones stated: "Accept contractor's proposal for installing a LFTS at Sembach Annex lodging facilities and issue a delivery order" (tr. 3/247; *SUFII*, ex. A27).

193. In mid-August 1998, when the Kapaun LFTS was nearly complete, but no Sembach DO had been issued, Ms. Guilmenot and COTR Sellers told Mr. Stephens that they would not approve the \$1.00 line charge because no contract provision allowed it, and asked him to submit another proposal for Sembach AB without the line charge. SUFI sent such a proposal to AFNAFPO on 17 August 1998, according to Mr. Stephens under protest that it was a bait and switch. That proposal itself did not state "under protest," "bait and switch" or the equivalent. (R4, tab 86A at 2797-2801; tr. 1/240-42)

194. On 25 August 1998 CO J. Jones issued DO No. 7 for Sembach LFTS service in Building Nos. 94, 110, 210, 212, 215, 216 and 219, incorporating SUFI's 11 March 1998 proposal for Building Nos. 110, 210, 212, 215, 216 and 219, but not Building No. 94, in which SUFI apparently installed no LFTS service, with a \$1.00 per day per room line fee for "Sembach Contingency Operations" (R4, tab 20 at 3-5; tr. 1/242-43; ex. B110 at 46-58).

195. In September 1998 COTR Sellers told Mr. Stephens that, notwithstanding DO No. 7, SUFI could not collect the \$1.00 line charge on the DOs for the Sembach and Kapaun LFTS (tr. 1/243-44). Mr. Stephens' 12 September 1998 e-mail to Ms. Guilmenot and COTR Sellers mentioned his frustration at recent "outright deceit on the part of the government" (ex. B21 at 2). COTR Sellers' 21 September 1998 e-mail to Ms. Guilmenot recounted a 16 September 1998 conversation he had with Mr. Stephens, in which he asked what Stephens considered "deceit," to which Stephens replied "the agreement he tried to work with me for a room [fee] at Kapaun and Sembach were part of the reason" and stated to Ms. Guilmenot (but apparently not to Mr. Stephens): "My observation is

that was only part of the COTR negotiation and never a firm commitment. I don't have that authority to commit the Government" (ex. B20).

196. Ms. Ansola, who succeeded Mr. Stephens as SUFI's General Manager in the fall of 1998, understood that SUFI could not charge the \$1 line fee and so she did not invoice that line fee for Kapaun or Sembach (tr. 4/189-90, 16/93; *SUFII*, tr. 3/51).

197. LFTS services commenced at Kapaun at the beginning of October 1998 and at Sembach on 12 May 1999, including Building Nos. 212, 215, 216 and 219 (tr. 4/178, 14/86; ex. B205, tab 10A at 375, n.1). Delta Squadron personnel lodged at Sembach Building Nos. 210, 212, 215, 216 and 219 for 60-90 day periods of contingency operations (tr. 2/199-201, 279-80, 6/64, 16/87). Testimony of USAFE's David White that SUFI did not install telephones in "contingency quarters" or "contingency lodgings" addressed the Delta Squad "Orderly Room" in Sembach Building No. 210 (tr. 16/89-93).

198. SUFI based lost revenues damages for Kapaun and Sembach on the number of rooms in Building Nos. 2778, 2790, 2794 (Kapaun) and 210, 212, 215 and 219 (Sembach) from the date of LFTS service initiation at each such building to 31 May 2005 when SUFI ceased LFTS performance, at \$1.00 per day per room (ex. B205, tab 10A at 374-75; tr. 14/89-90). DCAA took no exception to and verified SUFI's methodology used to calculate lost revenues (R4, tab 106 at 15-16).

199. SUFI's Count IX damages were as follows (ex. B205, tab 10 at 373-78):

A. Lost Revenues (Sembach)	\$ 758,463.00
• Interest thereon through June 2005	122,166.93
Lost Revenues (Kapaun)	401,355.00
• Interest thereon through June 2005	73,302.25
B. Out-of-pocket Costs	
7/1/05 consulting fee, C. Stephens	<u>62.50</u>
Total:	<u>\$1,355,349.68</u>

## DECISION ON COUNT IX

SUFI argues that respondent's refusal to pay the \$1.00 line charge for the Sembach contingency operations was an "open and obvious breach"; SUFI did not invoice for that charge because it was told the Air Force would not pay it, and complained to the CO and COTR about such breach; and that respondent is equitably estopped to deny that it orally accepted the proposed \$1.00 line charge for both the Kapaun and Sembach LFTS because it induced SUFI to install those systems by such oral agreement and promised to send SUFI the paperwork to incorporate the charge, and it remained silent for four months while SUFI substantially completed the Kapaun work in detrimental reliance on the assumption that it would be paid, citing several estoppel decisions (app. br. at 289-93).

Respondent argues that it never agreed to a line charge for the Kapaun buildings, Mr. Stephens' testimony that Mr. Hall directed SUFI to remove the Kapaun buildings from DO No. 4 is unreliable, Mr. Hall was not a CO authorized to change the DO and SUFI never installed telephones in any Sembach contingency lodgings or invoiced for the \$1.00 per room per day line charge for such lodgings (gov't br. at 156-57).

We need not resolve the conflicting testimony regarding whether Mr. Hall directed SUFI to remove the Kapaun dormitories from DO No. 4, because such a direction would plainly have been a change to that DO which was beyond his authority to make (findings 3, 182). Respondent's contention that SUFI never installed telephones in Sembach "contingency quarters" or "contingency lodgings" is misleading and immaterial, since Mr. White's testimony addressed the Delta Squadron Orderly Room in Building No. 210, which is not in issue in this Count IX. SUFI indisputably installed telephones in Sembach Building Nos. 212, 215, 216 and 219. (Finding 197) DO No. 7 included SUFI's 11 March 1998 proposal which specified \$1.00 per day per room line fee for "Sembach Contingency Operations." Delta Squadron personnel used the guest rooms in Sembach Building Nos. 212, 215, 216 and 219. (Findings 187, 184, 197)

The remaining issue is whether respondent was equitably estopped to deny that COTR Sellers accepted the \$1.00 line charge for Kapaun Building Nos. 2778, 2790 and 2794.<sup>3</sup> The elements to establish an equitable estoppel are:

- (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so

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<sup>3</sup> Whether respondent was equitably estopped to deny COTR Sellers accepted the line charge for Sembach Building Nos. 212, 215, 216 and 219 is immaterial, since the CO indisputably included the \$1 line charge in DO No. 7 (finding 194).

intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

*Emeco Industries, Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973), adding:

Of course, it is essential to a holding of estoppel against the United States that the course of conduct or representations be made by officers or agents of the United States who are acting within the scope of their authority.

*Id.* The scope of authority requirement vitiates SUFI's argument, since COTR Sellers lacked authority to agree to the \$1 line charge as a change to DO No. 4 for Kapaun and, in effect, to disallow the \$1 line charge that the CO expressly included in DO No. 7 for Sembach (findings 3, 195; *SUFII*, 04-2 BCA ¶ 32,714, finding 20). Moreover, SUFI was not ignorant of the true facts about COTR Sellers's lack of contracting authority (finding 3). Nor did SUFI detrimentally rely on COTR Sellers' conduct when it installed LFTS at Kapaun, since it had reason to know before it began the Kapaun installation, that no one with authority had "withdrawn" the Kapaun requirement and AFNAFPO considered DO No. 4's Kapaun requirement to be binding (findings 183, 189). Thus, SUFI failed to establish elements (3) and (4) of equitable estoppel with respect to the Kapaun buildings

We hold that SUFI is entitled to recover \$758,463.00, with interest thereon at the FRB's monthly Prime Rate from May 1999 until payment of the \$758,463.00 pursuant hereto. Accordingly, we grant the appeal with respect to the \$758,463.00 Sembach line charge and deny the balance of the appeal with respect to the Kapaun line charge, except we decide Mr. Stephens' \$62.50 consulting fee *infra* in this decision.

#### FURTHER FINDINGS ON COUNT VII – DELTA SQUADRON

200. DO No. 7 designated AFNAFPO as the NAFI receiving the services ordered, required SUFI to provide local DSN service (but not morale calls, *see* finding 154) at Sembach lodgings, including telephone requirements for 118 rooms in Building No. 210, which did not include the ground floor "Day Room" (R4, tab 20 at 1, 6, 10, 14; tr. 2/31).

201. The "Day Room" was also called the "Orderly Room" or lounge. Delta Squadron's administrative, maintenance and transportation personnel worked in the administrative area of the Day Room, immediately outside of which was a desk with a DSN phone for local and long distance official use, monitored by an administrative person. (R4, tab 20 at 14; finding 188; tr. 4/170, 10/135, 143-45, 151-52; ex. B207) Adjoining the Day Room's administrative area were the lounge and restroom hallway in which there were five or six DSN phones and to which Delta Squadron personnel had open access (tr. 4/173-75, 10/148-49).

202. After the May 1999 “cutover” to SUFI’s LFTS at Sembach, Ms. Ansola asked COTR Yaeger, Mr. White and Delta Squadron commanders to remove the government DSN phones from the Day Room, because SUFI had provided a DSN phone in the lobby of Sembach Building No. 216. The government eventually removed those DSN phones. On 13 April 2000, without modification to DO No. 7, but with the knowledge and tacit approval of USAFE, SUFI installed, adjacent to the Day Room’s administrative area, two SUFI DSN phones connected to SUFI’s HICOM switch in Building No. 216, numbers x.6998 and x.6999, with speed dial buttons to expedite contact to Delta Squadron personnel in their guest rooms and for morale calls (480-HOME), whose call data SUFI was able to monitor. (R4, tab 20 at 6; tr. 4/171-79, 6/50-51, 104-05, 193-96, 8/120-22, 10/139-40, 12/32-33, 108-15, 16/87-88, 139-40)

203. According to Ms. Ansola, the call data for phones x.6998 and x.6999 showed many calls exceeding the 15-minute, once a week, morale call limit. She complained of such calls to COTR Adams and several USAFE officials and on 12 June 2003 threatened to remove the SUFI phones. The Delta Squadron commander told her that if SUFI did so he would order his troops not to use SUFI’s room phones. COTR Adams viewed the situation as “touchy” because of Delta Squadron’s flight crew needs. Mr. Myers complained to CO Henson in January 2001 and to CO Browning in April 2002, suggesting the exclusive use of the morale call phone at the front desk lobby; COTR Adams concurred with the suggestion. No CO ever acted on such suggestion. According to Ms. Ansola, SUFI DSN phones x.6998 and x.6999 remained in the Day Room until SUFI’s performance ended, but they do not appear on SUFI’s floor plan for Building No. 210 as of 31 May 2005. (Tr. 4/174-75, 179-85, 6/50-51, 66-67, 105-06, 7/70, 117-20, 13/192-95, 14/204; R4, tabs 28, 82B at 2602; exs. B23, B27 at 1-2, B110 at 48; *SUFII*, ex. A136 at 359-60)

204. From late February through June 2003, MAJ Jason Salts used SUFI’s DSN phones in the Orderly Room daily for official calls lasting from 5 to 45 minutes (tr. 10/96-98, 175-78, 184-90).

205. On 18 January 2001 Mr. White told COTR Adams that the Delta Squadron orderly room/administrative space was not a part of, or controlled by, NAFI lodging (R4, tab 28; tr. 16/91-92). At an unidentified time, COTR Adams searched and found from base real property records that the Orderly Room, or the portion of it to which there was no controlled access, had been recategorized to an administrative area and taken out of the lodging inventory (tr. 7/119-20, 122-23). Those base real property records are not in evidence. COTR Adams did not know whether the Day Room had an area with controlled administrative access (tr. 7/123-24).

206. SUFI queried the CDR for phones x.6998 and x.6999 for morale calls and other direct access operator numbers from 23 February 2003 to 30 June 2003 (the period

of use by MAJ Salts) and from 13 April 2000 through 31 May 2005 (noting that the April-May 2000 records were incomplete) and tabulated the following results:

<u>2/23/03 to 6/30/03</u>				
A	B	C	D (C/B)	E
<u>Origination</u>	<u>Total Mins</u>	<u>Operator Mins</u>	<u>Operator Calls Ratio</u>	<u>Calls &gt; 15 Mins</u>
6998	88,130	87,702	0.995	2,362
6999	64,962	64,575	0.994	1,704
[Totals:	153,092	152,277	0.995	4,066]

<u>4/13/00 to 5/31/05</u>				
A	B	C	D (C/B)	E
<u>Origination</u>	<u>Total Mins</u>	<u>Operator Mins</u>	<u>Operator Calls Ratio</u>	<u>Calls &gt; 15 Mins</u>
6998	882,907	877,568	0.994	20,853
6999	651,963	643,858	0.988	14,538
[Totals:	1,534,870	1,521,426	0.991	35,391]

SUFI noted that “Operator Mins” were the “[t]otal minutes of calls placed to 480-HOME and other direct-access operator numbers.” (Ex. B224; tr. 23/67-71)

207. From the foregoing tabulated data we find that: (a) for the period 2/23/03 to 6/30/03 there was a monthly average of 956.7 calls exceeding 15 minutes (4,066 ÷ 4.25 mos.); (b) for the period 4/13/00 to 5/31/05 there was a monthly average of 575.5 calls exceeding 15 minutes (35,391 ÷ 61.5 mos.); and (c) monthly calls exceeding 15 minutes were not level in those periods.

208. SUFI claimed lost revenues due to DSN phones in the Day Room based on 905,562 call data minutes for phone x.6998 and 668,728 minutes for phone x.6999 from 13 April 2000 to 31 May 2005, including 162,768 minutes in 2000 and 340,826 minutes in 2001 for those phones, extrapolated those data to the two government Day Room DSN phones before 13 April 2000 and applied its weighted average long distance revenue and cost rates (including .8966-.1185 in 1999 and .9014-.0769 in 2000) to the minutes for the applicable DSN phones claimed (ex. B205, tab 8A at 351, 353, 355, 357).

209. DCAA took no exception to SUFI’s claimed lost revenues and verified its methodology used, but could not determine the reasonableness of its assumption that all calls from these four phones were improper and no calls were local or for official business (R4, tab 106 at 13; tr. 8/122-23).

210. SUFI’s Count VII, as adjusted at trial, included the following damages:

A. Lost Revenues

April 2000 through May 2005

• Phone x.6998	\$763,199.03
• Interest thereon through June 2005	98,492.51
• Phone x.6999	563,646.27
• Interest thereon through June 2005	74,219.35

May 1999 through April 2000

• Government “DSN 1” and “DSN 2” phones	230,195.27
• Interest thereon through June 2005	<u>77,315.53</u>
Subtotal:	\$1,807,067.96

B. Extra Work

• Ansola, 11/04-4/05, 5.75 hrs. @ \$90/hr.	\$ 517.50
• Broyles, 04/00-04/05, 138.75 hrs. @ \$68/hr.	9,435.00
• Smith, 01, 03/05, 13.75 hrs. @ \$68/hr.	935.00
• Congalton, 04/00, 04/05, 14.75 hrs. @ \$90/hr.	<u>1,327.50</u>
Subtotal:	\$ 12,215.00
• Interest thereon through June 2005	<u>1,304.09</u>
Subtotal:	\$ 13,519.09
• Plus, Ansola “neglected” 137 hrs. @ \$90/hr. from May 1999 through May 2005 (tr. 4/185-87)	12,330.00
• Interest on “neglected” Ansola hours	<u>2,435.58</u>
Revised subtotal:	\$ 28,284.67

C. Out-Of-Pocket Expenses

• 4/13/00 2 phones	\$160.00
• 4/13/00 2 jacks, wiring, etc.	200.00
• Profit thereon at 25%	90.00
• Interest thereon through June 2005	<u>260.78</u>
Subtotal:	\$ 710.78

Total, A \$1,807,067.96 + B \$28,284.67 + C \$710.78 = \$ 1,836,063.41

(Exs. B126, B127, B205, tab 8 at 350-65)

DECISION ON COUNT VII

SUFI argues that when LFTS began at Sembach lodgings, respondent not only did not remove all government DSN phones from Building No. 210, but added government DSN phones; after repeated complaints, respondent allowed SUFI to replace two

government DSN phones with two SUFI DSN phones with morale call access enabling SUFI to record their usage; and such DSN phones breached the contract as well as SUFI's "arrangement" to permit morale calls only at the Sembach front desk lobby area (app. br. at 259-60).

