

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Gray Personnel, Inc.) ASBCA Nos. 54652, 55833
)
Under Contract Nos. DADA15-97-D-0023)
DADA15-98-D-0037)

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CPT Charles D. Halverson, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THRASHER

These appeals arise from two Army contracts awarded to Gray Personnel, Inc. (Gray) to provide nursing services.¹ ASBCA No. 54652, in the amount of \$329,872.97, relates to a contract for services at Walter Reed Army Medical Center (“WRAMC”). ASBCA No. 55833, in the amount of \$2,624,811.46, relates to a contract for services at Womack Army Medical Center (“Womack”). Although both contracts were personal service contracts to provide nursing services to supplement the Army hospital’s permanent nursing staff, the structure of the two contracts and facts underpinning appellant’s claims differ. We have jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. The government concedes entitlement on both appeals and this decision only addresses quantum.

INTRODUCTION

On 21 July 2009, the Board issued an Order of Proof of Costs to Gray. On 30 September 2009, Gray filed Appellant’s Statement of Claimed Costs with accompanying exhibits in three binders. One binder labeled Appellant’s Claim relates to ASBCA No. 55833 and contains the “A” exhibits with a total claim of \$2,692,163.95. Two binders labeled Supplemental Rule 4 File relate to ASBCA No. 54652 and contain the “B” exhibits with a total claim of \$350,997.48. On 12 October 2009, appellant provided

¹ Judge Wilson presided over the hearing of this appeal.

corrected sheets for some pages in the exhibits. We refer to the first binder as 55833, Appellant's Statement, and the second and third binders as 54652, Appellant's Statement.

On 14 December 2009, the government filed the Government's Statement in Response to Appellant's Statement of Claimed Costs (hereinafter the Government's Statement). The government attached Defense Contract Audit Agency (DCAA) Audit Report No. 1281-2010B17200001 (Revised), under the date of 9 December 2009. We refer to this report as the Audit Report. Because DCAA found Appellant's Statement and supporting data to be inadequate to support appellant's costs, they employed "alternative methods" to question the claimed costs (Audit Report at 80, 91, 102, 113). DCAA's alternative evaluation method included attempting to use the same computation methodology implemented by appellant in its Statement analyzing each contract year separately, and presenting their findings in the same format as Appellant's Statement (*id.*).²

Five individuals testified at the hearing. Appellant called Mrs. Johnson, Gray's president, and the two individuals who prepared Appellant's Statement, Mr. McDonald (55833) and Ms. Holloway (54652). The individuals who prepared the claim did not testify. The government called the two DCAA auditors who reviewed Appellant's Statement, Mr. Hensley and Ms. Raper. None of the contracting officers assigned to the contracts testified.

Appellant's post-hearing brief included attached exhibits 1 and 2 with page changes to exhibits A and B of Appellant's Statement, revising the total claimed on the WRMAC appeal downward from \$350,997.48 to \$329,872.97 and the Womack appeal downward from \$2,692,163.95 to \$2,624,811.16 (app. br., ex. B-2).³ Appellant explained that based on the evidence presented at trial and the concessions appellant made in several instances, its experts had recalculated the amounts claimed (app. br. at 1).

² For WRAMC, Audit Report, Schedule A-1 correlates to Option Year ("OY") 1 (1 October 1997 – 30 September 1998) (*id.* at 6, 8). Schedule A-2 correlates to OY2 (1 October 1998 – 30 September 1999) (*id.* at 6, 29). Schedule A-3 correlates to OY3 (1 October 1999 – 30 September 2000) (*id.* at 6). The Womack claim is analyzed in Exhibit B (*id.* at 54, 55). Schedule B-1 correlates to the base year (1 October 1998 – 30 September 1999) (*id.* at 54, 56). Schedule B-2 correlates to OY1 (1 October 1999 – 30 September 2000) (*id.* at 54, 79). Schedule B-3 correlates to OY2 (1 October 2000 – 30 September 2001) (*id.* at 54, 90). Schedule B-4 correlates to OY3 (1 October 2001 - 30 September 2002) (*id.* at 54, 101). Lastly, Schedule B-5 correlates to OY4 (1 October 2002 – 3 March 2003) (*id.* at 54, 112).

³ Appellant's post-hearing brief refers to an amount of \$392,872.97 for the WRAMC claim within the text. The supporting exhibits make clear that this amount is a transposition of \$329,872.97.

The government moves to strike "Exhibit 1" because it seeks to introduce evidence into the record after it was closed at the conclusion of the hearing (gov't reply br. at 6). The government is correct that the record was closed at the conclusion of the hearing and once the record is closed, unless a compelling reason is established and the circumstances are fair to both parties, the Board will not re-open it to accept new evidence (tr. 2/175). See Board Rules 13(b), 28(a); *T&M Distributors, Inc.*, ASBCA No. 51279, 01-2 BCA ¶ 31,442 at 155,276. However, the submitted documents are not evidence; they merely revise the numbers in appellant's claim. In a quantum case the proof of cost generally functions in the nature of a complaint. It represents the contractor's allegation of what it should recover which the contractor then attempts to support with evidence. Here, appellant sought to conform its allegation to the proof at hearing. As a result, we do not strike these documents. In our findings below, we address the A exhibits and B exhibits as presented prior to the hearing making note of post-hearing revisions to the extent relevant.

FINDINGS OF FACT

ASBCA No. 54652 ("WRAMC Appeal")

1. On 13 May 1997, Walter Reed Army Medical Center (WRAMC or the government) awarded Contract No. DADA15-97-D-0023 to Gray through the Small Business Administration (ASBCA No. 54652 (54652), R4, tab 7 at 2).⁴ The effective date of contract performance was 21 June 1997 (54652, R4, tab 7 at 3). The contract was a firm fixed-price requirements contract to provide 25 Full Time Equivalent (FTE) Licensed Practical Nurses (LPNs) (*id.* at B-1 to B-12). The period of performance consisted of a base period from 21 June 1997 through 30 September 1997 and four option years, fiscal years 1998 through 2001 (54652, R4, tab 7 at 3). The total estimated price of the contract at the time of award was \$3,926,840.09, including all option years (*id.* at 8). The government ultimately exercised all options and extended the contract six months, resulting in a completion date of 31 March 2002 (54652, R4, tab 21 at 2). Appellant's claim, which is the subject of this appeal, only addresses the first three option years.

2. Mrs. Johnson, Gray's president, prepared the proposals on the WRAMC contract (tr. 1/20-22). The contract was subject to the Service Contract Act (SCA) and the price was established and appellant was reimbursed under the contract based upon a negotiated burdened hourly rate for services rendered by each category of nurse (54652, R4, tab 7 at B-1 to B-12). The hourly rate was established by identifying the appropriate U.S. Department of Labor (DOL) hourly wage rate determination (WD) for each category of

⁴ Nursing services were primarily required by WRAMC but the contract allowed for negotiation for services at other locations and, in fact, services were provided at the United States Military Academy, West Point, New York (54652, R4, tab 7 at B-12).

employee and then applying a fringe costs percentage required by the SCA,⁵ a General and Administrative (G&A) overhead costs percentage and a negotiated profit margin percentage (54652, R4, tab 1, ex. 2). The DOL wage rate is a minimum hourly rate established for the local market, but a contractor may propose and negotiate a higher hourly rate if necessary to compete for labor in the local market and Gray did propose and pay wages at a rate higher than the SCA wage rate throughout the contract (tr. 1/117-18). At time of award, the hourly rate for the base period and option year 1 was \$19.96. The rate for option years 2 and 3 was escalated 4% to \$20.76 and for option year 4 by another 4% to \$21.59. (54652, R4, tab 7 at B-1 to B-12)

3. The base year and each of the option years provided three categories of personnel by shift. DOL WD No. 94-2103, Rev. 6, dated 5 May 1995 was provided in the solicitation for pricing purposes despite the fact it was not current at that time (54652, R4, tab 1, ex. 1). The solicitation should have been amended prior to award to incorporate WD No. 94-2103, Rev. 10, dated 3 February 1997, so that the offerors could adjust their prices accordingly. WD No. 94-2103, Rev. 10, was incorporated into the contract at time of award in Section J of the contract (54652, R4, tab 7, § J). However, no modification was issued to adjust the contract prices. Despite the fact Gray priced its proposal based upon the outdated rates in WD No. 94-2103, Rev. 6, we find that it proposed wage rates in all categories that were higher than the WD No. Rev. 6 or 10 rates (54652, R4, tab 7 at B-1 to B-12). Shortly after award Modification No. P00003 incorporated DOL WD No. 94-2103, Rev. 14, dated 1 July 1997, into the contract on 26 September 1997 allowing adjustment of the contract prices (54652, R4, tab 8).