Respondent argues that the Delta Squadron Day Room was not under AFNAFPO's control, the DSN telephones SUFI placed there were for official, administrative business calls, SUFI failed to mitigate damages by not removing the two SUFI DSN Day Room phones on or after 22 June 2003 and SUFI's assumptions that there were no local or official calls from the two disputed SUFI DSN phones and the volume and length of calls from those phones would have passed through SUFI's commercial network on a linear ratio, are wrong due to evidence of proper official calls on the disputed DSN phones (gov't br. at 151-53).

SUFI rejoins that COTR Adams' testimony about control of the Day Room showed unawareness that within the Day Room was a smaller area with controlled administrative access, contract § E.2 required respondent to remove all government telephones in "lodging facilities" and Building No. 210 was a "lodging facility" and MAJ Salts' testimony is inconsistent with SUFI call data showing 99.5% of calls on phones x.6998 and x.6999 were morale calls and 35,391 such calls exceeded 15-minutes (app. reply br. at 62-65).

The first issue is whether respondent had the duty to remove DSN phones from the Day Room in Sembach Building No. 210. Building No. 210 was a "lodging facility" within the italicized provisions in § E.2 of the contract (findings 88, 197), as SUFI argues, but this does not resolve the issue. SUFI does not claim that § E.2 required respondent to remove any DSN phones from the so-called "administrative area" of the Day Room (app. reply br. at 62), so not all DSN phones in the Day Room had to be removed. Respondent argues that the Day Room was not in lodging inventory and was not under AFNAFPO control, so it did not have to remove any DSN phones. But that contention suffers from the absence of proof of when the Day Room was removed from lodging inventory (finding 205), especially proof that the Day Room was so removed before 25 August 1998, when the CO issued Sembach DO No. 7 (finding 5). Consistent with our interpretation of § E.2 under Count III, issue (1), we hold that § E.2 required respondent to remove government-installed DSN phones in Building No. 210's Day Room outside of the "administrative area" and its failure to remove them on cutover in May 1999 was a breach of contract.

SUFI installed DSN phones x.6998 and x.6999 in the Day Room on 13 April 2000, without modification of DO No. 7, but with the knowledge and tacit approval of USAFE. SUFI waited from 13 April 2000 until 12 June 2003 to threaten to remove those phones. (Findings 202-03) We reject SUFI's argument that the SUFI-installed phones

were a government breach, and hold that respondent had no duty to remove phones x.6998 and x.6999 from the Day Room in Sembach Building No. 210.

The second issue is whether SUFI sustained its burden of proving the claimed damages for the period of breach held above. With respect to lost revenues, SUFI acknowledges that it adduced no call data to show that there were *any* calls exceeding 15 minutes from May 1999 to 13 April 2000 on government phones “DSN 1” and “DSN 2,” and instead based its claim on call data extrapolated from the SUFI DSN phones x.6998 and x.6999 (finding 208). We are mindful, however, that it was respondent which generated the call data for government phones “DSN 1” and “DSN 2” which is absent from the record. Under these circumstances the burden of going forward with the evidence on government DSN phone data is on respondent. *See Aircraft Associates & Manufacturing Corp.*, ASBCA No. 6187, 70-1 BCA ¶ 8182 at 38,058:

Although a plaintiff ordinarily has the burden of proving every allegation of the complaint and a defendant of proving any affirmative defense, fairness and policy may sometimes require a different allocation.... Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.

*See also M. A. Santander Construction, Inc.*, ASBCA No. 15882, 76-1 BCA ¶ 11,798 at 56,334; *Sam Winer Motors, Inc.*, ASBCA No. 20602, 75-2 BCA ¶ 11,610 at 55,448.

Record evidence allows us to make a fair and reasonable approximation of the damages arising from government phones “DSN 1” and “DSN 2.” The call data minutes for phones x.6998 and x.6999 are not level in the time periods measured (finding 207(c)), are inconsistent with the call data minutes in SUFI’s claim (findings 206, 208) and so are not applicable *per se* (*i.e.*, without adjustment) to the time period of phones “DSN 1” and “DSN 2.” SUFI’s long distance revenue and cost rates were proven adequately; the missing factor is the call minutes multiplier.

We derive the approximate call minutes multiplier by adjusting and extrapolating the minutes claimed for the two phones x.6998 and x.6999 to the two phones “DSN 1” and “DSN 2.” SUFI’s claimed usage minutes for x.6998 and x.6999 were 340,826 for 2001 and 162,768 for 2000 (finding 208). Those usages average 28,402 min./mo. for 2001 ( $340,826 \div 12$ ) and 19,149 min./mo. for 2000 ( $162,768 \div 8.5$ ), but are overstated by 4% compared with SUFI’s exhibit 224 (finding 206). Therefore, we adjust these averages to 27,266 min./mo. for 2001 ( $28,402 \times .96$ ) and 18,383 min./mo. for 2000 ( $19,149 \times .96$ ).

By extrapolation of the 2001-2000 min./mo. trend, the 1999 average is 9,500 min./mo. ( $27,266 - 18,383 = 8,883$ ;  $18,383 - 8,883 = 9,500$ ). From 13 May 1999 (finding 193) to 13 April 2000 for phones “DSN 1” and “DSN 2,” 7.5 months of 1999 calls = 71,250 min. ( $7.5 \times 9,500$ ) and 3.5 months of 2000 calls = 64,340 min. ( $3.5 \times 18,383$ ). We multiply these 1999 and 2000 figures by SUFI’s revenue and cost rates for those years (finding 208), producing lost revenues of \$55,440 in 1999 ( $.8966 \cdot 1185 = .7781 \times 71,250$ ) and \$53,048 in 2000 ( $.9014 \cdot 0769 = .8245 \times 64,340$ ), for a total of \$108,488. SUFI is entitled to interest on such \$108,488 at the FRB’s monthly Prime Rate from 28 October 1999 (mid-point of breach period) until payment of the \$108,488 pursuant hereto. We disallow SUFI’s claimed Extra Work and Out-of-Pocket Expenses, because they did not arise from the May 1999-April 2000 breach, but rather from SUFI’s installation of phones x.6998 and x.6999. We do not decide its claim preparation costs incurred from 17 November 2004 through 22 April 2005, which latter element we address below.

We grant the appeal with respect to Count VII to the extent set forth above, and deny the balance thereof.

#### FURTHER FINDINGS ON COUNT XXII - CHANGE OF AIR FORCE SWITCHES

211. In April 2000, respondent replaced its existing Siemens DSN switch for Ramstein and other Air Base lodgings with a Nortel DSN switch (ex. B205, tab 23A at 499; tr. 12/61-62, 70, 86-87).

212. On 10 April 2000 Mr. Congalton backed up SUFI’s HICOM switch in Ramstein, Building No. 305, before respondent began its DSN switch change; on 11 April 2000 he assisted respondent in the change to the Nortel switch and on 14 April 2000 he reprogrammed all SUFI’s DSN and emergency routes to go via the new Nortel switch (ex. B205, tab 23A at 499; tr. 12/61, 69).

213. Mr. Broyles’ e-mails reported to Ms. Ansola: “April 11 [2000] ...Ramstein – Auto Attendant locked up, calls in queue, but phones not ringing. This is the second time in about 3 days” and “April 14 ...North Side [Ramstein] – Auto Attendant is [locking] up again, calls in queue but phones not ringing in Reservations. I reset the computer and it is working again. 3<sup>rd</sup> time this week!!!” (R4, tab 95A at 3132-33).

214. Soon after the Nortel switch was installed, SUFI saw that the reservations phones stopped ringing, learned that when an incoming caller hung up while in the reservation queue, his call would not release, would not connect to a reservation operator once the call reached the head of the queue, blocked reservations, and to restore reservations, the system had to be shut down, which released all queued calls and required re-dialing (tr. 4/277-79, 12/62-64).

215. Respondent told SUFI that the problem arose from SUFI's equipment, and so to fix it. For several months SUFI had Tiger and Siemens investigate their equipment and software to isolate the cause of the problem; they found no flaw in their products. Mr. Congalton, with Mr. Smith's assistance, tested various incoming reservation numbers and finally isolated the cause of the problem: respondent's Nortel switch did not transmit a correct call release signal from incoming commercial calls on number 06371-47-4920 [sic, meant 0637-45-4920] to SUFI's Siemens HICOM switch. (Tr. 12/64-67, 88-93, 13/52-53)

216. To resolve the problem, SUFI purchased and installed a Siemens automatic call distribution (ACD) flex-routing system for lodging reservations that replaced its Tiger call queue system, and upgraded the hardware shell and CPU of its Ramstein Siemens switch to operate with the ACD system. SUFI did not experience the Ramstein call queuing problem at other Air Bases where respondent installed Nortel DSN switches. (Tr. 12/67-70, 90, 94-98)

217. SUFI's claim included the following damages for Count XXII:

A. Extra work from 10 April 2000 through 22 April 2005 of Ms. Ansola and Messrs. Congalton, Broyles, Smith	\$ 84,980.50
• Interest thereon through June 2005	<u>12,843.64</u>
Subtotal:	\$ 97,824.14
B. Out-of-pocket costs	
• Lease payments on new Siemens switch from 12/02 through 6/05	\$ 97,509.88
• 12/28/03 Payment for new ACD system	5,058.62
• Profit at 25% on foregoing costs	25,642.13
• Interest through June 2005	<u>7,885.18</u>
Subtotal:	\$136,095.81

Total of A (\$97,824.14) + B (\$136,095.81) = \$233,919.95

(Ex. B205, tab 23)

218. At the hearing Mr. Myers testified that SUFI's claim for the new switch "was obviously duplicative" and SUFI stipulated that the new Ramstein switch was part of the LFTS that respondent purchased by the PSA (tr. 14/169-71).

## DECISION ON COUNT XXII

SUFI argues that respondent's change of base switches from Siemens to Nortel required SUFI to coordinate the change with SUFI's Siemens switches and caused a call queuing problem that required many hours and much expense to investigate and to isolate the cause (app. br. at 398). Respondent argues that contract § C, ¶ 4.1, required SUFI's LFTS to interface with existing and planned government equipment, so SUFI must bear the cost of interface with the new Nortel switch; respondent purchased the ACD system and new Siemens equipment from SUFI pursuant to the PSA; and this constructive change is barred because SUFI did not present it until "final payment" (gov't br. at 180).

"To receive an equitable adjustment from the Government, a contractor must show three necessary elements—liability, causation, and resultant injury." *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965). By analogy, under the FAR 52.245-2 GOVERNMENT PROPERTY (FIXED PRICE CONTRACTS) (APR 1984) clause, a contractor has the burden to prove that discrepancies in the system provided by the contractor were caused by defects in the government property. *See Tayag Bros. Enterprises, Inc.*, ASBCA No. 42097, 94-3 BCA ¶ 26,962 at 134, 256. Thus, for SUFI to recover for an allegedly malfunctioning government telephone switch, it must prove that the government changed Nortel switch caused the malfunction of SUFI's system.

SUFI observed incoming calls to Ramstein auto-attendant reservation queues lock up about three days before 11 April 2000 (finding 213), *i.e.*, about 8 April 2000, before respondent installed the Nortel DSN switch at Ramstein on 11 April 2000 (finding 212). SUFI did not show why the new Nortel switch did not transmit the correct call release signal to SUFI's equipment only for incoming commercial number "06371-47-4920", but not from other numbers (finding 215), resulting in a *post hoc ergo propter hoc* conclusion about liability. Moreover, SUFI did not establish that incoming commercial number "06371-47-4920" was government controlled or government property. SUFI resolved the queuing problem not by correcting respondent's Nortel DSN switch, but rather by replacing its Tiger queue call system with a Siemens ACD flex-routing system, and did not experience the Ramstein call queuing problem at other Air Bases at which respondent installed Nortel switches (finding 216). We hold that SUFI did not carry its burden of proof that respondent's new Nortel DSN switch caused the malfunction in SUFI's system and hence SUFI's extra work and purchased equipment. Accordingly, we deny the appeal with respect to Count XXII.

## FURTHER FINDINGS ON COUNT XVII - NEW HOTEL ASSISTANCE

219. Contract § H contained the following clause (*SUFI I*, ex. A1 at H-4, H-5):

### 22. TECHNICAL GUIDANCE

a. Technical guidance under this contract will be given to the contractor by the supporting Base Communications Squadron. Technical guidance is defined as that process by which the contractor receives guidance and approvals in his technical efforts as it [sic] relates to an element of work or task solely within the existing requirements of the contract as the result of technical review of the contractor's work by the supporting Base Communications Squadron....

b. Only the Contracting Officer (CO) is authorized to redirect the effort or in any way modify any of the terms of this contract. Such redirection or modification of contract terms shall be accomplished by issuance of change orders or supplemental agreements to this contract signed by the CO. In any event, if the contractor believes technical guidance given involves a change to the scope of the contract, he will immediately notify the CO pursuant to FAR 52.243-7, "Notification of Changes."

220. At the request of COTR Yaeger and KMC Lodging Manager Elias Branham, from July 2000 through the summer of 2002, SUFI's Cecilia Ansola and Robert Congalton attended meetings and provided information, drawings and on-site input to respondent for planning the telephone requirements for a new, 350-room lodging at Ramstein AB (tr. 3/219-21, 4/247-52, 5/137-38; R4, tab 94A at 3071, 3084; *SUFI I*, tr. 2/125-26, 3/132-33, 138-40; exs. A56, A89).

221. At the request of COTR Sam Adams and Spangdahlem AB General Lodging Manager John Brunfeldt, from April 2002 through mid-2003 Mr. Congalton and Ms. Ansola attended meetings and provided research, information, analysis, drawings and on-site input to respondent about the telephone service needs and requirements for a new, 100 to 200-room lodging at Spangdahlem AB. Mr. Brunfeldt knew that not he, but the ACO, would determine whether SUFI would provide telephones for the new lodging. (Tr. 4/248-50, 5/138, 7/26, 30-34, 48, 12/40-42; R4, tab 94A at 3072, 3085, 3090-91; *SUFI I*, tr. 3/137-38, 140-43, 3/221-22; exs. A87, A91, A92, A113).

222. SUFI had reason to know that COTRs Yaeger and Adams and Messrs. Branham and Brunfeldt were not COs and lacked authority to change the contract by adding buildings thereto (findings 3, 215).

223. Eight buildings were added to the contract. CO Henson executed contract Modification No. 6 on 8 June 1999, adding Ramstein Building 310, Volgelweh Buildings 1004 and 1034, and Landstuhl Building 3756 (R4, tab 9), and he executed Modification No. 2 to DO No. 1 on 10 May 2002, adding Kapaun Buildings 2778, 2790 and 2794

(finding 46). The only other building added to the contract was Ramstein Building 908, without written modification of DO No. 1: *SUFII*, 04-2 BCA at 161,864 (finding 43). On 23 January 2002 David White notified Ms. Ansola that the Deutsch Telecom contract on Building 908 would expire on 31 March 2002 and requested SUFI to do the telephone service thereon. She undertook to obtain a digging permit to lay copper cable to Building 908 and told COTR Sam Adams that such cable installation would be at no cost to the government, copying CO Max Browning on each e-mail exchange. (*SUFII*, ex. A79)

224. CO Henson’s 4 November 2002 e-mail to SUFI’s Mr. Myers stated: “As per our conversation last week, USAFE will not be asking SUFI to provide phone service in the new facility at Ramstein” (*SUFII*, ex. A97 at 1). SUFI’s 11 November 2002 meeting notes stated that USAFE proposed to install telephone service at the new Ramstein facility and CO Henson was unaware of any prior requests by USAFE field personnel to obtain SUFI’s help and involvement in planning meetings for new Ramstein and Spangdahlem lodgings (*SUFII*, ex. A99). There is no evidence that CO Henson (or any other CO) knew that SUFI continued to provide such efforts after 11 November 2002.

225. We find that SUFI’s efforts to provide telephone service information regarding new lodgings at Ramstein and Spangdahlem were in the nature of marketing efforts in hopes of obtaining DOs for the new lodging facilities. No such DOs in fact were issued to SUFI (findings 5, 219, 220).