4. Gray opened and was operating a local management office in Maryland by the fourth quarter of 1997 to support the WRAMC contract (54652, Appellant's Statement, tab 4 at 4). The total payments received by appellant consisted of the total invoiced sum of the nurse's contract negotiated hourly rate multiplied by the actual number of hours worked but there was no separate mechanism within the contract for paying costs such as those incurred for establishing, staffing and operating a local management office as a direct cost (Audit Report at 14). Mrs. Johnson did not include any overhead costs in Gray's proposal for opening a local office in Maryland because Gray's business strategy was to manage the work from the Chicago office (tr. 1/21, 22).

Contract Requirements

5. Gray's proposal and award were based upon the DESCRIPTION/SPECS./WORK STATEMENT at section C of the solicitation which describes an FTE requirement (54652, R4, tab 1). Section C contemplated the government

⁵ Fringe labor costs are costs associated with an employee that are incurred by the employer but not paid directly to the employee, such as vacation time, health insurance, etc. (tr. 1/64).

and appellant would schedule required nursing services four to six weeks in advance and then modify the schedule as necessary with changing demand two weeks in advance (54652, R4, tab 7 at C-15). Shortly after award, the government changed the method of performance from an FTE requirement, essentially a permanent placement basis, to a “*pro re nata*” (PRN) staffing, which is staffing on an as needed or supplemental basis (54652, compl. ¶¶ 41-45; gov’t br. ¶¶ 16, 39). Based on the record as a whole we find that appellant’s costs were increased by the government’s actions.

6. The contract included the following FAR and DFARS clauses: FAR 52.216-18, ORDERING (OCT 1995) (Ordering clause); FAR 52.216-21, REQUIREMENTS (OCT 1995) (Requirements clause); FAR 52.215-2, AUDIT AND RECORDS—NEGOTIATION (OCT 1995); FAR 52.233-1, DISPUTES (OCT 1995)—ALTERNATE I (DEC 1991); FAR 52.243-1, CHANGES—FIXED-PRICE (AUG 1987)—ALTERNATE III (APR 1984); and DFARS 252.24-7001, PRICING OF CONTRACT MODIFICATIONS (DEC 1991) (54652, R4, tab 7 at F-1, F-2, I-2, I-5, I-6).

Claim for Retroactive Wage Increase on Base Year and Option Years One Through Three

7. Gray began seeking increased wage rates on the contract shortly after award. Gray requested an increase in the unit price by letter dated 19 November 1997 (54652, R4, tab 9). Gray’s request stated that its bid was based on an erroneous and outdated SCA WD No. 94-2103, Rev. 6, included in the solicitation that led appellant to underestimate the hourly wage rate in its bid. It also asserted that it was entitled to an increase in the fringe benefit rate (*id.*). Again on 6 February 1998, Gray requested an increase in billing rate based upon the erroneous and outdated WD in the solicitation by letter to the contracting officer. This letter stated “Although the correct Wage Hour Determination (Revision 10) was included in our final contract award, the incorrect wage information has resulted in Gray Personnel Services actually operating at a loss in servicing this contract” (54652, R4, tab 10).

8. By letter dated 23 March 1998, appellant submitted a certified claim in the amount of \$109,904.25 for increased costs in the base year (Delivery Order (DO) Nos. 1-3) plus part of option year one (DO Nos. 4-11). Appellant stated “[t]his amount represents the difference in the amount of actual required wages and the erroneous Wage Hour Determination that was included in the...solicitation.” (54652, R4, tab 11 at 1) Gray’s claim was revised upwards to \$255,991.99 by letter dated 10 September 1998 which also included a proposal to modify the contract for option years two, three, and four by increasing the unit price from \$20.76 to \$25.55 for OY2 and OY3, and from \$21.59 to \$26.57 for OY4 (54652, R4, tab 14). The 10 September 1998 letter also included a breakdown by DO with the increase in the costs for DOs 0001 through 0016 totaling \$255,992, including interest and penalties. However, the letter also specifically stated the costs did not include hours billed for September 1998, which would be billed later in October. (*Id.*)

9. On 24 September 1998, Gray and the government entered into bilateral Modification No. P00004 that exercised option 2 applying the then current WD (54652, R4, tab 15). The modification increased the base price for option two to \$25.55 per hour stating the per hour rate for options 3 and 4 would be adjusted in accordance with the WD for those years. Among the stated purposes of the modification was to “settle all claims on subject contract”, settle all claims for outstanding amounts related to labor wage determinations against DO Nos. 0001-0016 and provide a “Settlement for DOL Wage Determinations 94-2103 Rev. 6, 10, and 14.” In addition, the modification authorized payment of \$255,992 in consideration of appellant’s claim and included a release stating:

In consideration of the modification agreed to herein as complete equitable adjustment for the above, the contractor hereby releases the Government from any and all liability under this contract for further equitable adjustment including, but not limited to delays, overhead and interest attributable to the facts and circumstances giving rise to this modification.

(*Id.*)

10. On 14 May 1999, Gray’s president wrote the contracting officer that “Section B refers to an estimated quantity of 15 FTEs. As you know, we have only 6 FTEs and the remainder of LPNs are ordered on an as needed basis, or PRNs. This discrepancy in estimated vs actual quantities has caused problems in scheduling and job cost over-runs.” The letter did not quantify the job cost overruns or otherwise assert a “claim.” (54652, app. supp. R4, tab 5)

11. Option four was exercised by Modification No. P00009 on 19 September 2000 (54652, R4, tab 16). Effective 3 November 2000, Modification No. P00010 increased certain unit prices in the fourth option year as a result of a revised WD (54652, R4, tab 17). On 21 March 2002, Gray submitted an uncertified request for reimbursement of \$160,732.11, exclusive of interest, for “retroactive payment” for wage adjustments for the contract periods “FY 1997-98, 1998-99, and FY 1999-2000” (54652, R4, tab 18). Gray’s request stated that it had submitted a request for these amounts as early as 13 October 2000, that it had been in contact with WRAMC contracting since then on this matter and, as recently as June 2001, was told that it would be paid retroactively but the government was still reviewing the figures for accuracy (*id.*).

12. The contracting officer responded to Gray’s letter on 8 May 2002 stating that the claim must be certified and be accompanied by a cost breakdown and that a request had been made to DCAA to audit the claim but the audit was delayed due to the fact that the government was extremely short-handed (54652, R4, tab 19). DCAA completed its audit of the claim on 22 August 2002 finding the proposed contract adjustment to be

unsupported and questioned the entire amount based upon the fact Gray could not provide supporting data to indicate an actual increase in employees' pay bringing their pay up to the newly established wage determination minimums as required by FAR 52.222-43 (54652, R4, tab 22 at 2). In fact, the audit found that appellant had paid its employees well above the wage determination minimums the entire timeframe of the contract (*id.*). As a result of the audit's findings, the contracting officer denied appellant's claim in its entirety on 9 September 2002 and appellant appealed the contracting officer's final decision to the Board on 6 December 2002 (54652, R4, tabs 23, 24). Gray's appeal was docketed as ASBCA No. 54036 (54652, R4, tab 25). The Board notified Gray on 15 January 2003 that its appeal lacked a certified claim (54652, R4, tab 27). As a result, this appeal was dismissed without prejudice and Gray submitted a certified claim on 14 February 2003 (54652, R4, tab 29). The contracting officer issued a new final decision denying the claim on 7 April 2003 and Gray again appealed to the Board on 15 April 2003 which was docketed as ASBCA No. 54161 (54652, R4, tabs 31, 32, 33).

13. On April 29, 2004, Mrs. Johnson authorized her attorney to withdraw the appeal based upon the DOL wage determination issue asserted in appeal ASBCA No. 54161 after she came to the conclusion Gray might not be entitled to an equitable adjustment (54652, Bd. corr. file, Johnson decl. dated 14 January 2005). The Board dismissed the appeal on 11 May 2004 (54652, R4, tab 37).

Claim for Contract Breach

14. By letter dated 26 April 2004, Gray submitted a certified claim for \$952,859 for damages incurred during the first three option years, fiscal years 1998-2000. Gray alleged that "the government breached the...contract in two ways," as follows: "First, after the base year, the government changed the contract from the supply of full-time equivalent ('FTE') LPN services to the supply of 'as needed' LPN services," dramatically increasing Gray's performance costs. Second, in reliance on the RFP, appellant "used the wrong Wage Hour Determination to determine its bid, dramatically under-pricing the true costs of its performance." (54652, R4, tab 36 at third page)

15. By letter dated 19 May 2004, Gray reduced its claim to \$704,431. The rationale for the claim was unchanged. (54652, R4, tab 38) The contracting officer responded to the claim on 10 June 2004 denying Gray's claim based upon changing the contract from a FTE to "as needed" basis and stated the DCAA would need to review the claim to determine any dollar amount due based upon the wage determination allegation and also the possibility that Gray was overpaid by Modification No. P00004 in the amount of \$255,991.99 (54652, R4, tab 39).

16. Gray considered the contracting officer's 10 June 2004 letter a complete denial of its 19 May 2004 revised claim and filed notice of appeal with the Board, which was docketed as ASBCA No. 54652 (54652, R4, tab 40).

17. On 29 September 2004 DCAA issued Audit Report No. 01281-2004G17200070 with findings on Gray's 19 May 2004 claim (54652, R4, tab 41). At the request of the contracting officer, the audit report also specifically reviewed the \$255,992 paid Gray by Modification No. P00004 for under-payments due to the use of the erroneous and outdated WD Rev. 6 used in the solicitation and pricing related to the WDs placed on contract. The audit found that, contrary to Gray's assertions, the wage rate placed on contract by incorporation of WD Rev. 10 was higher than appellant requested on 19 November 1997, six months after award,⁶ and that the WD hourly rates were updated several times over the period of performance.⁷ (54652, R4, tab 41 at 8-12)

18. On 17 November 2004, the government filed a motion to dismiss Gray's appeal with prejudice. In opposition to the motion, Mrs. Johnson submitted a declaration that stated in part at paragraph 44, "No part of Gray Personnel's May 17, 2004 REA includes monies allegedly due Gray Personnel due to any alleged lack of contract modification based on DOL wage determinations" (Johnson decl. ¶ 44). On 9 August 2006, the Board granted a motion to dismiss the appeal for lack of subject matter jurisdiction as to those delivery orders on which performance began prior to 26 April 1998 as they were barred by the statute of limitation. *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,476. The Board retained jurisdiction over the appeal as it relates to DO Nos. 13 and later.

APPELLANT'S WRAMC STATEMENT OF CLAIMED COSTS

19. Gray's WRAMC Statement was prepared by a consultant, Ms. Susan Holloway (tr. 1/155). Ms. Holloway did not participate in the preparation of the original claim nor did she prepare her findings based upon direct documentation but instead prepared Appellant's Statement based on her verification and review of documents prepared by two outside payroll service providers, Automated Data Processing (ADP) and PayChex, and a review of data included within the Rule 4 file (tr. 1/155, 156). Appellant's Statement asserted entitlement to only \$350,997.48 of the original \$704,431.00 claimed (54652, Appellant's Statement, tabs 1, 2). Appellant's Statement of its claim is as follows:

⁶ The wage rate in the solicitation (Rev. 6) was \$9.19 per hour. Appellant's 19 November 1997 letter stated the correct rate should have been \$12.69. However, the wage rate actually placed on contract for the base year (with add-ons) was \$19.96. (54652, R4, tab 7 at B-1 to B-5, tab 41 at 8).

⁷ P00007-CLIN 0013AB increased to a billable rate of \$40.90, P00007-CLIN 0013AC increased to a billable rate of \$30.90, P00008-CLIN 0013AA increased to a billable rate of \$43.35, P00009-CLIN 0013AA increased to a billable rate of \$26.57, P00010-CLIN 0013AF increased to a billable rate of \$40.90, P00012-CLIN 0014AB increased to a billable rate of \$35.00, P00014-CLIN 0014AC increased to a billable rate of \$40.90 (54652, R4, tab 41 at 8-12).

	<u>Option 1</u> 1 Oct 97 – 30 Sep 98	<u>Option 2</u> 1 Oct 98 – 30 Sep 99	<u>Option 3</u> Oct 99 – 30 Sep 00
Contract Revenues	\$ 996,922.00	\$ 905,696.00	\$1,489,615.00
Contract Costs:			
Direct Labor	\$ 801,793.71	\$ 632,295.69	\$1,036,986.71
ODC's	<u>\$ 80,526.29</u>	<u>\$ 82,304.01</u>	<u>\$ 160,553.60</u>
Subtotal	\$ 882,320.00	\$ 714,599.70	\$1,197,540.31
Overhead	<u>\$ 211,756.80</u>	<u>\$ 157,211.93</u>	<u>\$ 239,508.06</u>
Subtotal	\$1,094,076.80	\$ 871,811.63	\$1,437,048.37
Profit (10%)	<u>\$ 109,407.68</u>	<u>\$ 87,181.16</u>	<u>\$ 143,704.84</u>
Total	\$1,203,484.49	\$ 958,992.79	\$1,580,753.20
Less Revenues	\$ 996,922.00	\$ 905,696.00	\$1,489,615.00
Amount of Claim	\$ 206,562.49	\$ 53,296.79	\$ 91,138.20
			<u>Total Claim</u> \$350,997.48

(54652, Appellant's Statement, tab 2) Gray, in its post-hearing brief, reduced the total claimed to \$329,872.97 to conform its claim to proof presented at the hearing (app. br. at 1). The reduction resulted from a reduction of \$14,324 from ODCs in option year three (OY3) due to duplication with the claimed direct labor costs (*see* app. reply at 16, response to gov't PFF 66, Audit Report at 44) and \$4,880.10 in direct labor costs in OY1 that were paid prior to start of performance (*see* Audit Report at 13).

20. The Government's Statement, based upon the Audit Report, found that appellant failed to substantiate any of its claimed increased costs (Audit Report at 4). In fact, the questioned costs on the WRAMC claim were found to exceed the total amount claimed in each option year (Audit Report at 6). In addition, DCAA noted two other reasons to disallow all costs claimed during OY1. First, DCAA opined that Gray was already reimbursed for any monies claimed for OY1 by the \$255,992 received by Modification No. P00004 and its associated release of all claims for costs incurred under DO Nos. 0001 through 0016 during the base year and OY1. (Audit Report at 24-26) DCAA noted that Gray's request for payment that resulted in Modification No. P00004 stated that it covered all costs through August 1998 under DO Nos. 0001 through 0016, Modification No. P00004 was executed 24 September 1998 and the OY1 performance period ended on 30 September 1998. Although the WRAMC claim was not broken out by delivery order, DCAA opined that Modification No. P00004 fully reimbursed Gray for any claimed costs for OY1. (*Id.*) Second, DCAA noted that the Board's decision in *Gray Personnel Inc.*, would bar any claim for costs under Delivery Orders 5 through 12 (*see* finding 18). Because those delivery orders require services beginning on dates between 1 October 1997 and 1 March 1998 DCAA concluded that any claim as to those delivery orders would be barred. (Audit Report at 26) A summary of the WRAMC Audit Report's review is as follows:

	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>	<u>Total</u>
Amount Claimed	\$206,563	\$ 53,297	\$ 91,138	\$350,998
Amount Questioned	\$208,265	\$162,199	\$273,984	\$644,448
Difference	(\$1,702)	(\$108,902)	(\$182,846)	(\$293,450)

(Audit Report at 4)

DCAA WRAMC AUDIT FINDINGS

Claimed Direct Labor Costs

21. The majority of Gray's claimed costs consisted of direct labor costs (tr. 1/157). Appellant's total amount of direct labor costs asserted for the WRAMC contract was \$2,471,076.11 (54652, Appellant's Statement, tab 2). Appellant's Statement claimed the following amounts of direct labor costs by option year:

<u>OY1</u>	<u>OY2</u>	<u>OY3</u>	<u>Total</u>
\$801,793.71	\$632,295.69	\$1,036,986.71	\$2,471,076.11

(54652, Appellant's Statement, tab 2) Ms. Holloway prepared a summary and spreadsheets summarizing payroll records that were originally prepared by PayChex in the normal course of business (tr. 1/160). The Statement broke out the overall direct labor costs by option year and each quarter within an option year (54652, Appellant's Statement, tabs 2, 4, 10, 15). Each segment of the claim was associated with individual payroll records that included, Gray Personnel Inc. identification, the employee's name, wages paid, the time period of payment covered, and state tax withholding but did not include any information identifying the wages directly with a specific contract (*id.*, tabs 5-7, 12-15, 17-20). No records were provided to support the total amount claimed for the OY1, 4th Quarter (*id.*, tab 8).

22. Since there were no documents directly linking the labor costs incurred to this contract, Ms. Holloway's methodology for establishing the labor costs on the WRAMC contract was to review the payroll records and identify those individuals whose record reflected state tax withholding in the District of Columbia, Maryland, New Jersey, New York, or Virginia (tr. 1/159). Her premise for this methodology was based upon the assumption employees working at WRAMC, located in the District of Columbia, would live within the D.C. Metro area and those at West Point would live in either New York or New Jersey (tr. 1/159-60). Appellant's Statement did not include any base year labor costs (tr. 1/159; 54652, Appellant's Statement, tabs 2, 3).

23. Ms. Holloway testified, "I know of no commercial contracts that [they] had in D.C....[o]r Maryland or New York or Virginia" (tr. 1/160-61). Later in her testimony, Ms. Holloway testified that to her knowledge Gray did not have any other contracts in the

District of Columbia, Maryland, Virginia or New York (tr. 1/167). The government did not challenge the foundation for these statements nor did it offer any credible evidence to the contrary.