226. SUFI’s claim included the following damages (ex. B205, tab 18 at 459-61):

Extra work for new hotel assistance	
Ansola for Ramstein, 3 hrs., \$90/hr.	\$ 270.00
Congalton " , 2 hrs., \$90/hr.	180.00
Ansola for Spandahlem, 10.5 hrs, \$90/hr.	945.00
Congalton " , 24 hrs., \$90/hr.	<u>2,160.00</u>
Subtotal:	3,555.00
Interest thereon through June 2005	<u>482.58</u>
Total:	\$ 4,037.58

### DECISION ON COUNT XVII

SUFI argues that in *SUFII* the Board held that SUFI had no express contract right to service all lodging facilities on bases for which it had a DO and that holding, 04-2 BCA ¶ 32,714 at 161,868-69—

establishes, as a matter of law, that the work SUFI did at the Air Force’s request to assist the Air Force with its plans for telephone systems at Ramstein and Spangdahlem was not

required under the contract. As a result, SUFI is entitled to [compensation for] the extra work it claims....

(app. br. at 347), and the CO's silence after the 11 November 2002 meeting, after which SUFI continued new hotel efforts, amounted to ratification of SUFI's work done and to be done (app. reply br. at 87). Respondent contends that no CO authorized SUFI to take any action regarding new hotels, Mr. Brunfeldt was not a CO, and respondent has no duty to pay SUFI's costs for seeking "hoped-for additional facilities" (gov't br. at 170-71).

We do not doubt that the work SUFI performed to assist respondent in planning telephone service for the new hotels was "not required by the contract." SUFI's conclusion that such work is compensable does not follow, *ipso facto*. Contract § H clauses 2 and 22 stated that only a CO had the authority to approve changes to the contract or any DO thereunder (findings 2, 219). SUFI's ratification argument fails, because CO Henson did not know of the requests of COTRs Yaeger and Adams and Messrs. Branham and Brunfeldt for SUFI's assistance to plan telephone service requirements for new Ramstein and Spangdahlem lodgings before 11 November 2002, and there is no evidence that CO Henson (or any other AFNAFPO CO) knew that SUFI continued to provide such efforts after 11 November 2002 (finding 224). Thus, the facts are distinguishable from those regarding Ramstein Building 908, when SUFI advised the CO of the field request for added service to that building before providing any telephone infrastructure and thereafter provided LFTS service to Building 908 without written modification of DO No. 1 (finding 223). We deny the appeal with respect to Count XVII.

FURTHER FINDINGS ON COUNT IV –  
A&B BED SWITCH, USE OF PINS AND LTS SWITCH

227. Contract § C provided in pertinent part (*SUFII*, ex. A1 at C-9):

3.3.2 Authorization/Account Code Calling. The LFTS shall have the capability of random generation and activation and deactivation of authorization/account codes [that] shall not be less than five digits and shall be assigned...from the administration terminal by lodging personnel.

228. In early 2003 the impending Iraq conflict raised the expectation of increased lodging facility guests and the need to double up in a single room and to provide PINs to each guest (tr. 4/119-20, 9/80-81, 91; *SUFII*, tr. 3/77-79, 4/30-31; finding 74).

229. Respondent selected the "A&B Bed" method allowing each lodging facility guest to use a separate PIN for telephone calls in his assigned guest room, and SUFI

modified its software and telephone equipment to accommodate the “A&B Bed” method (tr. 4/119-20, 5/85-89; *SUFII*, tr. 3/78-80).

230. Once respondent installed LTS at Spangdahlem and Rhein-Main lodgings in 2002 and at Ramstein, Vogelweh and Landstuhl lodgings in January-March 2003 (finding 72), the LTS issued guest PINs (tr. 6/94, 12/131; R4, tab 81A at 1995).

231. The LTS server “refreshed” itself whenever there was a momentary disconnect between the LTS and SUFI’s Hicom switch at a lodging facility or group of facilities, in which the LTS transmitted duplicate check-in and check-out data for each guest room to the Hicom switch. Refreshes at first took 24 hours, but later took half an hour to two hours. (Tr. 4/121-22, 6/93-100, 176-79, 9/141-43, 145-50, 155-56, 12/49-50, 129-30, 13/77-78, 200-203, 232-33, 17/31-32, 20/193-96; R4, tab 95A at 3526, 3599-3600; *SUFII*, ex. A104).

232. During each LTS refresh the LTS was inaccessible to process guest check-ins and check-outs, to post call records and call charges, and to bill guests; new PINs could not be issued, but were held in a queue until the LTS server came back on line, which required guests to return to the lodging front desk to obtain a PIN, prevented guests from making commercial calls for several days, and sometimes delayed posting of calls and the issuance of phone bills to the wrong guest (tr. 4/121-23, 6/94-99, 132, 9/155-58, 12/52-56, 291-92, 13/77-78, 172-73, 232-33, 20/186-88; ex. B205, tab 19A at 466-67).

233. Guest phone calls could not be processed when respondent took the LTS off-line up to 20 hours for required audits, script runs and tests (tr. 17/30-33, 38; ex. B44; R4, tab 95A at 3467).

234. Lodging front-desk clerks failed to issue some PINs and issued some PINs for guest rooms not configured for PINs, requiring SUFI to trouble-shoot PIN complaints (tr. 6/182-83, 13/26-27, 20/191; R4, tab 81B at 2035, 2140, tab 95A at 3595).

235. In May or June 2003, without prior notice to COTR Adams or to SUFI, Mr. Wible directed a change at Ramstein, and then at other KMC lodgings, from the “A&B Bed” method to the “shared room” method for double occupancy guest rooms. SUFI’s Hicom switch was not programmed to recognize PINs under the “shared room” method. Thus, a PIN issued to “guest 2” cancelled the PIN previously issued to “guest 1” for the same lodging room, making guest 1’s PIN inoperable. When a lodging front-desk attendant reactivated guest 1’s PIN, guest 2’s PIN was voided, and vice-versa. On 28 occasions SUFI investigated complaints about which guest made phone calls and erroneous phone charges to guests in double occupancy rooms under the “shared room” method. (R4, tab 81B at 2033; tr. 4/119-23, 5/86, 90-91, 6/93-94, 98, 7/57-59, 20/161-62; *SUFII*, tr. 3/80-83, 209, 4/31, 517)

236. In early July 2003 SUFI learned about multiple guest complaints and the “shared room” method change. SUFI promptly and repeatedly complained to COTR Adams and Mr. Wible, but he refused to discuss the matter and to return to the “A&B Bed” method. (Tr. 20/190; R4, tab 81B at 2040, 2215, tab 95A at 3418-19; *SUFII*, tr. 3/84-85; exs. A115-A116, A123)

237. Respondent paid SUFI to remove PINs under USAFE blanket purchase agreements dated July 1999 and February 2001, and an AFNAFPO purchase order issued by CO Henson on 23 January 2001 and extended by CO Browning to 22 January 2005 to remove PINs at \$19.75/PIN (supp. R4, tabs 150-51; tr. 15/179-80; exs. B126, B127).

238. In late 2003 lodging managers advised SUFI that double occupancy guest rooms and guest PINs no longer were needed because the Iraq war occupancy surge had leveled and abated. In November 2003 and in January 2004 SUFI requested Mr. Wible to remove PINs from KMC lodging rooms, but he and CO Henson refused, contending that contract § C.3.3.2 required such work. SUFI’s 17 September 2004 e-mail to CO Henson complained of the harmful effects of PIN use on SUFI phone revenues, but even with occasional AFNAFPO urging, Mr. Wible refused to eliminate PINs. SUFI ascertained that by January 2005 nearly all second beds had been removed from guest rooms. When SUFI ceased performance on 31 May 2005 it had not been allowed to remove any PINs. Shortly after respondent purchased the LFTS system from SUFI, Mr. Wible directed that all KMC lodging PINs be removed. (Exs. B49-B50, B55; R4, tab 81A at 2041, tab 81B at 2059, 2062, 2064, 2066, 2068-69, 2072-73, 2080-82, 2088, 2093-95, 2097, 2099; supp. R4, tab 360; tr. 3/169-72, 174-81, 209-12, 4/124-29, 14/67-75, 20/158, 167, 179-80, 21/14-33, 23/300-03)

239. SUFI’s claim, as amended at the hearing, included the following damages for Count IV (ex. B205, tab 5 at 215-221, 226; tr. 4/132):

A. Lost Revenues, 3/03-5/05	\$ 952,308.71
• Interest thereon to 5/05	<u>59,464.49</u>
Subtotal:	1,011,773.19
 B. Extra Work	 10,224.50
(including 15 hours on claim preparation, 11/17/04-5/23/05)	
• Interest thereon to 5/05	600.66
• Ansola added 18.25 hrs. @ \$90/hr.	1,624.50
• Interest thereon to 5/05	<u>105.35</u>
Subtotal:	12,555.01

Total: A (\$1,011,773.19) + B (\$12,555.01) = \$1,024,328.20

240. SUFI's methodology to calculate Count IV lost revenues damages was to determine monthly gross lost revenues as the difference between monthly revenues from bed-nights from March 2003 through May 2005 and monthly average revenues from bed-nights from 2000 through 2002, from which it deducted its monthly long distance costs, yielding net lost revenues of \$952,308.71. SUFI used the tabulation of bed-nights and SUFI billings for KMC lodgings for fiscal years 2000-2004 (through April) prepared by Mr. Wible (ex. B205, tab 5 at 227; *SUFII*, supp. R4, tab 216; tr. 4/463).

241. We find that: (a) before 2003, SUFI's total long-distance call revenues averaged \$82,742/mo. ( $\$5,957,401 \div 72$ ); (b) from March through June 2003 SUFI's long-distance call revenues averaged \$96,134/mo. ( $\$384,536 \div 4$ ); (c) from July 2003 through May 2005 SUFI's total long-distance call revenues for the KMC lodgings managed by Mr. Wible were \$63,385/mo. ( $\$1,457,851 \div 23$ ) (ex. B205, tab 16A at 430-38); (d) SUFI's total revenues from March-June 2003 exceeded its pre-2003 monthly average of \$82,742 by \$53,568 ( $\$96,134 - 82,742 \times 4$ ) and its total revenues from July 2003 through May 2005 were fewer by \$445,211 ( $\$82,742 - 63,385 \times 23$ ) and (e) SUFI's July 2003 through May 2005 average monthly long distance carrier cost rate per gross revenue dollar was \$0.07 (ex. B205, tab 5A at 216), so its net lost revenues for that period of time were \$414,046 ( $\$445,211 \times .07 = 31,165$ ;  $\$445,211 - 31,165 = \$414,046$ ).

#### DECISION ON COUNT IV

SUFI argues that respondent breached the contract because its LTS disabled PINs resulted in SUFI trouble-shooting, it changed the previously agreed-on "A&B bed" method to the "shared bed" method to account for calls by two guests in one room, and it refused to allow SUFI to eliminate PINs when the need to double-up guests abated (app. br. at 220). Respondent contends that SUFI's trouble-shooting of respondent's disabled LTS was minimal, respondent had the right to change the double occupancy accounting method and the contract required SUFI to add and remove PINs (gov't br. at 142-44).

Contract § C.3.3.2 gave respondent no right to change the methodology for assigning guest PINs (finding 227). The 1999-2005 course of dealing by USAFE and AFNAFPO in paying SUFI under blanket purchase agreements and a purchase order to remove PINs at a specified price confirms that the removal of PINs was not in the original scope of the contract. We hold that trouble-shooting PIN failures due to respondent's LTS interface was work not required by the contract (as we held in Count XVIII, *supra*) and its double-occupancy accounting methodology change was a constructive change. Respondent's refusal to allow SUFI to remove PINs when their need abated in late 2003 (finding 238) protracted the period for which SUFI is entitled to recover for such changes.

We determine that SUFI is entitled to recover the following amounts on Count IV:

A. Lost revenues (finding 241(e)):		\$414,046.00
B. Extra work:		
• Ansola, 32.75 hrs. @ \$26.44/hr. =	865.91	
• Broyles, 96.75 hrs. @ \$21.15/hr. =	2,046.26	
• Smith, 5 hrs. @ \$27.29/hr. =	<u>136.45</u>	
Subtotal:	3,048.62	<u>3,048.62</u>
Total:		\$417,094.62

We hold that SUFI is entitled to recover \$417,094.62, with interest thereon at the FRB's monthly Prime Rate for the period 1 July 2003 until payment of the \$417,094.62 amount is made pursuant to this decision. We do not decide here the 15 claim preparation hours incurred by Ansola, Smith and Broyles from 16 November 2004 through 23 May 2005, but instead *infra* in this decision.

#### FURTHER FINDINGS ON COUNT XI - GERMAN TROOPS HOUSING

242. RFP Amendment No. A002 included 94 questions and answers for the information of offerors, including (R4, tab 3; tr. 11/83-84):

31. Question: Will the U.S. Government guarantee a minimum coverage for recurring costs?

Answer: No.... There are always a fair amount of families in transition between Europe and the USA. This means they will use the long distance service to re-establish themselves in the USA or call relatives in the USA... Americans are frequent callers and use the long distance service.

32. Question: Will there be any non-transient persons that require use of the LFTS? If so, how should billing of these non-transients be handled?

Answer: No. There should be no use of the system by non-transients. This system is not for permanent party personnel.

243. Without prior notice to SUFI, respondent's lodging manager David White decided to house a group of German troops in Sembach AB from March 2003 through May 2005, using lodging Building 212 as a barracks rather than for transient lodging (tr. 4/197-98, 202, 6/113, 11/88, 12/312, 13/170, 16/143-44). Those German troops were

assigned to guard Air Force bases in Germany and were “long term guests” who stayed at Sembach Building 212 for six to eight week periods (tr. 20/211, 227).

244. The German troops’ commander requested Sembach Building 212 front desk personnel not to issue PINs to the German troops (tr. 4/197-98, 199-201, 5/119-21, 6/114, 210-12, 13/170-72). According to Ms. Ansola and Mr. White, at Building 212 front desk personnel were instructed to issue PINs to German troops “upon request” (tr. 4/199-200, 16/145) and some PINs were so issued (tr. 12/312-13). Without a PIN, one could not use a SUFI phone in Building 212 (tr. 4/200, 6/113-14, 208-12, 17/52-55).

245. For the year before March 2003 telephone revenues from Sembach Building 212 were \$29,390.12, averaging \$2,449.18 per month. Revenues were \$10,652.25 from March 2003 through May 2005, which was about 36% of the revenues before March 2003 ( $\$10,652 \div \$29,390$ ). (Ex. B205, tab 12A at 387-88) SUFI complained to Messrs. White and Branham and COTR Adams about that Building 212 telephone revenue reduction and requested that the German troops be re-housed in a traditional barracks, but received no response (tr. 4/198, 202).

246. The search data collected by Mr. Timothy Wible, General Manager for KMC, including Sembach, from 2 July 2003 through 8 December 2004 showed only four German troops used SUFI phones in Building 212, for \$372.70 in toll charges (R4, tab 139; tr. 20/214-22). After October 2003 some guests other than German troops stayed at Building 212, and SUFI received some telephone call revenue from them (tr. 4/201, 5/122-23).

247. SUFI’s Count XI included the following damages:

A. <u>Lost Revenues</u>	\$49,909.02
Calculated by subtracting from the \$2,449.18 average monthly revenues for the prior year (finding 226), the actual monthly telephone revenue and SUFI’s costs to generate such revenue for each of the 27 months from March 2003 through May 2005.	
Interest thereon through June 2005	<u>3,020.84</u>
Subtotal:	\$52,929.86
B. <u>Extra Work</u>	\$ 4,871.50
1. Original damages were for work done by Ms. Ansola and Messrs. Broyles and Smith from November 2004 through May 2005 to research and record work, prepare data and calculate Count XI damages.	\$1,667.50
2. Added Ansola effort to try to relocate German	

troops in March-April 2003; 2.5 hrs./month @ \$90/hr.=	450.00	
3. Added Broyles call record analyses, 1.5 hours per month for 27 months (March 2003 through May 2005) @ \$68/hr.=	<u>2,754.00</u>	
Subtotal:	\$4,871.50	
4. Interest thereon through June 2005		235.68
Original interest claimed:	\$ 30.30	
Interest on Ansola added extra work:	45.70	
Interest on Broyles added extra work:	<u>159.68</u>	
	\$235.68	
Subtotal:		<u>5,107.18</u>
Total of A (\$52,929.86) + B (\$5,107.18) =		\$58,037.04

(Ex. B205, tab 12 at 384, 12A at 385-88, tab 12B at 390-91; tr. 4/202-03, 6/115-16)  
DCAA took no exception to SUFI's methodology in calculating the foregoing lost revenues damages and verified its actual and average revenue from SUFI's call record database (R4, tab 108 at 14).