24. DCAA determined that the documentation included in Appellant's Statement was insufficient to demonstrate that Gray incurred the claimed costs. In addition, DCAA questioned the entire amount as incurred on this contract due to a lack of proof of the nexus between the costs and the contract. (Tr. 2/18-21, 157-58) DCAA specifically disagreed with Gray's assertion that tax withholding information on payroll service provider records was reliable enough to demonstrate that the employees associated with the records in fact worked on this specific contract:

We were unable to determine the amount of labor actually incurred on the subject contract from the details provided. No job cost ledger or employees' names and/or identification numbers were provided. Therefore, we have no way of verifying if the amounts claimed represent individuals actually working at WRAMC. The only thing that we can verify is that the amounts identified had taxes withheld in the District of Columbia, Maryland, New York, New Jersey, and Virginia.

(Audit Report at 3)

25. DCAA's reluctance to rely upon state withholding data to infer that the labor costs were incurred on this contract was based in part on the possibility that appellant had other contracts, government or commercial, within the states in question (tr. 2/18, 19). DCAA's concern was primarily based on a Proposed Plan of Action provided by appellant on 7 August 1997 in response to a Womack search letter issued by the contracting officer (*id.*). That Proposed Plan of Action, under FINANCIAL STABILITY, stated in part, "Gray Personnel Services has almost tripled its sales in the past two years...our sales have continued to increase..." (55833, R4, tab 3 at 8). We disagree with DCAA's conclusions and find that Gray has established its claimed direct labor costs were incurred on this contract.

Questioned Option Year 1 Direct Labor Costs

26. Appellant's Statement, as revised 12 October 2009, broke out OY1 direct labor by calendar year quarter as follows:

<u>CY97, Q4</u>	<u>CY98, Q1</u>	<u>CY98, Q2</u>	<u>CY98, Q3</u>	<u>Total</u>	<u>Adjusted Total</u>
\$187,170.49	\$203,699.51	\$188,284.85	\$229,727.41	\$808,882.26	\$801,793.71

(54652, Appellant's Statement tab 4 at 2) Appellant's Statement deducted \$7,088 from the total to account for an identified variance between the originally claimed labor costs and the costs found in the PayChex payroll records (*id.*). The \$7,088 variance consisted of \$2,564 in CY97 Q4 and \$4,524 in CY98 Q3 (Audit Report at 11). In addition, Appellant's Statement noted that the records for CY98 Q3 were unavailable so the amount stated was "backed into" based upon a comparison to records for FY 97 Q1 and FY 98 Q1 and 2 (Appellant's Statement, tab 4 at 3). DCAA compared the revised claimed labor costs in appellant's 12 October 2009 Statement with the PayChex payroll records submitted on 30 September 2009 (Audit Report at 10-11). DCAA's review identified specific areas of questioned costs that were not verified or not incurred during the option period. DCAA increased FY 98 Q2 by \$26,492 (Audit Report at 11-12). DCAA also found that Appellant's Statement included \$34,626.30 in salaries claimed during OY1, CY97 Q4, that were actually incurred on the base year of the WRAMC contract (Audit Report at 12).⁸ Ms. Holloway testified that it was proper to include these costs because although the labor was performed during the base year, the payroll was paid, and therefore, the expense was incurred at the beginning of OY1 (tr. 1/170). DCAA disallowed the costs because they were paid on 30 September 1997 and therefore were considered both incurred and paid prior to the start of OY1, 1 October 1997 (tr. 2/26-27). We find that DCAA was correct on this point. DCAA's final adjusted total number was \$793,660. DCAA also pointed out two additional factors that would bar direct labor and ODCs claimed during OY1. First, DCAA pointed out that the decision in *Gray Personnel, Inc.* would bar any claims for delivery orders issued before 26 April 1998. Therefore, any costs associated with DOs 5-12 would be barred. (Audit Report at 25, 26) This would bar the adjusted amounts claimed in CY97 Q4 and CY98 Q1 of OY1, \$149,980,⁹ and \$203,700 respectively and the first month of CY98 Q2, \$71,592,¹⁰ a total of \$425,272. Second, DCAA asserted that Modification No. P00004 was a bilateral modification executed on 24 September 1998, 6 days prior to the end of OY1 and, as a result, the modification included a general release that would bar any amounts claimed for OY1 (Audit Report at 24, 25).¹¹ Deducting the

⁸ \$4,880.48 was identified as actually paid prior to the beginning of the base year contract period (Audit Report at 13).

⁹ \$187,170.49 claimed in Appellant's Statement minus the variance recognized by appellant in the amount of \$2,564.17 and the \$34,626.30 actually incurred during the base year (54652, Appellant's statement tab 4 at 3).

¹⁰ The next delivery order was not issued until 1 May 1998. The \$71,592 represents one third of the total amount claimed \$214,777 (\$188,284.85 + \$26,492) for this quarter.

¹¹ DCAA raises this issue, arguing that the agreement language in Modification No. P00004 settled and fully compensated appellant for any amounts claimed in OY1. However, the government in its answer, argues that the agreement in Modification No. P00004 forms an accord and satisfaction and release barring any further claims but limits its coverage to increases due to DOL WDs (54652, answer ¶¶ 138, 141, 152). The government's post hearing briefs do not even raise the issue of accord and satisfaction or release related to Modification No. P00004. Since

identified amounts barred by the statute of limitations (\$425,272) from DCAA's final adjusted number, \$793,660, we find the total direct labor for OY1 was \$368,388. DCAA did not question the calculations of the direct labor costs claimed for OYs 2 and 3 (Audit Report at 27, 41). We find the total direct labor costs are as follows:¹²

<u>OY1</u>	<u>OY2</u>	<u>OY3</u>	<u>Total</u>
\$368,388	\$632,296	\$1,036,987	\$2,037,671

Administrative Labor Costs - ODCs

27. Gray claims \$323,384 for administrative labor costs or ODCs resulting from establishment and operation of Gray's local satellite office in Maryland (54652, Appellant's Statement, tab 2). Appellant's Statement claimed ODCs by option year as follows:

<u>OY1</u>	<u>OY2</u>	<u>OY3</u>	<u>Total</u> ¹³
\$80,526	\$82,304	\$160,554	\$323,384

(Appellant's Statement, tabs 3, 9, 15) Only administrative direct labor costs and payroll taxes associated with running the Maryland office were sought for OY1 and 2 (54652, Appellant's Statement, tab 4 at 4, tab 10 at 4, tab 16 at 4).¹⁴ The Maryland office was operating by the fourth quarter of 1997 and Appellant's Statement seeks direct office operating costs for that period (54652, Appellant's Statement, tab 4 at 4). The administrative labor costs are derived by appellant identifying the administrative employees by name and then cross referencing to salary information from the same payroll record used to support the direct labor claim (54652, Appellant's Statement, tab 4 at 3, 4, tab 10 at 3, 4, tab 16 at 3, 4). Appellant's proof of these costs is derived from employee earning statements provided by a third party payroll service, PayChex (*id.*). The employee earning statements include information on the time period of payments, amount of

appellant no longer relies upon its claim based upon use of the wrong wage determination (*see* finding 18) and the government argues the impact of Modification No. P00004 is limited to that theory of recovery, we do not address whether or not the agreement in Modification No. P00004 barred all amounts in OY1.

¹² All numbers are rounded.

¹³ The total is not included in Appellant's Statement but is rounded for purposes here.

¹⁴ The original claim included direct labor costs, payroll taxes and other administrative expenses, such as rent, furniture, etc. However, the other expenses were disallowed for OY1 and 2 by Ms. Holloway when she prepared Appellant's Statement. The OY3 Statement also disallowed the majority of other ODC expenses but retained costs for auto expense/parking, C&CT (Service Contract Act Health & Welfare Insurance) and postage.

payment, state for tax withholding, and employee identification information such as name, address, social security, etc. (*id.*).

28. DCAA questioned the total amount of claimed ODCs (54652, Audit Report at 14, 30, 31, 45). Specifically, DCAA asserted that the amounts claimed as administrative labor and associated taxes in Appellant's Statement were included in the burdened labor rates as G&A expenses and therefore, their inclusion in ODC costs was duplicative of these amounts included in the G&A cost pool (54652, Audit Report at 16, 33-4, 47). DCAA found that Gray's 6 February 1998 request for an increase in billing rates, which led to Modification No. P00004, did not separately break out the administrative salaries as ODCs but did include a G&A rate in the burdened labor rate per hour. DCAA went on to point out that as a SCA contract, the contractor is reimbursed based upon a burdened rate per hour and there were no separately established burdened rates for administrative salaries and associated payroll taxes. (Audit Report at 15, 30, 46) Additionally, DCAA review of Gray's internal accounting records revealed that Gray treated these administrative salaries as G&A not direct expenses. The administrative salaries were captured within the 6000 series of accounts which were recorded as G&A accounts in Gray's 1997 general ledger and 1998 and 1999 income statements from the compilation report included these expenses as G&A not cost of sales. (Audit Report at 15-6, 32-3, 46) DCAA's conclusion was that, "[t]he contractor did not provide any type of records or supporting documentation, adequate to demonstrate that these costs were not included in the G&A expenses originally included in the burdening of labor hourly rates on the subject contract. In fact, the administrative salaries are included in the expenses used to compute the G&A rate...." (Audit Report at 14, 33-4, 47) We disagree with DCAA's conclusions on this issue (*see* finding 4).