#### DECISION ON COUNT XI

SUFI argues that respondent's actions to lodge non-transient German troops for 27 months at Sembach lodging Building 212 breached its implied duties of good faith and cooperation and violated the express terms of the contract, including Q&As 31-32 incorporated therein, and further, by declining to issue PINs to the German troops made it impossible for them to use SUFI lodging telephones. Such breaches reduced SUFI's telephone revenues for Building 212 for those 27 months and caused extra work. (App. br. at 305-07) Respondent contends that it was not the AFNAFPO but the "United States Air Force, in consultation with the German government" that decided to house German troops at Sembach Building 212; AFNAFPO did not order front desk personnel not to issue PINs and some PINs were issued to German troops (gov't br. at 160).

The record is bereft of evidence that anyone other than David White decided to house the German troops at Sembach Building 212 (finding 243). We reject respondent's contention that AFNAFPO was not responsible for actions of Air Force and USAFE personnel, for reasons we analyzed in our holdings in Counts XXI and V, *supra*. The record reflects an exceedingly minimal use of SUFI telephones in Building 212 by German troops (finding 245), and some use by non-German, transient guests (finding 246). Such use does not defeat SUFI's claim; it shows that such diminished use was partial, not total. We hold that respondent's lodging of non-transient German troops was a change in the description of services to be performed under the contract's Changes clause.

We determine that the following equitable adjustment is recoverable for SUFI's extra work:

Extra Ansola work, Mar./Apr. 2003, 2.5 hrs/mo. @ \$26.44/hr.	132.20
Extra Broyles work, call record analyses, 1.5 hrs./mo. x 27 mos. @ \$21.15/hr.	<u>856.58</u>
Total:	\$988.78

SUFI is entitled to interest on the \$132.20 Ansola work item from 31 March 2003 (the mid-point of her work efforts) and on each monthly increment of the \$856.58 Broyles work from March 2003 through May 2005, at the FRB's monthly Prime Rate until the date of payment thereof. We do not decide here SUFI's claim preparation costs (the \$1,667.50 damages alleged for work of Ms. Ansola and Messrs. Broyles and Smith from November 2004 through May 2005 to research and record their work, prepare data and calculate Count XI damages for Count XI), but instead *infra* in this decision.

#### FURTHER FINDINGS ON COUNT II – FRONT DESK PATCHING

248. Timothy Wible became the General Manager of KMC lodging facilities on 15 April 2003 (*SUFII*, finding 50).

249. The attendant front-desk console phones at the four Ramstein lodgings had worldwide DSN access (tr. 6/155-56; *SUFII*, tr. 1/195-97, 261-66, 2/285-86; *SUFII*, finding 3). In late June or early July 2003 Mr. Wible instructed Ramstein front-desk attendants to patch through lodging guests' calls to the DSN base operator without informing CO Henson or COTR Adams of such instructions (*SUFII*, tr. 4/285, 498-502).

250. On 23 July 2003 SUFI discovered that Ramstein front-desk attendants were patching guest calls through the DSN operator, inspected call data records, observed an increase in call volume from the front-desk phones and protested on that date, and repeatedly thereafter, of "fraud and toll skipping" by such front-desk patching to CO Henson, COTR Adams, Mr. Wible and USAFE representatives (tr. 12/286, 301, 23/296-99; *SUFII*, exs. A122, A124-A129, A132-A133).

251. By 31 July 2003 Mr. Wible limited his early July instruction to require patching of guest calls to local DSN base operator and morale call numbers, but not to patch calls directly to the USA, and expanded the scope of his instructions to Landstuhl, Vogelweh, Kapaun and Sembach lodgings (tr. 12/268, 301, 13/238-40, 20/93-94; *SUFII*, ex. A130; tr. 4/471-74, 504).

252. After receiving instructions from CO Henson and COTR Adams, among others, on 28 August 2003 Mr. Wible instructed his lodging staff not to connect guest calls to the base DSN operator but to instruct guests to use hallway, lobby, workplace and other base DSN phones for such calls (tr. 20/134-35; *SUFII*, exs. A140, 143).

253. Front-desk patching of guest calls to DSN operators diminished during September 2003 (tr. 6/79; *SUFII*, supp. R4, tab 136). On 24 May 2004 Mr. Wible’s assistant manager, David White, notified lodging personnel to resume front-desk patching of “official DSN calls” by “guests in the grade of O-6 [Army/USAF colonels and Navy captains] or above” without notice to the COTR or SUFI (ex. B43; tr. 9/134-35, 12/274-76, 289-90, 305-06, 13/215-20, 14/48, 16/10-15, 21/88). Air Force representatives acknowledged that the “O-6” patching had occurred from mid-2003 through 10 March 2005, when SUFI blocked operator access from the front-desk phones (tr. 6/79, 12/277, 13/238-40; *SUFII*, ex. A130).

254. SUFI’s claim, as updated on 13 February 2007, included the following damages for Count II (ex. B205, tab 3 at 94, 109, 116-19):

A. Lost Revenues, 7/03-5/05	\$299,271.38
• Interest thereon to 5/05	<u>20,199.83</u>
Subtotal:	319,471.21
 B. Extra Work	 10,950.00
(including 74.25 hours of claim preparation, 11/15/04-5/26/05)	
• Interest thereon to 5/05	<u>572.42</u>
Subtotal:	11,522.42
 Total:	 \$330,993.63

255. SUFI’s methodology to calculate lost revenues due to alleged front-desk patching was to: (a) deduct from the monthly “actual usage” minutes from July 2003 through May 2005 (Column B) for seven front-desk phones (extensions 4940, 4950, 4960, 4968, 8910, 4610 and 4617), the “average monthly usage” minutes for calls exceeding 10 minutes in length from July 2002 through June 2003 (Column “C,” note 3) to derive monthly “extra usage” figures (Column D) and (b) apply the difference between SUFI’s weighted average long distance revenue rate (Column E) and its average monthly cost rate (Column G) to the extra usage figures to determine net lost revenues (Column H), which it alleges were \$299,271.38 (ex. B205, tab 3A at 95-107 (odd-numbered pages), 109-15).

256. Column C actually contained monthly usage data from July 2002 through June 2003 only for extensions 4940, 4960, 4968 and 8910 and data from September 2003

through August 2004 for extensions 4610, 4617 and 4950. If the “extra usage” figures for extensions 4610, 4617 and 4950 are excluded, the net lost revenues were \$225,373.68. (Ex. B205, tab 3A at 95-115)

### DECISION ON COUNT II

We reject respondent’s argument that lodging front-desk attendants had the right to transfer guest calls to any DSN or commercial trunk and telephone number (gov’t br. at 125-26). SUFI reserved in the contract the right to protect attendant calls from fraud and abuse and to block attendant calls due to toll considerations. See *SUFII*, findings 3 and 14, 04-2 BCA ¶ 32,714 at 161,858, 161,860 (lodging guests began to use several practices, called “toll skipping”, to avoid paying toll charges for SUFI’s long distance network, including calling the lodging front desk operator who then placed (“patched”) long distance calls to the U.S. and other nations via an AT&T, MCI, Sprint or other calling card). We hold that allowing front-desk patching to DSN operators, when hallway and lobby DSN phones were available for official business DSN calls, constituted *prima facie* evidence of breach, since it obviously permitted avoidance of the SUFI network for unofficial long distance calls from the lodgings.

With respect to damages, SUFI’s proof of “average monthly usage” from July 2002 through June 2003 was present for four of the seven front-desk attendant phones in issue (finding 255). SUFI’s use of September 2003 through August 2004 usage data for the other three phones was methodologically unsound, since the sample for comparison embraced the very period of the front-desk patching in issue. Accordingly, we determine that SUFI is entitled to recover the following amounts on Count II:

A. Lost Revenues	\$225,373.68
B. Extra Work	
• Broyles, 61.25 hrs. @ \$21.15/hr.	1,295.44
• Ansola, 18.25 hrs. @ \$26.44/hr.	<u>482.53</u>
Total recovery:	\$227,151.65

We hold that SUFI is entitled to recover \$227,151.65, with interest thereon at the FRB’s monthly Prime Rate for the period 1 July 2003 until payment of the \$227,151.65 amount is made pursuant to this decision. We do not decide here the 74.25 claim preparation hours incurred by Ansola and Broyles from 15 November 2004 through 26 May 2005, but instead *infra* in this decision.

FURTHER FINDINGS ON COUNT X - KAPAUN PHONE SHUTOFF

257. Contract § C provided in pertinent part (*SUFII*, ex. A1 at C-6, C-14):

3.2.3 Administrative Terminal (AT). The contractor shall provide an AT for exclusive use by the Lodging Facility personnel. The terminal shall provide access to the switching system and allow additions, deletions, and changes to be made to administrative data (station features, telephone numbers, authorization codes, class of service, etc.) and call detail and billing parameters....

....

3.4.2.5 Class of Service Override. The attendant shall be able to override any line or trunk class of service marking for the purpose of accessing and switching the service.

258. Contract § J.1, Equipment Performance Specification for a [LFTS], provided:

3.1.5 Class of Service. The switching system shall provide all necessary classes of service (class marks) to control subscriber access to other subscribers and trunk circuits. All class mark codes shall be assignable on a per line basis for each switched line.

(R4, tab 1, § J.1 at 3 of 21) The AT was described as a handset or a “PC” (personal computer) hooked up to SUFI’s “switch” in the switch room (tr. 14/132, 20/145). We find that § C.3.2.3 provided for an attendant to be able to change administrative data, including the class of service among subscribers and trunks, in SUFI’s switch, but there was no evidence that § C.3.2.3 or § C.3.4.2.5 provided for an attendant to be able to disconnect a guest room telephone.

259. In July-August 2003 when a group of 80 Junior ROTC cadets stayed at 46 rooms at Kapaun Air Station Building 2790, respondent disconnected and removed the telephones from the guest rooms for two weeks without notice to SUFI (tr. 4/191-93, 6/107; *SUFII*, ex. A135 at 1-2). The military departments sponsor military training for Junior ROTC units at secondary educational institutions pursuant to 10 U.S.C. § 2031.

260. Those disconnected SUFI telephones lost their memory affecting speed dial features (messages, wake up and front desk) and voice mail (tr. 4/191-93, 6/107-09,

198-200). Respondent later replaced the disconnected phones, but not in the same rooms in which SUFI had originally installed them (tr. 6/108-09).

261. On 3 August 2003 SUFI learned of the foregoing phone disconnections from a lodging housekeeping clerk when Mr. Broyles investigated guests' complaints of phone memory problems (tr. 6/106-09, 198-200). SUFI reprogrammed the disconnected phones, returned them to their proper guest rooms and on 6 August 2003 reported such actions to CO Henson (tr. 4/193-94, 6/106-07; *SUFII*, ex. A135 at 1-2).

262. On 23 July 2004 respondent notified SUFI that on 24-25 July a group of ROTC cadets would arrive at Kapaun, and asked it to remove or shut off the phones in 72 rooms in Buildings 2790 and 2794 (R4, tab 87A at 2806-08, 2811; tr. 4/194-97, 20/209).

263. SUFI sent respondent a change proposal to shut off the Kapaun phones. By 26 July 2004 respondent had removed those phones because, as Mr. Wible and COTR Adams asserted, SUFI had not provided an administrative terminal for the lodging staff to shut off the telephones or change the class of guest room telephone service required by contract § C, ¶ 3.2.3. (R4, tab 87A at 2810-11)

264. SUFI asked respondent to reinstall the phones on 27-28 July 2004, which it did without loss of their memory (R4, tab 87A at 2809-10). SUFI programmed its switch so the phones could receive incoming but not place outgoing calls. After the ROTC group checked out, SUFI reprogrammed Buildings 2790 and 2794 phones for regular service on 7 August 2004. (R4, tab 87A at 2809, 2812; ex. B205, tab 11B at 382) The 80 guest rooms affected by the shutdown for JROTC guests were less than four percent of the 2,111 guest rooms under contract (2,300 rooms in DOs 1-7, less 189 "missing" rooms) (findings 5, 143-44, 146).

265. SUFI's Count X included the following damages:

A. Lost Revenues

Gross lost revenues, July-August 2003, of \$2,553.60, derived from 1,120 bed-nights (80 guests x 14 nights) at \$2.28 average daily revenue from FY 2000-2002 data (tr. 14/91; <i>SUFII</i> , R4, tab 216), less SUFI's cost of \$265.83.	\$2,287.77
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Gross lost revenues, 24 July to 7 August 2004, 1,120 bed-nights (80 guests x 14 nights) at \$2.28 average daily revenue, \$2,553.60, less SUFI's cost of \$276.81.	\$2,276.79
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Interest thereon through June 2005	<u>\$ 309.01</u>
Subtotal:	\$4,873.57

B. Extra Work

08/03/2003	Broyles, reprogrammed phones, 4.0 hours @ \$68/hr	\$ 272.00
07/23/2004	Broyles, changed class of room service, 1.5 hrs	102.00
08/07/2004	Broyles, " " " " " "	102.00
11/19/2004	Ansola, work on claim, .75 hrs. @ 90/hr.*	67.50
11/19/2004	Broyles, " " " " @ 68/hr.	51.00
11/19/2004	Smith, " " " " "	51.00
03/05/2005	Ansola, " " " .25 hrs. @ 90/hr.	22.50
03/05/2005	Smith, investigating data base for claim, 2 hrs.	136.00
03/10/2005	Broyles, Work on claim, 1.5 hrs.	102.00
04/07/2005	Ansola, " " " , .25 hrs.	22.50
04/07/2005	Smith, investigating data base for claim, 4 hrs.	272.00
04/29/2005	Smith, worked on Kapaun phone removal damage charts, 2.5 hrs.	170.00
	Interest thereon through June 2005	<u>49.49</u>
	Subtotal:	\$1,419.99
	Total of A. \$4,873.57 + B. \$1,419.99	\$6,293.56

\* At the hearing SUFI corrected Ms. Ansola's hourly rate from \$68 to \$90 (tr. 4/194). Messrs. Broyles and Smith and Ms. Ansola confirmed the accuracy of their extra work hours (tr. 4/194, 6/106, 13/31; ex. B205, tab 11 at 379-83). DCAA took no exception to SUFI's methodology for calculating its lost revenues, element A (R4, tab 108 at 13-14).

DECISION ON COUNT X

SUFI argues that both in 2003 and in 2004 respondent shut down SUFI's telephone services at 80 guest rooms at Kapaun Air Station lodgings and mishandled SUFI's equipment; such actions effectively were not Stop Work Orders since the contract has no such clause, and hence were breaches; and SUFI is entitled to recover its lost revenues and its extra work costs to reprogram its telephones (app. br. at 298-99).

Respondent admits that it removed the phones from the Kapaun rooms in 2003 without notifying SUFI; contends that SUFI's extra work arose from its failure to provide attendant consoles and administrative terminals that would have enabled respondent to change the class of service under contract § C, ¶¶ 3.4.2.5 and 3.2.3; respondent is not responsible for the ROTC chaperones' "decision" to prohibit long distance calling from lodging phones by "teenagers" whose charges respondent "would very likely have been unable to collect"; and changing the class of service took only 90 minutes (gov't br. at 157-59).

The removal of the phones in the 80 rooms occupied by the JROTC cadets for two weeks each in the summers of 2003 and 2004 was within the scope of the Changes clause

of the contract and was not a breach of contract. Such removal had a reasonable basis, was of a limited duration, and affected less than four percent of the 2,111 guest rooms under contract (finding 264).

We determine the equitable adjustment for the increased cost incurred by SUFI as a result of this change, using the SUFI employee hourly rates found above (finding 11), as follows:

F. Broyles, 8/3/03, 4.0 hrs. @ \$21.15/hr.	84.60
" 7/23/04, 1.5 hrs. "	31.73
" 8/7/04, 1.5 hrs. "	<u>31.73</u>
Subtotal:	148.06
• Profit at 10%	14.80
Total:	\$162.86

SUFI is entitled to interest on each element of said \$162.86 at the FRB's monthly Prime Rate for the period from the date of each extra work item, until the date of payment thereof. We do not decide here SUFI's \$894.00 in claim preparation costs from November 2004 through April 2005 for Count X, but instead *infra* in this decision.

We grant the appeal with respect to Count X to the extent set forth above, and deny the balance thereof.

#### FURTHER FINDINGS OF FACT ON COUNT XXIII – SECURITY INSPECTION

266. In October 2003 respondent notified SUFI that USAFE was required to certify and accredit all call accounting systems connected to the government's LTS at Air Force bases, including SUFI's Tiger computer system, pursuant to Public Law 100-235, OMB Circular A-130, DoD Instruction 5200.40, USAF Directive 33-2 and USAF Instruction 33-202. SUFI completed a security questionnaire on its Tiger computer equipment and provided it to respondent in October 2003. (Tr. 4/280, 13/56; R4, tab 40 at 1-3)

267. In late August 2004 respondent tested SUFI's Tiger equipment under the "DoD Information Technology Security Classification and Accreditation Process" (tr. 4/280-82). To permit such testing, SUFI employees Ansola and Smith disconnected the Tiger computer, moved it to the testing room and installed network card drivers to respondent's local area network (LAN) (tr. 13/54-57).

268. "The Computer Security Act of 1987," Public Law 100-235, required the National Bureau of Standards to establish a security plan for each federal computer

system. Public Law 100-235 did not mention or require a “DoD Information Technology Security Classification and Accreditation Process.” Air Force Policy Directive 33-2 and Air Force Instruction 33-202 required the “DoD Information Technology Security Classification and Accreditation Process.” (R4, tab 40 at 3)

269. The contract did not refer to OMB Circular A-130, DoD Instruction 5200.40, USAF Directive 33-2 and USAF Instruction 33-202, nor did it refer to the LTS (which replaced respondent’s SIMS, finding 69) (*SUFII*, ex. A1). Thus, the contract did not require SUFI to enable respondent to conduct such security inspection on its Tiger computer.

270. SUFI’s claim included the following damages for Count XXIII (ex. B205, tab 24):

A. Extra Work, Ms. Ansola and Mr. Smith, 10/03 through 5/05, 37 hours	\$1,875.50
• Interest thereon from 10/03	<u>87.70</u>
Total:	\$1,963.20

Of the foregoing 37 hours of extra work, 5.25 hours were incurred on claim preparation in April-May 2005.

#### DECISION ON COUNT XXIII

SUFI had no statutory or contractual duty to move and disassemble its Tiger computer to accommodate respondent’s August 2004 security inspection (findings 267-69). Such extra work constituted a constructive change. As the equitable adjustment for such change, we hold that SUFI is entitled to recover:

Ms. Ansola, 16.75 hrs. @ \$26.44/hr. =	\$442.87
Mr. Smith, 15.0 hrs. @ \$27.29/hr. =	<u>409.35</u>
Subtotal:	852.22
• Plus 10% profit thereon	<u>85.22</u>
Total recovery:	\$937.44

with interest thereon at the FRB’s monthly Prime Rate for the period 24 October 2003 until payment of the \$937.44 amount is made pursuant to this decision. We do not decide here the 5.25 hours of claim preparation work in 2005, but instead *infra* in this decision.

#### FURTHER FINDINGS & DECISION ON COUNT I – CALLING CARDS

271. The Board’s findings that the contract and in particular Modification 5 thereto did not require SUFI to remove restrictions on (“unblock”) toll-free calls

accessing other long-distance carriers, and the CO's 5 November 2003 order for SUFI to remove such restrictions, were set forth in *SUFII*, 04-2 BCA ¶ 32,714, need no further repetition, and establish respondent's liability for Count I.

272. SUFI's claim, as updated 13 February 2007, and as corrected at the hearing included the following damages for Count I (ex. B205, tab 2 at 2, 10, 35, 40):

A. Lost Revenues (Feb.-Aug. 2004)	\$ 912,303.67
• Interest thereon	50,906.54
Lost Revenues (Sep.-Dec. 2004)	35,448.62
• Interest thereon	<u>1,378.71</u>
Subtotal:	1,000,037.54
B. Extra Work, Jan. 04 through May 05	
• Ansola, 106.5 hrs. @ \$90/hr.	
• Congalton, 40.25 hrs. @ \$90/hr.	
• Smith, 283.25 hrs. @ \$68/hr.	
• Broyles, 30.25 hrs. @ \$68/hr.	
Subtotal:	35,523.00
• Interest thereon	<u>1,115.13</u>
Subtotal:	36,638.13
C. Out-of-pocket Costs	
• Myers' trip 24-29 Jan. 04	524.48
• Computer damages	1,950.59
• Profit thereof @ 25%	618.77
• Interest thereon	<u>106.08</u>
Subtotal:	3,199.92

Total of A (\$1,000,037.54) + B (\$36,638.13) + C (\$3,199.92)  
= \$1,039,875.59

273. SUFI's methodology to calculate calling card lost revenues from mid-February 2004 through August 2004 was calling card usage minutes (1,153,476 minutes) x (weighted average long distance rate (0.9559) – weighted average carrier cost rate (0.0797)) - revenue received (\$98,372) = \$912,303.67 (ex. B205, tab 2A at 3-6).

274. SUFI estimated further revenue reductions at 20% (September), 10% (October) and 5% (each of November-December) 2004 when lodging guests were adjusting to the discontinuance of use of calling cards and respondent's delay in approving and distributing revised dialing instructions in the guest rooms, amounting to \$35,448.62 (ex. B205, tab 2A at 8).

275. We find, from SUFI's February 2003 through December 2004 Total Long Distance Revenue data from all bases (ex. B205, tab 16A at 436-37), that: (a) during the period February 2003 through January 2004 preceding the "unblocking" of guest room phones ordered by the CO in November 2003 and accomplished by mid-February 2004, SUFI's \$1,093,566 total gross revenues, less \$87,157.21 (for the .0797 average carrier rate), were \$83,867.40/mo.; (b) SUFI's total gross revenues from mid-February through August 2004 of \$419,541, less \$33,437.42 for the carrier rate, were \$59,400.55/mo., \$24,466.85/mo. less than the prior \$83,867.40/mo. average; (c) SUFI's total gross revenues from September through December 2004 of \$332,355, less \$26,488.69 for the carrier rate, were \$76,466.58/mo., \$7,400.82/mo. less than the prior \$83,867.40/mo. average; and (d) SUFI's total lost revenues due to unblocking the guest phones from mid-February through December 2004 were \$188,637.80 (\$24,466.85 x 6.5 + \$7,400.82 x 4).

DECISION ON COUNT I

We determine that SUFI is entitled to recover the following amounts on Count I:

A. Lost Revenues (finding 275(d))	\$188,637.80
B. Extra Work (hours through 26 October 2004):	
• Ansola, 45.75 hrs. @ \$26.44/hr. =	\$1,209.63
• Congalton, 46.75 hrs. @ \$41.14/hr. =	1,923.29
• Smith, 6.0 hrs. @ \$27.29/hr. =	163.74
• Broyles, 3.0 hrs. @ \$21.15/hr. =	63.45
Subtotal:	3,360.11      3,360.11
C. Out-of-pocket costs	\$ <u>2,475.07</u>
Total:	\$194,472.98

We hold that SUFI is entitled to recover \$194,472.98, with interest thereon at the FRB's monthly Prime Rate for the period 14 February 2004 until payment of the \$194,472.98 pursuant to this decision. We do not decide here the 357.25 claim preparation hours incurred by Ansola, Congalton, Smith and Broyles from 27 October 2004 through 24 May 2005, but instead *infra* in this decision.

FURTHER FINDINGS ON COUNT XIV - AT&T TRAILER

276. DO No. 4 specified lodging Building Nos. 3751-54 and 3756 at Landstuhl AB, *inter alia*, but included no provision regarding the Landstuhl Regional Medical Center (Landstuhl Hospital) located on Landstuhl AB (R4, tab 18; tr. 8/14).

277. The Landstuhl Hospital was an Army Post staffed by Army and 360 to 500 Air Force medical staff which cared for sick and wounded Army and Air Force personnel. Army COL Rhonda Cornum was the Commander of Landstuhl Hospital; her husband, Air Force COL Kory Cornum, was its Deputy Commander and Commander of the Air Force's 435<sup>th</sup> Medical Squadron at the hospital. (Tr. 5/76, 8/14-16, 28-29)

278. Landstuhl Hospital's outpatients, nearly all of its Air Force staff and many of its Army staff stayed at Landstuhl lodging Building Nos. 3752-54 and 3756, including an entire floor of Building No. 3753 that the hospital reserved. Some outpatients were lodged at Kleber barracks, about 15 miles from Landstuhl, and transported back and forth by bus, which stopped on a driveway inside Gate 1, not far from the main entrance to Landstuhl Hospital on the north side of Building 3711. (Tr. 5/75-76, 6/214-18, 8/16-17, 22-23, 28-31, 44-47, 13/203-04; R4, tabs 140, 160 at 2).

279. Landstuhl Hospital outpatients did not have access to the hospital's DSN phones and free cellular phones provided to inpatients; inpatients, outpatients and probably some staff had donated calling cards for use outside the hospital (tr. 8/31-35). Persons stationed at and visiting the KMC bases, including Landstuhl, used AT&T calling cards at telephone kiosks, shoppettes, officers' clubs, post exchanges and the like (tr. 1/95, 15/211-12), *i.e.*, locations other than lodging facility guest rooms with SUFI-provided telephones.

280. On 17 August 2004 the CO materially breached the contract by directing SUFI to remove restrictions on toll-free calls from guest lodgings via other long-distance carriers. 04-2 BCA ¶ 32,714 at 161,868. CO Henson and Mr. Wible testified in *SUFII* (*SUFII*, tr. 4/320-40, 438-523).

281. On about 15 September 2004 SUFI re-blocked access to calling card numbers in Landstuhl lodging guest rooms (tr. 3/301; 14/41-43). In September 2004 Landstuhl Hospital staff complained about the cost of telephone calls and requested COL K. Cornum to provide AT&T pay phones in the lodging lobbies. COL K. Cornum was advised by CO Henson that AT&T phones would violate the SUFI contract, so they were not installed in lodgings. (Tr. 3/199-200, 8/22-23, 34-36; ex. B63, ¶ 3)

282. In October 2004 Landstuhl Hospital personnel asked USAFE's Mr. Wible about placing an AT&T trailer phone bank close to the lodgings. CO Henson advised Mr. Wible "that it was a bad idea and to advise the Army of possible liabilities associated with the 'phone bank.'" Calling card liabilities were sensitive because they had been the subject of litigation. (Ex. B62 at 2; tr. 13/256-67, 269-70)

283. Landstuhl Hospital had 14 connected wings and was connected between wings 8 and 9 to Building Nos. 3711, 3766 and 3773-3776. The Hospital had several

minor entrances, one of which was to Building 3757, wing 1. (R4, tab 91A at 2972; tr. 8/23-24)

284. On or about 10 January 2005, the Army had AT&T install a trailer 30 feet outside Landstuhl Hospital Building 3757 (wing 1) and about 150 feet from Building No. 3754 and 172 feet from Building No. 3756 to the east of wing 1, which COL K. Cornum considered the “perfect location” for outpatients who resided at the guest lodgings. The trailer had five telephones for making long distance calls over AT&T network, with instructions posted by each telephone telling users how to use AT&T calling cards. (R4, tab 91A at 2964-72, tabs 140, 160 at 2; tr. 3/201, 4/227-37, 8/21, 23-24, 43-59, 20/228)

285. On 12 January 2005 SUFI’s Mr. Broyles first noticed the AT&T trailer, went inside, saw the phones and reported the AT&T trailer to Ms. Ansola (tr. 6/122-24). Ms. Ansola went into the trailer, verified Mr. Broyles’ report, asked a nearby lodging front desk person what was in the trailer outside. The front desk person said it was telephones and she was indicating to all guests to go to the trailer because it was cheaper than the lodging facility phones. Ms. Ansola told COTR Adams, Mr. White and Mr. Myers about the AT&T trailer. (Tr. 4/221-23, 237-39)

286. Mr. Myers’ 18 January 2005 e-mail to CO Henson stated:

Cecilia was at Landstuhl last week and saw a trailer that had been put up by AT&T right next to the lodgings. She walked inside, and it has five telephones.... Obviously, the purpose of the placement of this trailer is to get lodging guests to use AT&T phones and calling cards, instead of the room phones. Cecilia has checked the Landstuhl revenue, and it has taken a nosedive, despite very high occupancy rates at the lodgings.

This is not consistent with the Air Force’s good faith duties....

...What I’d like you to do is:

1. Get the Landstuhl AT&T trailer...shut down immediately.

....

4. Make sure that lodging personnel are not directing guests to the AT&T trailers. When Cecilia checked with the front desk at Landstuhl, they said they were doing that.

(Ex. B63 at 1-2; tr. 14/102-03)

287. Mr. Wible's 19 January 2005 e-mail to USAFE's inquiries about the AT&T trailer stated that his lodging staff had not directed guests to the phones, "[i]f guests have asked, 'Where is an AT&T phone', we will certainly not lie to them!" His office was not involved with the placement of the trailer and did not authorize it to be placed where it was, and it was not in close proximity to his facilities (ex. B62 at 3-4; tr. 6/241).

288. The 19 January 2005 e-mail was sent to COL K. Cornum, who stated that the AT&T trailer "is for our war injured patients. We encourage them to call their loved ones. I will get confirmation, but I don't think it will be taken down—it is for the moral [sic] of our warfighters about 20 feet from the hospital, where it needs to be." The foregoing e-mail chain was sent to CO Henson and Mr. Gedraitis on 20 January 2005. (Ex. B62 at 2-3) COL K. Cornum's 20 January 2005 e-mail stated that AT&T does "require a calling card and we must have a million of those that have been donated to outpatients" (ex. B61).

289. CO Henson's 21 January 2005 e-mail to COTR Adams and others reflected the 19 January 2005 recommendation of his attorneys and stated:

[W]e must take a proactive approach to make Lodging guests aware that the AT&T phone trailer is for wounded Hospital guests only. Please require lodging front desk personnel at Landstuhl to inform guests of that at check-in. We also need to approach the Army and request that they label the trailer for use by wounded hospital patients only and periodically monitor its use....

(Ex. B61 at 1-2)

290. On 24 January 2005 CO Henson spoke with Mr. Wible, who told him that many Landstuhl guests were "walking wounded," the Army had "plans to place additional AT&T phones all over the base" and asked whether the lodging front desk personnel ought to tell guests anything at all about the AT&T trailer. Mr. Gedraitis advised CO Henson (ex. B62 at 1):

[B]ased upon the revelation that certain lodging patrons are out patients to the hospital and eligible to use the phones, the lodging desk personnel should not discuss the AT&T phones other than to point out when asked, that the sign by them outlines one's eligibility for use. Our request for the sign by the phones should be in writing and the Army response

should be maintained to demonstrate our good faith efforts to SUFI.

291. Shortly after COTR Adams, at CO Henson's request, asked COL K. Cornum "to have a sign placed on the AT&T trailer stating that the phones are for patient use only," the Army placed signs saying "FOR PATIENT USE ONLY" on the exterior and interior of the AT&T trailer (tr. 3/201, 8/26-27; R4, tabs 50, 91A at 2965-66, 2968).

292. CO Henson's 26 January 2005 e-mail to SUFI stated that AFNAFPO had no advance knowledge of the AT&T trailer, the Air Force had "no authority [to] remove the trailers," he had no personal knowledge of additional trailers, the Army posted signs on the trailer stating that the phones were for patient use only and he had asked that "front desk personnel at Landstuhl refrain from discussing the AT&T phones other than to point out when asked, that the sign on them outlines one's eligibility for use" (ex. B63 at 1).

293. On 17 February 2005 Mr. Broyles saw lodging guests, but no one from the hospital, going back and forth to the trailer to use the phones (tr. 6/122-24). In February 2005 Mr. Myers asked COs Henson and Browning to remove or relocate the AT&T trailer (tr. 14/104-05). The Landstuhl Hospital executive staff, including COL K. Cornum, considered SUFI's requests and decided not to remove or relocate the AT&T trailer since it provided a valuable service to outpatients staying at the guest lodgings. (Tr. 8/58-62, 13/274)

294. The AT&T trailer was removed from Landstuhl Hospital in about November 2006, about 17 months after SUFI ceased LFTS service (tr. 13/204-05, 20/229-30).