29. However, despite their overall finding, DCAA also reviewed the specific direct costs claimed. Appellant's Statement applied an 8.45% tax burden rate to the administrative labor costs for all option periods, which DCAA did not question.¹⁵ Appellant's OY1 Statement claimed a total of \$80,526 in burdened administrative labor costs. Of this amount, DCAA challenged \$3,374 as incurred out of period costs reducing the total to \$77,152 and we agree (Audit Report at 14). In addition, we find that the amounts claimed for the dates of the CY97 Q4 and CY98 Q1 and the first month of CY98 Q2 were incurred prior to 1 May 1998 and are barred by our decision in *Gray Personnel, Inc.* ASBCA No. 54652, 06-2 BCA ¶ 33378 at 165,476.¹⁶ As a result, we find that appellant's OY1 claim of \$80,526 is reduced to \$32,147.¹⁷ Appellant's Statement claimed a total of \$82,304 in burdened administrative labor for OY2. However, DCAA's review

¹⁵ The 8.45% burden rate includes 6.2% FICA, 1.45% Medicare and .8% Unemployment

¹⁶ *See* finding 18.

¹⁷ The record does not allow us to determine the precise amount of cost incurred during this period. As a result, we deducted 7/12th of the total amount claimed for the option period (\$45,005).

found a math error of \$9,901 so the DCAA verified a higher total of \$92,205 in burdened administrative labor costs during this period (54652, Audit Report at 30-33). Appellant's Statement for OY3 claimed \$160,553.60 in ODC costs. However, unlike the other two option periods, this amount included \$39,903 in non-labor ODC costs. DCAA questioned \$14,324 of the \$39,903 because the costs were duplicated in the Womack claim. (54652, Audit Report at 44-45) Based upon the record, we find Gray incurred ODC costs for OY3 in the amount of \$146,230 (\$160,553.60 - \$14,324). A summary of adjusted ODCs is as follows:

<u>OY1</u>	<u>OY2</u>	<u>OY3</u>	<u>Total</u>
\$32,147	\$92,205	\$146,230	\$270,582

Overhead/G&A Rate

30. Ms. Holloway testified that there was no documentation addressing the G&A rates on the contract so she included the rates prepared by the accountants who prepared the original claim (tr. 1/171-72). Those G&A rates asserted were 24% for OY1, 22% for OY2, and 20% for OY3 (54652, Appellant's Statement, tab 1). However, Ms. Holloway only applied a 22% rate to OY1 in Appellant's Statement (*id.*, tab 2).¹⁸

31. DCAA rejected the G&A rates asserted in Appellant's Statement on the basis the auditors were unable to determine which expenses were included in the G&A because no general ledger or source documents were made available for verification of accuracy of expenses included in the income statement for each period (Audit Report at 17-22, 35-37, 49-51). As a result, DCAA used alternative means to calculate G&A rates on the contract. For OY1, DCAA used the 14% rate the parties negotiated for Modification No. P00004, which reflected the latest negotiated G&A rate (*id.*). For OY2, DCAA escalated the negotiated Modification No. P00004 rate by a factor of 4.0 to arrive at a G&A rate of 14.56% (*id.* at 37-38). DCAA found that the contract rates did not change from OY2 to OY3 and therefore determined 14.56% was the proper G&A rate for OY3 as well (*id.* at 51-52). Ms. Holloway testified that in her opinion the G&A rates applied in Appellant's Statement are more appropriate because they are based on actual costs rather than a rate that was negotiated (tr. 1/185). Based upon the lack of insight into how Gray derived the claimed G&A rates and the fact there is no evidence in the record to support them, we find DCAA's approach is a more reasoned approach for determining a G&A rate. Accordingly, based upon the record, we find that the appropriate G&A rate for OY1 is 14% and OYs 2 and 3 is 14.56%.

¹⁸ The 29 September 2004 DCAA Audit Report No. 01281-2004G17200070 that reviewed Gray's 19 May 2004 claim stated that the contractor proposed a G&A rate of approximately 22% for OY1, 19.5% for OY2 and 16.87% for OY3 (54652, R4, tab 41 at 7, ¶ c).

Profit

32. Appellant's Statement applies a 10% profit rate on the WRAMC claim (54652, Appellant's Statement, tab 2). DCAA questioned the 10% profit rate applied to the contract (Audit Report at 22, 38, 52). The WRAMC contract, as awarded, included an 8.7% profit rate (54652, R4, tab 7 at 8¹⁹; Audit Report at 23). Ms. Holloway testified that the 10% rate was included in Appellant's Statement based upon the rate included in the original claim and she "felt it was reasonable considering the risks involved [in]this contract" (tr. 1/179). Based upon the lack of insight into how Gray derived the 10% rate in its claim and no evidence in the record to support it, we find DCAA's approach is a more reasoned approach for determining a profit rate. Accordingly, we find the appropriate profit rate is 8.7%.

Revenues

33. Appellant's Statement provided no supporting documentation for the revenue numbers it included in its claim (Audit Report at 23-24, 38, 52). Ms. Holloway testified that the revenue numbers used in Appellant's Statement were those included in the claim of 26 April 2004 because there was no documentation (tr. 1/179). DCAA questioned all of the revenues contained in Appellant's Statement as unsubstantiated (Audit Report at 23-24). In addition, DCAA contacted the contracting officer to verify the total revenue amounts from the contracting officer's records or DFAS. However, as of the time of the hearing there was no response from the contracting officer or DFAS. (Tr. 2/95-98) A summary of the revenues by option period is as follows:

<u>OY1</u>	<u>OY2</u>	<u>OY3</u>
\$996,922	\$905,696	\$1,489,615

We conclude, for purposes of determining damages, that revenues were not less than the amounts alleged by appellant.

Summary

34. Based upon the above, we find that the record shows the following costs and profit, less revenue:

¹⁹ The eighth page of tab 7 is entitled, "CONTRACT PRICING PROPOSAL COVER SHEET." In block 8c of that document a profit dollar figure is listed for the base and the out years. Each of the figures represents 8.7% of the cost for each period listed in block 8b.

	Option 1	Option 2	Option 3
Labor	\$368,388	\$632,296	\$1,036,987
ODC's	<u>\$ 32,147</u>	<u>\$ 92,205</u>	<u>\$ 146,230</u>
Subtotal	\$400,535	\$724,501	\$1,183,217
G&A @	14%	14.56%	14.56%
	<u>\$ 56,075</u>	<u>\$105,487</u>	<u>\$ 172,276</u>
Subtotal	\$456,610	\$829,988	\$1,355,493
Profit (8.7%)	\$ 39,725	\$ 72,209	\$ 117,928
Total Costs	\$496,335	\$902,197	\$1,473,421
Less Revenue	\$415,384 ²⁰	\$905,696	\$1,489,615
Total	\$ 80,951	(\$ 3,499)	(\$ 16,194)
			<u>Net Total</u>
			\$61,258

DECISION

ASBCA No. 54652 WRAMC APPEAL

PARTIES' CONTENTIONS

Appellant asserts the government is liable for the difference between appellant's incurred costs and revenues received during performance because the government breached the contract in two ways: "First, after the base year, the government changed the contract from the supply of full-time equivalent ('FTE') LPN services to the supply of 'as needed' LPN services," dramatically increasing appellant's performance costs. Second, in reliance on the RFP, appellant "used the wrong Wage Hour Determination to determine its bid, dramatically under-pricing the true costs of its performance." (Finding 14) However, appellant no longer asserts recovery based upon use of the wrong Wage Hour Determination. Although asserted in both its claim and complaint in this appeal, appellant denied it formed the basis of this appeal when responding to a motion for summary

²⁰ We recognize that seven months (7/12) of Gray's incurred costs are barred by the statute of limitations and that the total cost of \$496,335 represents those cost incurred during the last five months of the option year. However, it is impossible to determine from the record the exact revenues received during the last five months of the contract period. As a result, we have only allocated 5/12 of the total revenues against the incurred cost.

judgment in this appeal and it is not mentioned in appellant's post-hearing briefs.²¹ As a result, only the claim for converting the contract from an "FTE" to an "as needed" contract is before us in this appeal.

The government concedes entitlement but counters appellant has failed to prove the government's actions caused appellant any monetary harm (gov't br. at 1). The government's rebuttal falls into four general categories. First, the majority of appellant's claim is for labor costs which are either the direct labor of the nurses or the administrative labor incurred in establishing and operating the local satellite offices to manage each contract, claimed as ODCs. Since there are no job ledgers or similar documents that explicitly connect the costs to this contract, the government contends that appellant has not proven the labor costs claimed were incurred on this contract. Second, in regard to the claimed ODCs, even if appellant can prove the nexus between the administrative labor costs and this contract, they were included in appellant's overhead when it prepared its proposal for award and therefore should not be reimbursed as a direct expense. Third, the government further asserts that the government requested appellant provide documentation to support its claims on numerous occasions, which it has failed to do, and DCAA has conducted numerous audits on appellant's claims but these efforts have not provided sufficient proof to demonstrate government harm or to quantify any harm. Finally, even if appellant can prove all of the above, the government asserts appellant was paid for all the work it billed, so it has been fully compensated for any impact the government caused. In summary, the government concedes entitlement but takes the position that appellant is not entitled to any monetary compensation for government actions.

DISCUSSION

Appellant asserts the government is liable for the difference between appellant's total incurred burdened costs and revenues received during OY1, 2 and 3. Appellant's costs include direct labor, ODCs, overhead and profit, with the majority of the amounts claimed consisting of direct labor and ODCs (finding 19). The direct labor costs consist of hourly rates paid the nurses and the ODCs consist of the cost of establishing and operating the local management office to support the increased workload under the contract (finding 27). The crux of appellant's claim is that the government changed the requirements of the contract requiring a more expensive manner of performance than contemplated in its pricing for this contract and, as a result, it incurred unanticipated increased costs (finding 14). Appellant characterizes its claim as "essentially one of *quantum meruit* – the

²¹ Mrs. Johnson executed a declaration dated 14 January 2005 in support of appellant's opposition to the government's motion for summary judgment in this appeal that stated at paragraph 44, "No part of Gray personnel's May 17, 2004 REA includes monies allegedly due Gray Personnel due to any alleged lack of contract modification based on DOL wage determinations" (finding 18).

contractor incurred costs in performing work, which work was accepted by the Government, but not paid for by the Government” (app. br. at 4, 5).

Quantum meruit may be used in a situation where the contractor has provided goods or services pursuant to an express contract, but the government refuses to pay for them because of defects in the contract that renders it invalid or unenforceable. *Perri v. United States*, 340 F.3d 1337, 1344 (Fed. Cir. 2003). However, that is not the situation here. Although appellant characterizes its claim in terms of a breach of the contract, we view this claim as one of a constructive change to the contract (finding 14).

Appellant’s recovery for an equitable adjustment requires proof of three necessary elements: (1) liability – that the government did something that changed the contractor’s costs for which the government is legally liable; (2) causation – that there exists a causal nexus between the basis for liability and the claimed increase in costs; and (3) resultant injury. *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991). The government concedes element one, liability. The crux of this appeal is whether appellant has proven causation – that the claimed increased costs were the result of the government’s actions and incurred on this contract – and, if so, by what amount.

Our findings above resolve the parties’ contentions to the extent necessary regarding the allocability of the claimed costs to this contract (the government’s first point). Ms. Holloway testified that appellant did not have any other contracts in the states she used to establish the allocability of the labor cost to this contract. The government did not challenge the foundation for these statements nor did it offer any credible evidence to the contrary. (Finding 23) The only evidence proffered by the government on this issue is a Proposed Plan of Action letter that appellant submitted in 1997 in support of its proposal on the Womack contract (finding 25). We find the government’s proposed evidence is unpersuasive in this regard and conclude appellant has established the nexus between its claimed direct labor and administrative labor (ODC) costs and this contract. We also disagree with DCAA’s conclusion that the ODCs were included in the G&A rates (the government’s second point). Mrs. Johnson testified that she did not include any costs in G&A for a local management office because her plan was to manage the contract out of the Chicago office (finding 4). We do not find DCAA’s rationale persuasive enough to establish these costs were included within G&A. As a result, we conclude they were not.

Although appellant established the allocability of the claimed costs to this contract, and that the ODCs were not included in the G&A rates, it still bears the burden of proof to establish the nexus between the government’s actions and any increased costs claimed. The basis of appellant’s claim is that the government changed the requirements of the contract requiring a more expensive manner of performance than contemplated in its pricing for this contract and, as a result, it incurred unanticipated increased costs (finding 14). Appellant asserts the majority of its claim is for increases in unreimbursed direct labor

costs. However, appellant structured its claim in such a way that it is impossible to specifically quantify any increased direct labor costs associated with government actions without assuming all of appellant's increased costs were caused by the government. In addition, no evidence was presented in the record to establish the specific nexus between the government's actions and appellant's increased labor costs. Likewise, the record does not include any evidence of specific unbilled hours. However, the government concedes entitlement and confronted with the government's clear liability we conclude the government's actions had some increased cost impact upon appellant. However, the record does not establish the allocation of fault between the government and appellant. Accordingly, we consider whether we may make an award on the basis of a jury verdict.

There are three elements required for a jury verdict. *Grumman Aerospace Corp. v Wynne*, 497 F.3d 1350, 1358-59 (Fed. Cir. 2007). The first is clear proof of injury. Here the government concedes entitlement. Appellant has, therefore, established injury. The second element is that there is no more reliable method for computing damages. Given the change to appellant's manner of performance, it was impracticable to prove actual damages. The third element is that evidence is sufficient for a court to make a fair and reasonable approximation of damages; given the evidence in the record, we can do so. For example, the major portion of appellant's claim is for direct labor costs and ODCs. For the most part, we have evidence from payroll records and other documentation of the costs incurred (findings 21, 27). In those areas where there is a lack of direct records, such as G&A, profit, etc., we have access to information to approximate the applicable rates (findings 30-33). As a result, we conclude, contrary to the government's remaining arguments, that the evidence allows us to make a fair and reasonable approximation of the damages incurred.

We believe the evidentiary record here fully supports application of a jury verdict and we would be remiss if we were to deny appellant's recovery here where the government's actions so obviously adversely impacted appellant's manner of performance of the contract. At the same time, appellant has not shown that the entire amount is 100% attributable to the change. However, the government has conceded entitlement. We found appellant proved actual burdened costs after revenues of \$61,258 (finding 34). In the nature of a jury verdict, we conclude that appellant is entitled to recover 85% of that amount \$52,069.30 (85% of \$61,258) as a result of the government's actions.

FINDINGS OF FACT

ASBCA No. 55833 ("Womack Appeal")

35. The WRAMC contracting officer sent Gray a search letter on 31 July 1997 inquiring into Gray's interest and ability to fulfill a requirement for providing nursing services at the Womack Army Medical Center ("Womack"), Fort Bragg, North Carolina (55833, R4, tab 2). The search letter put Gray on notice that the proposed Womack

contract would be more extensive and complex than the WRAMC contract, which Gray was performing at the time (*id.*). The search letter informed Gray that the Womack requirement would primarily differ from the WRAMC requirement in two ways. First, Gray would be required to provide LPNs but with a 72-hour response time from notification of services required. Second, there was a more extensive requirement for 72-hour response time for a variety of type of nurses. The overall purpose of the contract would be to:

[P]rovide supplemental staffing on a temporary basis when other staff are unavailable, generally due to deployment, extended training, reassignments or vacation. The intent is to have a readily available pool of nursing personnel to meet personnel shortages.... [T]he contractor is responsible for having an established method available at all times to meet the 72-hour availability of personnel. That is what makes performance under this contact complex for the contractor.

(*Id.* at 2) Gray responded to the search letter on 7 August 1997 expressing its interest in fulfilling the Womack requirement and attached a proposed plan of action that summarized its methods of “soliciting and qualifying LPN and RN personnel, retraining qualified personnel, arrangements with local agencies as a backup source” and how Gray would “guarantee 100% reliability” (55833, R4, tab 3). This letter also included an attached “Fort Bragg Action Plan” that described specific steps it would take to phase into the contract during the first twelve weeks after award. The phase in plan included setting up a local office during the 4th week after award. (*Id.*) Gray submitted a proposal to the government on 23 January 1998 (55833, R4, tab 6). Negotiations continued until 24 July 1998 when the government forwarded Gray copies of the award document for signature (55833, R4, tabs 7-11). On 3 August 1998, Gray’s representative, Mr. Jamie Cruz, confirmed Gray’s proposal prices by fax (55833, R4, tab 12).

36. Gray entered into a personal services contract DADA15-98-D-0037 with the government on 14 August 1998 to provide ancillary nursing services at Womack (55833, R4, tab 1 at 2).²² The contract was a firm fixed-price personal services requirements contract consisting of one base year and four one-year options with an original performance period of 1 October 1998 through 30 September 2003 (55833, R4, tab 1 at 2-31). The first three options were exercised, but not the fourth (55833, R4, tabs 45, 70,

²² As with the WRAMC contract, the government awarded the Womack contract to the SBA as an 8(a) set-aside. The contracting officer signed the SF 26 for the Womack contract on 27 July 1998. (55833, R4, tab 1 at 2) On 30 July 1998, Janice Gray, President of Gray Personnel, Inc., signed the SF 26 and the SBA contracting officer acknowledged award on 14 August 1998 (*id.*).