295. As revised on 13 February 2007, SUFI's Count XIV alleged the following damages (ex. B205, tab 15 at 410-17):

A. Lost Revenues, Jan. – May 2005	\$15,488.88
• Interest on Lost Revenues through June 2005	<u>255.14</u>
Subtotal:	\$15,744.02
B. Extra Work	
• Ansola, 01/12/05, 4/27/05, 2.25 hrs. @ \$90/hr.	\$ 202.50
• Broyles, 1/12/05, 2/17/05, 3 hrs. @ \$68/hr.	204.00
• Smith, 04/21-26/05, 5.5 hrs. @ \$68/hr.	374.00
• Interest on extra work through June 2005	<u>14.01</u>
Subtotal:	\$ 794.51
Total, A (\$15,744.02) + B (\$794.51) =	\$16,538.53

296. SUFI calculated Count XIV lost revenue by adjusting the December 2004 Landstuhl revenues by a “factor” of the monthly percentage of December 2004 revenue experienced at all other bases having no AT&T trailer, subtracted therefrom the adjusted Landstuhl revenue to the actual revenues obtained in January through May 2005 and subtracted SUFI’s monthly cost rate (ex. B205, tab 15A at 411; tr. 14/105-06). Occupancy rates were high at the Landstuhl lodgings in 2005 (tr. 8/30). DCAA took “no exception” to SUFI’s lost revenue computations and “verified the contractor’s methodology” (R4, tab 106 at 17-18). Ms. Ansola and Messrs. Broyles and Smith each verified the accuracy of their respect extra work hours and work descriptions (tr. 4/237, 6/124, 13/43-44).

#### DECISION ON COUNT XIV

SUFI argues that respondent’s refusal to request the Army to remove or relocate the AT&T trailer, which was placed for outpatient lodging guests to use AT&T calling cards instead of SUFI guest room phones, and its failure to monitor or enforce the “FOR PATIENT USE ONLY” signs added to the trailer, breached respondent’s duty of good faith and cooperation so as not to frustrate SUFI’s performance (app. br. at 320). Respondent argues that it was not consulted in the AT&T trailer’s installation, service or placement, and it did not request, suggest or encourage the Army to place that trailer near Landstuhl Hospital; acting in good faith, it did not refuse, but investigated and requested the Army to remove or relocate the trailer; when the Army refused to do so, it requested the Army to post the “FOR PATIENT USE ONLY” signs on the trailer, and the Army complied; since SUFI previously had cancelled the contract, respondent had no duty to take any action with respect to the AT&T trailer (govt. br. at 166-67, reply br. at 25-26). SUFI counters that respondent’s 2004 material breach of directing SUFI to unblock access of guest room phones to calling cards at Landstuhl (and other bases) and SUFI’s September 2004 re-blocking of such access, led the Landstuhl Hospital staff to push to use AT&T calling cards in Landstuhl lodgings and to the AT&T trailer circumvention of SUFI’s long distance phone system (app. reply br. at 82).

SUFI’s claim is unpersuasive. First, the AT&T trailer was not placed outside the Landstuhl Hospital by AFNAFPO or the Air Force, but by the Army commander of that hospital, who accepted the Air Force’s recommendation to post a sign limiting the AT&T trailer’s use to hospital patients only (findings 284, 289-92). Second, and more important, hospital out-patients’ used AT&T calling cards in locations other than within the lodging facility guest rooms serviced by SUFI phones (finding 279). We see no logical basis to distinguish calling card use at telephone kiosks, shoppettes, officers’ clubs and post exchanges from use of such cards at the AT&T trailer outside Landstuhl Hospital. Unlike the CO’s direction to unblock lodging guests’ access to use calling cards in guest rooms, which we held in *SUFI I* was a material breach of the contract, 04-1 BCA at 161,868, we now hold that out-patients’ use of AT&T calling cards in the trailer

outside the Landstuhl Hospital did not violate the contract. Accordingly, we deny the appeal with respect to Count XIV.

#### FURTHER FINDINGS ON COUNT XXIV – SEVERANCE & SHUTDOWN COSTS

297. During the 2004-2005 PSA transition period, SUFI found it necessary to offer stay-pay and severance allowances to its employees Broyles, Smith and Ansola, and its consultant Congalton, to induce them to continue working for SUFI until the shutdown was completed on 31 May 2005 (tr. 4/284-85, 6/137, 13/57-58, 14/115-17, 15/9-10).

298. In February-March 2005 SUFI and its foregoing employees agreed to stay-pay and severance allowances based on their wages paid from March 2004 through February 2005, and reimbursement of expenses based on FAR definitions of “reasonable” costs; SUFI paid Mr. Congalton for three months’ services under his consulting agreement (tr. 4/282-83, 6/137-38, 13/57-58, 14/117-19; R4, tab 101A at 4389, 4391; ex. B140 at 11-98, B147 at 12).

299. SUFI’s claim included the following damages for Count XXIV (ex. B205, tab 25):

Severance & Shutdown Personnel Costs	\$199,779.97
• Profit thereon @ 25%	49,944.99
• Interest thereon from 3/05 to 11/05	<u>218.51</u>
Total:	\$249,943.47

#### DECISION ON COUNT XXIV

SUFI’s need to pay severance and shut-down costs to its employees and consultant during the post-PSA transition period was caused directly by respondent’s material breach of contract on 5 November 2003 that justified SUFI’s discontinuance of performance, as this Board decided on 17 August 2004 in *SUFII*, 04-2 BCA ¶ 32,714 at 161,865-66 (finding 58), 161,868.

As damages for such breach, we hold that SUFI is entitled to recover \$199,780.00, with interest thereon at the FRB’s monthly Prime Rate from 13 March 2005 until payment of the \$199,780.00 amount is made pursuant to this decision.

#### FURTHER FINDINGS ON COUNT XXV – OFFICE LEASE

300. The 1 April 2005 PSA established 31 May 2005 as the end of the transition period and of SUFI’s performance (ex. B70). On 1 April 2005 SUFI verbally gave its landlord the specified 90-day notice to terminate the lease of SUFI’s office at Ramstein, Germany and mentioned the possibility that SUFI might need to rent the office beyond

the end of June 2005. SUFI confirmed its oral notice in a 12 April 2005 letter to “Frau Spanier.” (R4, tab 102A at 4395, 4401; tr. 4/284-85)

301. According to Ms. Ansola, on 1 April 2005 SUFI was able to give only 60 days notice (before the 31 May 2005 end of transition) and “so we went one month beyond our closure into June” and thus had to pay \$1,083.20 for the June 2005 rent (Tr. 4/284-85). SUFI continued to occupy its Ramstein office until it vacated on 30 June 2005 (ex. B205, tab 29A at 529; tr. 9/23-24).

302. SUFI’s claim included the following damages for Count XXV (ex. B205, tab 26A at 519):

Office lease costs, June 2005	\$1,083.20
• Profit thereon @ 25%	<u>270.80</u>
Total:	\$1,354.00

#### DECISION ON COUNT XXV

SUFI argues that it had to pay one month’s rent after it “stopped performance.” Respondent argues that although the PSA transition period ended 31 May 2005, SUFI continued to occupy its Ramstein office space until 30 June 2005. We conclude that SUFI ended performance of LFTS services under the PSA transition period on 31 May 2005, and in June 2005 SUFI packed and removed materials and records from its Ramstein office due to respondent’s material breach of contract on 5 November 2003.

As appropriate damages resulting from such breach, we hold that SUFI is entitled to recover the \$1,083.20 rental, with interest thereon at the FRB’s monthly Prime Rate from 13 March 2005 until payment of the \$1,083.20 amount is made pursuant to this decision.

#### FURTHER FINDINGS ON COUNT XXVI – EXTRA TRANSITION WORK

303. After 1 April 2005 Col Rogers requested SUFI to assist Air Force employees during the PSA transition period, and told SUFI that the Air Force would pay for such services as part of its shut-down costs (tr. 12/167-68).

304. Before stopping performance on 31 May 2005, SUFI employees Ansola, Broyles and Smith notified its vendors and telephone carriers of the impending shut-down, began to close down its office, inventoried SUFI’s spare parts and provided information to Col Rogers, COTR Adams and CO Hollins-Jones needed to operate the LFTS after 31 May 2005, including the status of vendor debts owed and vendor addresses and contacts (tr. 4/285-88, 6/137-38, 13/58-59).

305. Between September 2005 and April 2006 Ms. Ansola prepared SUFI claim materials for DCAA audit (tr. 4/287-88; ex. B148 at 1, 3-4).

306. SUFI's claim, as updated 13 February 2007, included the following damages for Count XXVI (ex. B205, tab 27 at 520-23):

Extra work from 4/25/05 – 4/6/06 by employees Ansola, Broyles and Smith, including 106.5 hrs. @ \$90/hr. for Ms. Ansola from 09/05 thru 04/06.	\$12,563.00
• Interest thereon through 5/31/05	37,59
Total:	\$12,600.59

### DECISION ON COUNT XXVI

For the same reasons analyzed in our decision on Count XXIV with respect to the cause of, and need for, SUFI's shut-down expenses, we hold that SUFI is entitled to recover its extra transition work expenses. As damages therefor, we determine that SUFI is entitled to:

Ms. Ansola, 48.5 hrs. @ \$26.44/hr. =	\$1,282.34
Mr. Broyles, 8.5 hrs. @ \$21.15/hr. =	179.78
Mr. Smith, 7.5 hrs. @ \$27.29/hr. =	<u>204.68</u>
Total:	\$1,666.80

with interest thereon at the FRB's monthly Prime Rate from 13 March 2005 until payment of the \$1,666.80 amount is made pursuant to this decision. We do not decide here the 106.5 hours of Ms. Ansola's claim preparation work from 19 September 2005 through 6 April 2006, but instead *infra* in this decision.

### FURTHER FINDINGS ON COUNT XXVII – SPARE PARTS

307. In the parties' 1 April 2005 PSA, § 1: (a) SUFI agreed to sell to respondent "SUFI's existing telephone system" and "all its constitutive elements...in good working order...as is, where is, with no other warranties, express or implied" as of 31 May 2005 and (b) the parties agreed to generate a complete inventory of SUFI's equipment, including all "infrastructure by device, type, and serial number; existing wiring diagrams and cable maps; software licenses; and any outstanding leases" (ex. B70 at 2).

308. The parties' inventory of SUFI's telephone system equipment did not include any spare parts (tr. 12/227, 23/167-74).

309. Prior to 31 May 2005, respondent agreed to purchase spare parts consisting of battery packs, computer monitors and a UPS trolley for \$3,485.00, which transaction was formalized in a purchase order for that amount signed by CO Hollins-Jones, and which price was paid to SUFI without any reservation of government rights (ex. B74; tr. 12/189, 191-93, 17/112-15; supp. R4, tab 148 at 3-4).

310. SUFI offered to sell its remaining spare parts to respondent, but the parties did not agree on a price (ex. B74). Respondent asserted that such remaining spare parts were part of SUFI's telephone system purchased under the PSA (tr. 12/191-96).

311. Respondent gave SUFI a Certification of Receipt of the telephone system in good working order on 1 June 2005 (tr. 12/188-89, 23/167, 171-74). SUFI delivered the disputed remaining spare parts to respondent on 2 and 24 June 2005, under protest that it would include the cost of such parts in its impending claim, with an inventory of 125 types of disputed parts (exs. B74, B130; tr. 12/189-90, 196-97, 227-28).

312. SUFI's claim asserted \$125,292.65 in damages for Count XXVII and appended a 3-page list with 126 categories of parts (ex. B205, tab 28 at 524-27).

313. SUFI derived its claimed spare parts amounts from vendor invoices to SUFI, from costs in SUFI's BPA with USAFE, and from estimates by Messrs. Congalton and Smith. SUFI used the full amount invoiced for unused parts, and 50% for used parts. At the request of DCAA, CO Hollins-Jones obtained the views of USAFE's Pat Eldridge, who confirmed the reasonableness of the Congalton and Smith estimates. DCAA could not verify the incurrence of \$60,937.11 of SUFI's claimed spare parts costs. (Exs. B127, B141 at 3, B150 at 2; supp. R4, tab 106 at 25; tr. 4/289-90, 9/13-18, 12/72-73, 82-85, 13/59-60, 17/118-21, 21/203, 250-53) Of SUFI's vendor invoices, approximately \$67,000 were in German without translation to English, as ordered by the Board (R4, tab 104A at 4413-99; tr. 1/67-72).

#### DECISION ON COUNT XXVII

We hold that § 1 of the parties' 1 April 2005 PSA did not include SUFI's spare parts in the "as is, where is" "existing telephone system" respondent purchased and that SUFI is entitled to recover the proven value of the delivered spares in the amount of \$58,292.65 (\$125,292.65 – 67,000.00), with interest thereon at the FRB's monthly Prime Rate from 13 March 2005 until payment of the \$58,292.65 amount is made pursuant to this decision.

FURTHER FINDINGS ON COUNT XXVIII –  
MISCELLANEOUS SHUTDOWN EXPENSES

314. In June-July 2005 Ms. Ansola closed SUFI’s office in Germany, rented a truck and laborers to move SUFI’s property out of that office to her garage, sent SUFI’s business records to New York and canceled SUFI’s business cell telephones (exs. B140 at 90, 92-95, B142 at 13-18; tr. 4/294-95, 9/18-20).

315. SUFI’s claim, as updated 13 February 2007, included the following miscellaneous shutdown expenses (ex. B205, tab 29 at 528-29):

6/1/05	Company de-registration	\$ 12.63
6/28/05	Moving services	301.95
6/30/05	Hertz truck rental	86.03
7/1/05	DHL chg. to ship records to USA	500.69
7/1/05	Cell phone cancellation fees	630.63
8/15/05	ITO exp. to ship records to USA	1,298.01
"	" " " " " "	1,359.82
11/3/05	Customs fee	50.00
12/1/05	Doris Dobrani service chg. after Ms. Ansola departed Germany	<u>150.00</u>
	Subtotal:	4,227.13
	Profit at 25%	<u>1,056.78</u>
	Total:	\$5,283.91

SUFI substantiated the foregoing expenses except for the Hertz truck rental charge (exs. B140 at 90, 92-95, 98, B142 at 13-18).

DECISION ON COUNT XXVIII

We reject respondent’s argument that the PSA already compensated SUFI for the miscellaneous shutdown expenses. However, the costs SUFI claims for shutting down its office would have been incurred even had there been no material breach of contract, except for the \$150 for Doris Dobrani’s services to complete the shutdown after Ms. Ansola’s departure. We hold that SUFI is entitled to recover \$150.00, with interest thereon at the FRB’s monthly Prime Rate from 13 March 2005 until payment of the \$150.00 amount is made pursuant to this decision.

FURTHER FINDING ON COUNT XV – GENERAL LACK OF COOPERATION

316. The Board denied respondent’s motion to dismiss Count XV for failure to state a sum certain on the basis, *inter alia*, of appellant’s proposition that this claim sought “damages ... measured by a difference in achieved revenues and those projected

as reflected in the contract” (07-1 BCA at 166,122). However, SUFI’s post-hearing brief does not propose any findings of fact, assert any legal arguments or address Claim XV, General Lack of Cooperation.<sup>4</sup> Nor does respondent address this claim in its post-hearing brief. We find that SUFI has abandoned the claim underlying Count XV.

### DECISION ON COUNT XV

We hold that SUFI has abandoned the claim underlying Count XV.

### FURTHER FINDINGS ON COUNT XVI - LOST PROFITS

317. At the outset of the contract the parties expected SUFI to generate substantial profits, based on a 60 to 85% occupancy rate for lodging facilities (tr. 2/209-11, 3/10-13, 70-71, 122-23, 131). During the period SUFI performed the contract, the lodging occupancy rate exceeded 90% (tr. 16/32, 21/106-07).

318. In its Lost Profits claim, SUFI first tabulated the historical revenues it received from January 2002 through May 2005 (except for Rhein Main, through November 2004) at three locations: \$3,269,820.99 from Ramstein, including Landstuhl, Vogelweh, Kapaun and Sembach; \$434,979.71 from Spangdahlem, including Bitburg; and \$381,818.69 from Rhein Main (ex. B205, tab 17A at 440; tr. 8/129-33).

319. SUFI added to those historical revenues the amount of lost revenues alleged (and assuming 100% entitlement) for respondent’s breaches in Counts I-V, VII, IX-XIV, viz., \$20,404,264.23 at Ramstein, \$725,611.86 at Spangdahlem and \$1,158,600.41 at Rhein Main, resulting in adjusted gross revenues of \$23,674,085.22 (\$3,269,820.99 + 20,404,264.23) at Ramstein, \$1,160,591.57 at Spangdahlem (\$434,979.71 + \$725,611.86) and \$1,540,419.10 at Rhein Main (\$381,818.69 + \$1,158,600.41) (ex. B205, tab 17A at 440-41, n.4; tr. 8/129-32, 151, 21/182).