89). Instead, option three was extended twice for a total contract extension period of six months, 1 October 2002 through 30 November 2002 by Modification No. P00011 and 1 December 2002 through 31 March 2003 by Modification No. P00013 (55833, R4, tabs 129, 142).²³ As a result, the actual performance period was 1 October 1998 through 31 March 2003. The contract as awarded required the contractor “at all times to maintain an available pool of personnel to meet the requirement to fill shifts within 72-hours” (55833, R4, tab 6, ¶ C.1.3.1.). The claim which is the subject of ASBCA No. 55833 relates to the entire period of performance.

37. As on the WRAMC contract, the contract price was established and appellant was reimbursed per the contract based upon a negotiated burdened hourly rate for services rendered by each category of nurse based upon a WD (55833, R4, tab 6 at B1-5). The hourly rate was established by applying the current DOL hourly wage rate for each category of employee and then adding the fringe costs percentage required by the SCA, G&A overhead cost percentage and negotiated profit margin percentage (55833, R4, tab 6, § J attach. 1). However, the intended scope of the Womack contract was broader than the WRAMC contract, with twelve categories of personnel listed for the base year and each of the option years. At the contracting officer’s request, DCAA performed an audit on the contract pricing and published their findings in DCAA Audit Report No. 1281-2004G17900009 (Womack Pricing Audit) on 25 November 2003 (55833, Appellant’s Statement, tab 36). The purpose of the audit was to verify, for each category of nurse, Gray’s initial price bid, the actual rate paid and the Health and Welfare rate paid per hour paid (*id.* at 1). The focus of the audit was verifying the prices paid for each category of nurse by examining payroll records of nurses working on the contract and sampling DD 250s submitted under the contract for payment (*id.* at 11, 12). The audit did not examine total revenues received under the contract.

38. The contract included the following FAR and DFARS clauses: FAR 52.216-18, ORDERING (OCT 1995) (Ordering clause); FAR 52.216-21, REQUIREMENTS (OCT 1995) (Requirements clause); FAR 52.215-2, AUDIT AND RECORDS-NEGOTIATION (AUG 1996) (Audit Clause), FAR 52.233-1, DISPUTES (OCT 1995); DFARS 252.243-7001, PRICING OF CONTRACT MODIFICATIONS (DEC 1991); and FAR 52.243-1, CHANGES-FIXED-PRICE (AUG 1987) -ALTERNATE III (APR 1984) (R4, tab 6 at F-1, F-2, I-1, I-3, I-4, I-5).

Contract Performance

39. The government’s requirements quickly overwhelmed both the government contract administration staff and Gray’s management and recruiting staff. The total hours ordered under the contract substantially exceeded the estimated hourly maximums and not

²³ Although the contract was extended by extending option three rather than exercising option four, the extension is referred to as option four by both parties.

all nursing hours ordered were documented by a task order (tr. 1/44-47). In addition, some of the nursing specialties ordered did not correspond to the CLINs (55833, Appellant's Statement, tab 24 at 1, OY3). Based upon the record as a whole, we find that appellant's costs were increased by the government's actions.

Establishment of Womack Field Office in North Carolina

40. Because of the unexpected workload on the Womack contract, Gray was forced to open a full-time office in North Carolina and "hire more people" (tr. 1/29). Mr. DeVoe, from the WRAMC office in Maryland, sent a fax to Mr. Jamie Cruz in the Chicago office on 21 October 1998 requesting payment for a trip to North Carolina to locate office space and equip an office (55833, R4, tab 167, ex. 5). The fax stated, "Mrs. Johnson has instructed me to travel to North Carolina on Monday to finalize the acquisition of office space for the Fort Bragg contract.... Also, I will investigate sources for office furniture, setting up telephone service, utilities, etc." (*Id.*) In fact, during the base year Gray rented office space, purchased equipment, and hired six additional employees to staff the office (55833, R4, tab 164 at 4 ¶ 10, tab 167 at 12).

41. Mrs. Johnson testified that she prepared the Womack proposal and because her proposal was based upon the original contract estimated hours, she did not include any overhead costs for opening a local office in North Carolina and DCAA found such costs were not included in appellant's proposal as labor burden rates or direct costs (tr. 1/22). Mrs. Johnson testified, in reference to her original business plan, that Gray's original strategy was to use a contracted service it had used on other contracts in other states to obtain a "virtual office" service, i.e., for a set monthly fee the company provides a local address, telephone number and a location to interview perspective employees, etc. (tr. 1/27-29). It was a branch office opened to exclusively service the Womack contract (55833, R4, tab 167 at 4). We find that the branch office was opened exclusively to service the Womack contract, that all costs originating from the office were allocated directly to the Womack contract and the office was closed at the end of the Womack contract.

Initial Request for Equitable Adjustment (REA)

42. Gray submitted an REA to the contracting officer on 23 March 2005 seeking to recover \$1,289,014 (55833, R4, tab 152). The REA asserted that the government modified the anticipated method and manner of performance at Womack causing an increase in Gray's costs to perform the work. Specifically, Gray's stated rationale for the REA was (1) the government grossly under estimated hours by as much as 100% for the term of the contract, the base year and options, and (2) the government changed the terms of the contract from servicing a 200-bed hospital facility to servicing a 300-bed facility when it opened the new Womack Army Medical Center in March of 2002. (*Id.*) Appellant's REA was structured to break out costs by the contract base year and options 1-4, further broken out by labor costs, other direct costs (ODCs), administrative staff, indirect costs and

revenues (*id.*). Labor costs were further broken out by quarter. Direct costs were broken out by the name of personnel and by individual expense indicating the amount of costs by base year and option years on the contract. (*Id.*) In addition, wages for administrative staff charged as direct costs were further broken out by quarter and by name (*id.*). Revenues were broken out for each of the five years by labor category (*id.* at 5 Year Revenues). No substantiating documentation was submitted with the REA but the cover letter stated much of the supporting documentation was in the possession of the DCAA (*id.*).

43. The contracting officer enlisted assistance from DCAA to assess Gray's REA (tr. 2/7-10). DCAA auditors visited appellant's location in Beaufort, South Carolina on 17 May 2005 after providing Gray with a detailed data request prior to their visit (55833, R4, tab 153 at 1; tr. 2/7-10). Mrs. Johnson rented a conference room, arranged to retrieve her records from storage and provided the auditors with the information she believed they had requested, consisting of approximately 100 boxes of documents organizing the materials into stacks (55833, R4, tab 167 at 3; tr. 1/34). The auditors considered the materials to be too disorganized and not adequately cross referenced to review (55833, R4, tab 166 at 5). As a result, the auditors cut short their review and instead requested additional information from Mrs. Johnson to conduct their audit (tr. 2/8). DCAA received a package from Mrs. Johnson containing some, but not all, of the requested documentation and on 30 June 2005, Mrs. Johnson informed DCAA that more documents would be provided (55833, R4, tab 155).

Womack Claim

44. Gray revised its REA by letter on 29 August 2005 increasing the amount claimed from \$1,289,014 up to \$2,516,887, stating it was doing so "as suggested by the DCAA and in response to a conference with the Contracting Officer" to address the auditor's comment that the numbers in Gray's claim did not match with financial statements submitted by appellant. (55833, R4, tab 157) Again, Gray described the basis of its claim as a result of the breakdown of contract administration on the contract stating:

In response to its conference with the Contracting Officer, Gray again states that it was unable to assess the negative impact of these changes at the time they occurred due to (1) the inconsistent and erratic way in which the orders were made, and (2) the non-sequential way in which the delivery orders were presented to Gray.

After Gray Personnel's last discussion with the Contracting Officer, Gray Personnel retrieved many of the delivery orders in question from storage. What Gray Personnel learned was that many of these delivery order/modifications were issued only after the work was performed. That is, the

government ordered Gray Personnel to perform additional hours of work and Gray Personnel performed as ordered, only to learn at the time payment was due, that the government had never issued a delivery order adding those additional hours. Gray Personnel would then have to wait until after the government produced the delivery orders in order to be paid for the services rendered, nullifying Gray Personnel's option to accept or reject the additional work when the government ordered it. In this way, the government changed the terms of the contract and increased Gray Personnel's costs to perform.

Due to Womack's inconsistent ordering pattern, and the manner in which the government presented the delivery orders to Gray Personnel, Gray Personnel could not calculate the cumulative cost impact on its bottom line until now, when it could properly evaluate the total and cumulative impact of these changes on its costs. That is, the government failed to timely issue delivery orders for all work Gray Personnel either performed or was performing. Gray Personnel often did not discover until after it had performed the changed work that the government had failed to issue a delivery order for that changed work. At the same time, the government issued more changes. Thus, Gray Personnel was entirely consumed, first, with performing the changed work and then with the effort involved in getting paid for that work. Under such circumstances, Gray Personnel could not possibly calculate that cost impact while the cycle of ordering and performing the work and then issuing a delivery order continued. Finally, Gray Personnel notes that the delivery orders were marked "Contractor is not required to sign" further confusing the problem as routine paperwork often did not reach the administrative level required to recognize and resolve problems such as this as quickly as delivery orders requiring signatures would.