320. SUFI’s adjusted gross revenues included: (a) the Rhein Main/Spangdahlem Front Desk Patching claim, the subject of ASBCA No. 55948, which SUFI deleted from its *SUFI II* claim (tr. 14/111), and (b) the *pro rata* reduction in accordance with the Settlement Agreement Addendum of the amounts used for Counts I, II, IV and XIII, which *pro rata* reduced amounts are: Count I, \$698,723.05; Count II, 186,585.64; Count IV, \$424,101.76 and Count XIII, \$79,179.17 (ex. B153; tr. 23/230).

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<sup>4</sup> SUFI’s brief has no “Count XV,” but does have point “VII. O. Revenue Sharing,” in which it calculates that portion of its projected long-distance call revenue which would have been shared with respondent during the balance of performance, if respondent had not breached the contract and SUFI ceased performance in May 2005, with respect to its Count XVI Lost Profits claim decided *infra*.

321. SUFI derived the average annual revenues at each of the three sites by dividing their adjusted gross revenues by their actual performance in years after 1 January 2002 (3.417 years for Ramstein/Spangdahlem, 2.915 years for Rhein Main), resulting in annual average revenues of \$6,928,324.62, \$339,652.20 and \$528,445.66 for the sites. SUFI multiplied those average annual revenues by the number of years after 31 May 2005 allegedly remaining under the contract as amended on 31 March 2000 by Modification No. 008 (R4, tab 11), that would have been performed but for respondent's material breach, *viz.*, 10.014 years for Ramstein, 10.285 years for Spangdahlem and .083 years for Rhein Main (closed 30 June 2005), producing gross lost revenues of \$69,380,242.73, \$3,493,322.88 and \$43,860.99, respectively, for those three sites, and totaling \$72,917,426.60, before room adjustments. (Ex. B205, tab 17A at 440, 443, n.1; tr. 8/130-32)

322. SUFI adjusted the foregoing gross lost revenues, based on a 1,798 room count as of 31 May 2005, adding 104 and 355 rooms for new Spangdahlem and Ramstein facilities to be opened, respectively, in April and September 2007, deducting 49 rooms for Bitburg lodging facilities closed on 15 September 2005 and adding 54 rooms for new Spangdahlem Building Nos. 408, 409 and 410 (which buildings were not in DO No. 6) starting 1 October 2005 (ex. B205, tab 17A at 443, n.2; tr. 12/73-74, 13/61-63, 14/112, 21/57-59, 23/40; R4, tab 19 at 4)

323. With respect to the 355 Ramstein rooms and 104 Spangdahlem rooms SUFI included in its lost profits calculation, and whether it would have serviced those new facilities, had it continued performance after 31 May 2005: (a) During the 2007 hearings, respondent was using some, but not all, of the LFTS equipment and cabling purchased from SUFI under the PSA for the new Spangdahlem and Ramstein lodging facilities (tr. 12/74-75, 77-81, 21/59). (b) Former SUFI equipment was capable of servicing the new Spangdahlem and Ramstein facilities, though respondent needed new line cards and components to satisfy the statement of work for those facilities (tr. 12/160-62, 20/231-32). (c) Prior to October 1999 SUFI's employees working in Germany, *e.g.*, Ms. Ansola, lost their German tax exemptions. According to SUFI, to compensate it for added tax and other increased costs, the parties, in agreeing to the five-year extension of the contract term in Modification No. 8 on 31 March 2000, discussed the additions of a new 350-room facility at Ramstein and 200-room facility at Spangdahlem to off-set the expected closure of Rhein Main AB in 2005. The record does not show how the U. S. Government was responsible for the lost German tax exemptions or any CO representation or promise that AFNAFPO would order SUFI to service those new lodging facilities, but at most that some SUFI and government personnel "assumed" that SUFI would provide such service. (*SUFII*, finding 37; tr. 2/125-26, 209-10, 3/127-28, 130-31; ex. A49 at 1547) (d) CO Henson's 4 November 2002 e-mail to Stephen Myers stated (*SUFII*, ex. A97):

New 350 Rm VQ at Ramstein.... As per our conversation last week, USAFE will not be asking to SUFI to provide phone service in the new facility at Ramstein. USAFE feels that the prices of PBXs have fallen significantly over the past few years. The reduction in prices have [sic] prompted them to take a serious look at the business model of purchasing their own switch, trunks, lines, call acctg system, etc.

(e) SUFI's notes of the 9 July 2003 meeting with AFNAFPO recorded that USAFE's COL Hanson had a new business plan "to run his own phone system," "USAFE wants out" of the SUFI contract, and SUFI gave respondent a \$7.2 million preliminary estimate for a convenience termination settlement, plus a \$3 to \$10 million breach of contract claim (tr. 8/144-45; *SUFII*, ex. A117 at 1-3).

324. SUFI credited respondent for a revenue share based on: (a) \$85,887,992.06 projected gross revenues on its foregoing room count from June 2005 through June 2015 for Ramstein/Spangdahlem locations, (b) less \$1,751,660.80 in local revenues (at a .0203947 rate), (c) applying the § B, ¶ 5.2 table to the assumed equal monthly increments of the net \$84,136,331.26 in projected long-distance call revenues and (d) producing \$4,138,883.71 in shared revenue (ex. B205, tabs 17B, -C, -E at 443-44, 458).

325. From its \$85,887.992.06 projected gross lost revenues, SUFI deducted: (a) \$15,768,964.00 in projected direct and overhead expenses, based on its 2003-2004 expenses and a 2.5% inflation rate for increased salaries to provide LFTS services from June 2005 through June 2015, and (b) the \$4,138,883.71 revenue share, leaving \$65,980,144.35 in net lost profits (ex. B205, tabs 17D, 17E at 445-58; tr. 4/243-45, 5/134-36, 14/112-14), on which net amount SUFI claims interest from 1 July 2005 when it submitted its claim pursuant to the PSA, ¶ 4 (ex. B70 at 2).

326. SUFI's \$15,768,964.00 projected expenses included an "Adjustment for Claims" expense for additional long-distance traffic that SUFI would have carried, and thus for which it would have to pay carriers, but for respondent's breaches of contract that caused lost revenues, namely Counts I-V, VII, and X-XIV (see finding 266), and which expense, according to SUFI, requires adjustment to the lost revenues determined by the Board herein and due to the revised opening dates for the new Ramstein and Spangdahlem lodging facilities (tr. 4/244-45, ex. B205, tab 17D at 445, n.2).

327. DCAA verified SUFI's methodology used to calculate and project lost profits, but DCAA's recalculation adjusted certain lost revenue claims, omitted SUFI's adjustments for rooms and new lodgings and excluded lost profits beyond April 2011, 15 years from the contract award date rather than base acceptance date and noted that SUFI's "lost profits recovery will need to be discounted to present value as of the date of payment or judgment" (R4, tabs 106 at 19, tab 108 at 17-18; tr. 21/185-86, 232-33).

## DECISION ON COUNT XVI

SUFI argues that respondent's calling card breach was a material breach of the contract that permitted SUFI to stop contract performance, *SUFII*, 04-2 BCA at 161,868; a party is entitled to "expectancy" damages for such breach, including lost profits on work it was unable to complete. SUFI asserts that it meets the elements of proof of lost profits enunciated in *California Federal Bank v. United States*, 395 F.3d 1263, 1267 (Fed. Cir. 2005), namely, lost profits were within the contemplation of the parties because the loss was foreseeable; there would have been a profit but for the breach; and the measure of damages can be clearly established, although, if "a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery." (App. br. at 335-36)

Respondent argues that SUFI's "entire lost profits claim is impermissibly speculative" because in 2003 the parties were in discussions about a convenience termination and such termination was "almost certain," and the portion of its lost profits claim related to the new Ramstein and Spangdahlem facilities "is without a basis" because respondent was not required to order such new services from SUFI, as held in *SUFII*, and the CO told SUFI in November 2002 that respondent would not order such services (gov't br. at 168-70).

SUFI counters that respondent's convenience termination contention is foreclosed because it did not so terminate timely when it had the opportunity to do so, but instead materially breached the contract, its convenience termination theory improperly would foreclose all lost profit damage recovery and respondent cannot retroactively terminate for convenience to supplant breach damages, citing *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988) (app. reply br. at 84-86).

We reject respondent's contention that SUFI's lost profits claim is wholly speculative because it was "almost certain" that respondent would have terminated the contract for convenience. Such contention conflicts with the fact that respondent rejected SUFI's convenience termination settlement proposal and in fact breached the contract, as we held in *SUFII*. Moreover, in *Northern Helex Co. v. United States*, 634 F.2d 557, 559, 563-64 (Fed. Cir. 1980) (*Northern Helex III*), in June 1970, during the ninth year of a 22-year contract to purchase helium, the government materially breached the contract (by failing to pay the contractor for gas delivered). The court awarded the contractor \$33,457,400 in lost anticipatory profits for the remaining 13 years of the contract, notwithstanding that the contractor "terminated" the contract on 24 December 1970 and the government "terminated" the contract effective 28 March 1971, while 12 years remained in the original contract term. Judge Nichols joined in the court's majority opinion on anticipatory profits, but stated in his concurring opinion (634 F.2d at 565-66):

It appears to me...that, given a contract that had almost 13 years left to run at the time of the breach, it was not reasonable to measure damages wholly by anticipated revenues whether offset or not offset by anticipated costs. This assumes...a certainty in the prediction of future events that we do not rely on in managing our own affairs. Those contracting with the government have uncertainties about their prospects.... The government may...pass laws allowing modification of its deals that it comes to consider ill advised. It may revoke its consent to suit and repudiate its debts. The contingencies for which defendant reserved the right to terminate might occur. For all these reasons...the fair market value of that or any other government contract having nearly 13 years to run would not normally equal the capitalized value of all expected contractor revenues.... The government could have passed a law for the expropriation or taking by eminent domain of Northern Helex's contract rights, and if it had done so, the just compensation would not necessarily have equaled the anticipated revenues.

The Federal Circuit Court has cited *Northern Helex III* 17 times after 1980, but has not overruled or altered its rationale for lost anticipatory profits damages, nor has it adopted Judge Nichols' suggestion to substitute a jury verdict approximation of lost profits to avoid the uncertainties of future events inherent in the court's holding. *Northern Helex III* reinforces our rejection of respondent's convenience termination argument.

During the final years of SUFI's contract performance, whenever the issue of servicing new lodging facilities came up, the CO advised SUFI that respondent had no intent to order such services from SUFI and USAFE determined to oust SUFI and take over performance of telephone service at U.S. air bases in Germany (finding 323). Under those circumstances, the likelihood that AFNAFPO, notwithstanding such USAFE posture, would have ordered SUFI to service the new Ramstein and Spangdahlem facilities – and the 54 rooms in Spangdahlem Building Nos. 408-10 added on 10 October 2005, though the parties' briefs do not analyze this issue – was essentially zero.

Therefore, we hold that SUFI has satisfied the criteria for recovery of lost profits set forth in *California Federal Bank, supra*, subject to the following adjustments to SUFI's lost profit calculations. We exclude the Rhein Main/Spangdahlem Front Desk Patching claim in *SUFI III* (finding 320(a)). We adjust gross lost revenues to those held recoverable for Counts I-V, VII, IX-XIV from June and September 2000 through 2005, and disregard SUFI's *pro rata* reductions of the amounts for Counts I, II, IV and XII pursuant to the October 2006 Settlement Agreement Addendum (finding 320(b)). We exclude Rhein-Main revenues from lost profit calculations because Rhein-Main would

have been closed on 30 June 2005 even if there had been no breach. We exclude 513 rooms (355 Ramstein, 104 + 54 Spangdahlem) in SUFI's room count factor (findings 322, 325). We adjust the projected long distance carrier tolls (in SUFI's "Adjustment for Claims" expense item) to correspond to the lost revenues sustained in this decision (finding 326). We substitute 25 April 2011 as the end date of the unperformed years (finding 1).

We follow the same basic methodology as SUFI used for its lost profits calculations (findings 318-25), and adjust its calculations as follows.

A. We adjust SUFI's historical revenues received for the period January 2002 through May 2005 at Ramstein, Spangdahlem and Rhein Main of \$4,086,619.39 (finding 318) to \$4,793,725.49 for the period July 2000 through May 2005, including \$4,424,156.58 at Ramstein and \$369,568.91 at Spangdahlem, but excluding \$569,358.99 at Rhein-Main, which USAFE closed one month after SUFI ceased performance.

B. We adjust SUFI's calculated gross lost revenues from July 2000 through May 2005 to correspond to the lost revenues the Board has allowed in the following Counts from July 2000 through May 2005:

<u>Count</u>	<u>Ramstein</u>	<u>Spangdahlem</u>	<u>Total Lost Rev.</u>
I	\$147,137.48	\$20,750.16	\$167,887.64
II	225,373.68		225,373.68
III	0	0	0
IV	414,046.00	0	414,046.00
V	0	0	0
VII	0	0	0
IX	0	0	0
X	0	0	0
XI	0	0	0
XII	80,984.57	0	80,984.57
XIII	193,279.48	0	193,279.48
XIV	0	0	0
	<u>\$1,060,821.21</u>	<u>\$20,750.16</u>	<u>\$1,081,571.37</u>

C. We add the foregoing Board-adjusted historical and lost revenues:

<u>Location</u>	<u>Actual revenues</u>	<u>Lost revenues</u>	<u>Total revenues</u>
Ramstein	\$4,424,156.58	1,060,821.21	\$5,484,977.79
Spangdahlem	<u>369,568.91</u>	<u>20,750.16</u>	<u>390,319.07</u>
Subtotals:	\$4,793,725.49	1,081,571.37	\$5,875,296.86

D. We divide the foregoing total gross lost revenues per location by their revised base performance period of 4.917 years (July 2000 through May 2005) for Ramstein and Spangdahlem (see A. above) to derive average annual lost revenues:

<u>Location</u>	<u>Gross lost revenue</u>	<u>Perf. Duration</u>	<u>Avg. Annual Lost Rev.</u>
Ramstein	\$5,484,977.79	4.917	\$1,115,513
Spangdahlem	390,319.07	4.917	79,382

E. We multiply the foregoing average annual lost revenues per location by their respective number of unperformed years, based on the date set by contract Modification No. 008 for the period of unperformed services ending 25 April 2011 for both locations (finding 1):

<u>Location</u>	<u>Avg. Lost Income</u>	<u>Remaining Yrs.</u>	<u>Projected Lost Revenues</u>
Ramstein	\$1,115,513	5.92	6,603,837
Spangdahlem	79,382	5.92	<u>469,941</u>
Subtotal:			\$7,073,778

F. We eliminate the 513 rooms for the new Ramstein and Spangdahlem facilities after 31 May 2005, resulting in the following room adjustment: foregoing gross lost revenues \$7,073,778 times adjustment factor of .9727474 (1,798 basic room count -49 Bitburg rooms deducted (finding 276) = 1,749 rooms ÷ 1,798 basic count) is \$6,880,999 adjusted gross revenues.

G. We re-calculate SUFI's Projected Revenue Sharing as follows: \$6,880,999 adjusted gross lost revenues divided by 71 months (7 in 2005, 12 in each of 2006-2010, and 4 in 2011) yields \$96,915.48 monthly lost revenues, which we apply to the following years:

<u>Year</u>	<u>Number Months</u>	<u>Gross Lost Revenue</u>	<u>Local Rev. - @ .0203947</u>	<u>Lost Long Dist. Revenues</u>
2005	7	678,408	13,836	664,572
2006	12	1,162,986	23,719	1,139,267
2007	12	1,162,986	23,719	1,139,267
2008	12	1,162,986	23,719	1,139,267
2009	12	1,162,986	23,719	1,139,267
2010	12	1,162,986	23,719	1,139,267
2011	4	387,662	7,906	<u>379,756</u>
Subtotal:				\$6,740,663

We divide each year's foregoing Lost Long Distance Revenues by the applicable number of months in the year to derive the Lost Revenue per Month, to which we apply the pertinent part of the §B, ¶ 5.2, table (finding 328), mindful that for the purposes of such table, "Year 1" began in July 2000 and ended 30 June 2001 (finding 332) and thus each table "Year" straddled two calendar years:

<u>Year</u>	<u>Lost Long Distance Rev.</u>	<u>+ No. Months</u>	=	<u>Lost Rev/Mo.</u>	<u>Rev. Share</u>
2005	\$ 664,572	7		\$94,939	0
2006	1,139,267	12		94,939	0
2007	1,139,267	12		94,939	0
2008	1,139,267	12		94,939	0
2009	1,139,267	12		94,939	0
2010	1,139,267	12		94,939	0
2011	379,756	<u>4</u>		94,939	0
		71			0

H. For the period June 2005- April 2011 SUFI projected \$9,578,788 for all expenses, including \$4,167,489 expenses for carriers, claims adjustment and circuit charges. For that same period, we calculate costs of \$833,203 for carriers, claims adjustment and circuit charges, based on the actual damage adjustments we have allowed for the 12 pertinent counts for Ramstein and Spangdahlem lodgings, a difference of \$3,334,286 (\$4,167,489 – 833,203). When we subtract that \$3,334,286 difference from SUFI's projected \$9,578,788, our adjusted projected expenses are \$6,244,502.

I. We recalculate SUFI's net lost profits as follows:

Gross Lost Revenues, adjusted	\$6,880,999
Less: Revenue Sharing	0
Less: Adjusted SUFI Expenses	<u>(6,244,502)</u>
Net Lost Profits	\$ 636,497

The above allowed amount of lost profit would have accrued over the 71-month period from 1 June 2005 through 30 April 2011. For purposes of calculating interest, we allocate the total principal amount (\$636,497) in equal increments of \$8,964.75 to each month of the 71-month period. SUFI is entitled to simple interest at the FRB's monthly prime rate on the cumulative monthly increments of lost profit from 1 June 2005 to the date of payment of the Board's decision. No interest is due on the monthly increments of lost profit allocable to the months after payment of the Board's decision, and a discount shall be applied to the payment of those monthly increments to reflect their current value on the date of payment. See *Northern Helex Co. v. United States*, 634 F.2d 557, 564 (Ct.

Cl. 1980). We grant the appeal with respect to Count XVI to the extent set forth above, and deny the balance thereof.

### FURTHER FINDINGS ON REVENUE SHARING

328. SUFI's proposed table of percentages of long distance toll revenues to be shared with the government, as amended by contract Modification No. 0008, is found in §B, ¶ 5.2, set forth below in pertinent part (R4, tab 1 at B-2):

Dollar Amount	0-100K	101-200k [sic]
Year 1	0%	0%
Year 2	0%	0%
Year 3	0%	0%
Year 4	0%	0%
Year 5	0%	0%
Year 6	0%	0%
Year 7	0%	1%
Year 8	0%	1%
Year 9	0%	2%
Year 10	0%	2%
Year 11	0%	3%
Year 12	0%	3%
Year 13	0%	4%
Year 14	0%	4%
Year 15	0%	5%

That table showed monthly revenues in \$100,000 increments to \$500,000 and a final increment of ">500k", with the share percentages increasing from 0 to 10% in general proportion to the increasing number of years and monthly revenues. Contract § B, ¶ 5.2, also provided: "The year figure is calculated from the first complete month of operation following the acceptance of the third and final system required in the original solicitation (Ramstein, Rhein-Main and Aviano)." (*SUFI I*, ex. A1 at B-1, B-2; tr. 3/9-12)

329. SUFI intended that the § B, ¶ 5.2 shared revenue percentages for each \$100,000 were cumulative or incremental, *i.e.*, if in a given month in year 5, long distance toll revenues were \$600,000, respondent's revenue share would be \$0 (for revenues under \$100,000) + \$1,000 (1% of revenues between \$100,000 and \$200,000) + \$2,000 (2% of revenues between \$200,000 and \$300,000) + \$3,000 (3% of revenues between \$300,000 and \$400,000) + \$4,000 (4% of revenues between \$400,000 and \$500,000) + \$5,000 (5% of revenues exceeding \$500,000) = \$15,000 total (tr. 3/11-12, 15-17).

330. LFTS was not installed at Aviano AB for the reasons found in Count XX, *supra* (see particularly finding 33). When respondent issued DOs for LFTS services at Spangdahlem and Sembach ABs, § B, ¶ 5.2, was modified to reflect those ABs (R4, tabs 19 at 2, tab 20 at 4).

331. The contract revenue sharing schedule was amended by Modification No. 7 on 23 March 2000 to reflect the maximum LFTS performance term of 15 years (R4, tab 1 at B-2, tab 10 at 1)

332. Respondent accepted the Ramstein and Rhein Main ABs' LFTS on 6 June 2000 (ex. B229 at 1). Therefore, pursuant to contract § B, ¶ 5.2, Year 1 of revenue sharing began in July 2000.

333. Based on the long distance revenues SUFI actually received during contract performance, respondent was not entitled to any revenue share, and hence it agreed, in the PSA, to repay to SUFI the \$100,000 prepaid revenue share SUFI gave it in January 1997, and to release any further claim to such prepayment, including set-off to SUFI's contract claims (ex. B70, ¶ 3; tr. 3/12-13).

334. SUFI's first amended complaint included no count for "Revenue Sharing." Its 1 July 2005 claim item I.P, "Revenue Sharing," however, applied a \$776,609.55 revenue sharing "credit" against SUFI's 13 lost revenue claim items I.A-H, J-N (Counts I-VIII, X-XIV, first amended complaint) (R4, tab 77 at 63-64, tab 92 at 2975). On 13 February 2007 SUFI updated that "credit" to \$636,710.31 (ex. B205, tab 16 at 418).

335. SUFI calculated the updated \$636,710.31 revenue share by adding to actual monthly long distance toll revenues, the gross lost revenues SUFI alleged from July 2000 through May 2005 in lost revenue claim Counts I-V, VII, X-XIV, and applying the § B, ¶ 5.2, share percentages to each such monthly revenue amount (ex. B205, tab 16A at 419-20; tr. 14/108-10). SUFI assumed that it would recover 100¢ on each \$1 claimed for the foregoing counts. SUFI also included in its foregoing calculations the "Rhein Main/Spangdahlem Front Desk Patching" claim, subject of ASBCA No. 55948, *SUFI Network Services, Inc.*, ASBCA No. 55791, unpublished; *SUFI III*, 08-1 BCA ¶ 33,766, which we disregard herein.

336. SUFI states that its calculation must be adjusted to reflect the actual lost revenue amounts found due by the Board in this decision on Counts I-V, VII, X-XIV, and, if the Settlement Agreement is held to be enforceable, its calculations for the four lost revenue claims settled (Counts I, II, IV and XIII) should be *pro rata* reduced.

337. The actual gross lost revenue amounts we hold recoverable are as follows:

<u>Count</u>	<u>Amount Due</u>
I	\$188,637.80
II	225,373.68
III	0
IV	414,046.00
V	0
VII	108,488.00
X	0
XI	0
XII	368,916.75
XIII	470,760.57
XIV	0
Total:	\$1,776,222.80

338. SUFI calculated total actual revenues of \$5,363,584.68 from its CDRs (ex. B205, tab 16A at 421-22, 433-38). We adjusted SUFI's figures (ex. B205 at 419-20), to reflect the portion of actual gross lost revenue for the foregoing 11 counts during the period July 2000 through May 2005 that we granted. We added each monthly adjusted lost revenue amount to the corresponding monthly amount of actual revenues. In the nearly six years from July 2000 through May 2005, the sum of SUFI's actual monthly revenues plus our adjusted lost monthly revenues ranged from about \$96,000 in December 2002 to \$185,000 in November 2004, and in no month exceeded the \$200,000 threshold specified for 1% revenue sharing during those six years. Thus, when the revenue sharing formula in contract § B, ¶ 5.2, was applied to each such monthly amount, the government's adjusted total revenue share is \$0.<sup>5</sup>

#### FURTHER FINDINGS ON CLAIM PREPARATION COSTS

339. The AFNAFPO CO issued a final decision to SUFI on 15 January 2004, SUFI submitted its notice of appeal therefrom to the ASBCA on 6 February 2004 and the parties tried the appeal in June 2004 in ASBCA No. 54503 (*SUFI I*, 04-1 BCA ¶ 32,606 at 161,365-66, SOF ¶¶ 7-8).

340. Mr. Claybrook represented SUFI in preparing its 1 July 2005 claim and in litigating this appeal on a one-third contingent fee basis (tr. 8/69-70, 23/250).

341. SUFI submitted its notice of appeal to the Board in ASBCA No. 55306 on 5 January 2006.

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<sup>5</sup> Respondent's briefs do not address revenue sharing.

## DECISION ON CLAIM PREPARATION COSTS

SUFI's brief discusses "Claim Preparation Attorneys' Fees and Expenses (app. br. at 424-33). Neither SUFI's 1 July 2005 claim nor its 2007 briefs assert or identify any specific amounts of fees and expenses of any attorney representing SUFI, including Messrs. Claybrook, McLaughlin and Zimmer, all of Crowell & Moring, LLP. Since Mr. Claybrook undertook to represent SUFI in its claim preparation and in this litigation on a one-third contingency basis (finding 340), and no other basis is disclosed for other SUFI attorneys, we need not rule on the allowability of their legal fees and expenses. Once this decision is promulgated, Messrs. Claybrook *et al.* presumably will be compensated based upon their contingent fee arrangement with SUFI.

Respondent cites three pre-CDA decisions for the rule that a contractor's expenses of prosecuting an appeal before the ASBCA are not recoverable (gov't br. at 185). SUFI does not dispute that rule (app. br. at 426), so we need not belabor it further.

The parties dispute whether and to what extent SUFI employee claim preparation costs prior to prosecuting this appeal may be recovered. SUFI addresses the claim preparation costs of its employees Ansola, Smith, Broyles, Congalton and (presumably) Mr. Stephens, stating: "For the reasons more fully stated in SUFI's ...initial brief (at 424-33) as to why claim preparation attorneys fees and expenses are recoverable, these work hours for SUFI personnel are also recoverable" (app. reply br. at 35). SUFI urges the Board to apply a "clear-cut line provided by the common law—legal fees...directly related to the breach and foreseeable are recoverable; legal fees incurred in the actual litigation before the appropriate tribunal...are not" (app. br. at 428).

The terms and conditions of this non-appropriated fund contract did not include or refer to the FAR, Part 31, cost principles (finding 2). Nonetheless, this Board has held that the FAR criteria for the allowability of costs are useful in the absence of other guidance. *See Charitable Bingo Associates, Inc. d/b/a Mr. Bingo, Inc.*, ASBCA Nos. 53249, 53470, 05-1 BCA ¶ 32,863 at 162,852 (Board cited FAR 31.205-6(f), 31.205-1(e), 31.205-8 to deny recovery of claims for bonus and donations). In effect in April 1996, when the SUFI contract was awarded, (a) FAR 31.205-33 Professional and consultant service costs, provided:

(b) Costs of professional and consultant services are allowable subject to this paragraph...when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government (but see...31.205-47).

and (b) FAR 31.205-47, Costs related to legal and other proceedings, provided:

(a) *Definitions*....

Costs include...administrative and clerical expenses; the costs of legal services, whether performed by in-house or private counsel; the costs of the services of...consultants, or others retained by the contractor to assist it; costs of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceedings which bears a direct relationship to the proceedings.

....

(f) Costs not covered elsewhere in this subsection are unallowable if incurred in connection with—

(1) Defense against Federal Government claims or appeals or the prosecution of claims or appeals against the Federal Government....

*Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (*en banc*), stated the rule for classifying claim preparation and claim prosecution costs:

In classifying a particular cost as either a contract administration cost or a cost incidental to the prosecution of a claim, contracting officers, the Board, and courts should examine the objective reason why the contractor incurred the cost...[citation omitted]. If a contractor incurred the cost for the genuine purpose of materially furthering the negotiation process, such cost should normally be a contract administration cost allowable under FAR 31.205-33, even if negotiation eventually fails and a CDA claim is later submitted...[citation omitted]. On the other hand, if a contractor's underlying purpose for incurring a cost is to promote the prosecution of a CDA claim against the Government, then such cost is unallowable under FAR 31.205-33.

In applying the *Bill Strong* rule, this Board stated in *Grumman Aerospace Corp.*, ASBCA No. 50090, 01-1 BCA ¶ 31,316 at 154,673-74, *aff'd*, 34 Fed. Appx. 710 (Fed. Cir. 2002):

As the Court [in *Bill Strong*] observed, the line [between allowable FAR 31.205-33 and unallowable FAR 31.205-47(f) costs] is “rather indistinct.”

....

On the remand of *Bill Strong* to this Board...[w]e concluded that even though a CDA claim was filed and the parties were in litigation, evidence must still be taken to determine the purpose for which the costs were incurred. *Bill Strong Enterprises, Inc.*, ASBCA No. 42946, 96-2 BCA ¶ 28,428 at 141,999-142,000.... [T]he mere filing of a CDA claim does not automatically require a conclusion that costs incurred thereafter are unallowable costs of prosecuting a claim against the Government. The answer must depend on an examination of the evidence presented. On the other hand, costs incurred before the filing of a CDA claim are not automatically allowable and any presumption must yield to a consideration of the particular facts and circumstances involved....

In *Propellex Corp.*, ASBCA No. 50203, 02-1 BCA ¶ 31,721 at 156,730-31, *aff'd*, 342 F.3d 1335 (Fed. Cir. 2003), the contractor submitted a properly certified CDA claim in September 1994 seeking \$42,163 in claim preparation costs and in February 1996 the parties met and the CO offered \$77,325 to settle the contractor’s claim, which it rejected. We allowed recovery of \$25,497 in attorney fees incurred from January to 16 September 1994, holding that “Propellex can be said to have incurred the claim preparation costs for the purpose of materially furthering the negotiation process, which is a cost of contract administration. See *Bill Strong, supra*.” Similarly, in *American Mechanical, Inc.*, ASBCA No. 52033, 03-1 BCA ¶ 32,134 at 158,894-95, the contractor submitted its claim on 23 July 1996, subsequently met with the CO and negotiated and settled a number of its claim items but did not settle the claim preparation item. We held that the contractor’s costs incurred before claim submission were incurred for the genuine purpose of furthering the negotiation process and sustained their recovery. See also, *Advanced Engineering & Planning Corp.*, ASBCA Nos. 53366, 54044, 03-1 BCA ¶ 32,157 at 158,994-95, *aff'd*, 292 F. Supp. 2d 846 (E.D. Va. 2003) (same).

In the instant appeal, SUFI submitted its claim on 1 July 2005 (finding 8) and 14½ months later met with the CO, negotiated and attempted to settle 10 of its 28 claims (findings 13-16). In applying the *Bill Strong* rule to SUFI’s Counts, the foregoing facts adequately show that the objective reason SUFI incurred claim preparation costs and consulting fees prior to such claim submission was for the purpose of furthering the

negotiation process. The circumstance that the parties did not settle SUFI's 10 Counts on 13 October 2006 does not detract from that conclusion.

Therefore, we grant recovery of SUFI's claim preparation costs and consulting fees, accepting SUFI's hours for claim preparation, but quantifying them not at SUFI's claimed rate but at the employee's hourly rate (finding 11):

<u>Count</u>	<u>Amount</u>
I	\$9,511.33
II	1,962.16
IV	368.36
V	2,074.57
VII	843.94
VIII	347.78
	25.00*
IX	62.50*
X	317.21
XI	585.69
XII	639.46
	31.25*
XIII	1,263.46
XVIII	1,328.59
	75.00*
XIX	25.00*
XX	50.00*
XXIII	139.66
XXVI	<u>2,815.86</u>
Total:	\$22,466.82

\* Mr. Stephens' consulting fees.

### Conclusion

SUFI is entitled to recover the following principal amounts by count:

<u>Count</u>	<u>Amount</u>
I	\$194,472.98
II	227,151.65
III	0
IV	417,094.62
V	3,004.15

VI	0
VII	108,488.00
VIII	128,559.23
IX	758,463.00
X	162.86
XI	988.78
XII	368,916.75
XIII	483,864.87
XIV	0
XV	0
XVI	636,497.00
XVII	0
XVIII	151,614.00
XIX	20,368.79
XX	6,473.06
XXI	0
XXII	0
XXIII	937.44
XXIV	199,780.00
XXV	1,083.20
XXVI	1,666.80
XXVII	58,292.65
XXVIII	150.00
Revenue Sharing	0
Claim Preparation	<u>22,466.82</u>

Total: \$3,790,496.65

SUFI is entitled to interest on each of the monetary components of such \$3,790,496.65 to the extent stated in our holdings above.

We sustain the appeal to the extent set forth herein, and deny the balance thereof.

Dated: 21 November 2008

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

I concur

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

I concur

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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. 55306, Appeal of SUFI Network Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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