(55833, R4, tab 157) This revision also included a CDA claim certification and requested a contracting officer's final decision. We find that, although the parties used the term "REA" and "claim" interchangeably, appellant's claim relating to the Womack appeal (ASBCA No. 55833) was filed on 29 August 2005.

45. On 2 September 2005, DCAA forwarded a letter to the contracting officer regarding appellant's revised REA that concluded, "[DCAA] cannot perform additional audit services until the company provides necessary information as discussed. Absent

additional, relevant support we will respond appropriately that the basis for the revised REA amount is not adequate.” (55833, R4, tab 159 at 4)

46. Gray submitted a revision to its claim along with a cost breakdown on 12 September 2005 (55833, R4, tab 160). The claim included summary statements for the base year and each of the option years that included: (1) Gray’s revenues from Womack; (2) Cost of Sales (Womack Contract Employee wages); (3) Direct Costs (all costs associated with the Womack contract); and, (4) Indirect Costs (Other Operating Expenses). This revision increased the total amount claimed by \$48,225 from \$2,516,887 to \$2,565,112. Source documents were not attached to the claim but the cover letter stated, “The source documents showing all of the details were sent to the DCAA auditors” (*id.*).

47. In response, the contracting officer on 16 September 2005 requested that Gray provide supporting data relating to appellant’s 23 March 2005 REA (55833, R4, tab 161). Gray replied by email on 28 September 2005 requesting additional time until 31 October 2005 to provide the requested data (55833, R4, tab 162). On 24 October 2005, Gray requested a second time extension till 11 November 2005 to provide the requested substantiating data (55833, R4, tab 163). On 10 November 2005, Gray provided the contracting officer with a detailed response to DCAA’s audit of “Gray’s initial and revised REA” and stated that it should be able to provide additional records by the “end of November 2005” (55833, R4, tab 164 at 1, 6). In addition, appellant responded in detail to DCAA’s review of its initial and revised REA on 10 November 2005 stating in part that it had “no other clients or business in or near NC. Therefore, Gray opened, staffed, and equipped an office in Fayetteville, NC specifically to service the Womack contract. Accordingly, all costs are directly attributable to that contract.” (*Id.* at 4, ¶ 10) However, on 6 December 2005, in response to an email from DCAA of the same date, Gray indicated that it had submitted all requested additional supporting data (55833, R4, tab 165).

DCAA REA Audit Report

48. On 13 July 2006, the DCAA issued Audit Report No. 1281-2005G17900060 (hereinafter REA Audit) (55833, R4, tab 166). In that report, DCAA questioned the entire amount claimed by Gray (*id.* at 1). DCAA concluded that appellant “failed to substantiate the basis/cost support for the REA amounts as required by FAR 31.201-2(d)” (*id.*). Because of the poor organization of the company’s records and Gray’s inability to produce records that substantiated the claim, DCAA also concluded the company’s accounting system was inadequate to support work on government contracts (55833, R4, tab 166 at 18). The audit noted the claimed other direct costs were not related to nursing hours performed and since the contract only contemplated payment on the basis of nursing hours, these costs were improperly included within the direct costs (*id.* at 9, ¶ c). In addition, the audit report stated “Based on our analysis of the DD-250 billings submitted by the contractor and discussions with the contracting officer, the contractor was paid by the government for every hour requested (billed) on the requirements type contract” (*id.* at 10).

Claim for Extension of Option Three Rather than Exercise of Option Four

49. Gray responded to the 13 July 2006 REA Audit Report on 11 October 2006 with detailed responses to some of the auditor's findings and stated that it believed "the DCAA report [was] inadequate" (55833, R4, tab 167 at 1). The cover letter repeated the basis for its claim from the initial REA, but added a new rationale based upon the government's decision to extend option three in lieu of exercising option four which Gray asserted resulted in it paying its nurses a higher rate than it could recover from the government (*id.*). Gray asserted that the government exercised option four by Modification No. P00011 on 21 August 2002, but then cancelled the exercise of option four and instead extended option three with a lower wage rate (*id.* at 2). Gray asserted that because of the government's actions it began paying its employees at the option four higher hourly rates after Modification No. P00011, but when the government unilaterally cancelled option four and instead extended option three, Gray was paying higher wages to its employees than it could bill the government (*id.*). A sample of the form letter dated 12 November 2002 was attached to the response letter. The form letter informed employees of a pay raise that would be reflected in their paycheck dated 15 November 2002. Also attached was a spreadsheet identifying specific employees by their current pay rate and with the increase and detailed spreadsheets of "Contract Employee Wage Report Before Increase" and "Contract Employee Wage Report After Increase."²⁴

50. Gray's audit response also addressed opening the local management office and the company's accounting system. Gray stated the questioned direct costs were justified because the Fayetteville field office was only opened in response to the overwhelming workload to solely service the Womack contract. (55833, R4, tab 167, resp. to DCAA statements 7, 13, 14, 25 at 4, 6, 10) Concerning the auditor's comments regarding the inadequacy of the company's accounting system, Gray stated:

Gray Personnel has been a government contractor since 1990. However, I must agree with the auditor to the extent that our accounting system was not adequate to support such a huge amount of unanticipated business.

According to the offer letter sent to the U.S. Small Business Administration for Gray Personnel, the annual revenues on this contract should have been \$100,000-\$500,000. When the SBA accepted this requirement for Gray Personnel, we were both under the impression that this was a manageable contract based

²⁴ This theory of recovery is not raised in appellant's initial or amended complaints and is also not raised in any of appellant's post-hearing briefs. Consequently, we do not consider this theory of relief at issue in this appeal.

upon Gray's internal systems at that time. We did not anticipate opening, furnishing, equipping and staffing an office in NC, hiring on-call personnel around-the-clock, purchasing hardware and professional staffing and timekeeping software for hundreds of PRN employees. As an 8a firm, Gray should not have been required to have the same accounting system and staff as a multimillion dollar prime contractor with the federal government.

(*Id.* at 19, resp. to DCAA Statement 45)

51. On 5 December 2006, in response to a request from the contracting officer, DCAA provided a lengthy document addressing Gray's concerns and discussing why they lacked validity (55833, R4, tab 168). DCAA took the position that the contract did not require appellant to establish a second office and that it appeared to be Mrs. Johnson's personal business decision to do so, therefore, the government had no responsibility to reimburse costs associated with the operation of that office (55833, R4, tab 168 at 2, 3).

52. On 29 December 2006, in response to appellant's 29 August 2005 claim, subsequent revisions and 11 October 2006 audit rebuttal, the contracting officer issued the final decision denying appellant's claim of \$2,565,111 in its entirety (55833, R4, tab 169). The contracting officer based her decision upon the DCAA auditor's findings and appellant's responses, specifically noting in part:

a. The initial REA and subsequent revised REAs costs and pricing data were not adequate as required by FAR 31.201-2(d).

b. There was no supporting documentation to demonstrate that contract performance requirements caused additional direct and indirect expenses on the contract. The Government paid Gray personnel for the additional work required on each delivery order. You did not provide any supporting documentation to demonstrate that the contract performance requirements caused additional direct and indirect expenses on the contract.

....

d. When the contract was awarded, all costs, to include direct labor, indirect labor, G&A and Profit were included in the negotiated hourly rate. There were no contract line items

for billing of other direct or indirect costs, therefore, all contract costs should have been included in the hourly rate.

e. ...The documentation provided does not adequately support the additional costs proposed nor does it show that those costs were directly the fault of the government. While it is true that the Government ordered more hours than originally estimated, Gray Personnel was paid for every hour requested by the Government, worked and billed by Gray Personnel.

(55833, R4, tab 169)

53. On 28 June 2007, Gray appealed the contracting officer's final decision to the Board, and it was assigned ASBCA No. 55833.

APPELLANT'S WOMACK STATEMENT OF CLAIMED COSTS

54. Appellant's WOMACK Statement was prepared by a CPA consultant, Mr. McDonald (tr. 1/39). Like Ms. Holloway, Mr. McDonald did not participate in preparation of the original claim but, as he stated in his testimony, more accurately "packaged" Appellant's Statement based upon a review of the Rule 4 file and his verification and review of documents prepared by the author of the original claim (*id.*). The labor costs in the original claim were in turn based upon documentation provided by two third party outside payroll service providers, ADP and PayChex, which were utilized by Gray as a payroll service in the normal course of business (tr. 1/39, 40, 43). Appellant's Statement on the Womack claim asserted the claim as originally presented was \$2,574,213.33²⁵ but as documented in Appellant's Statement was \$2,692,163.95 (55833, Appellant's Statement, tabs 1, 2). Appellant's Statement of its Womack claim is as follows:

²⁵ Appellant's claim as presented in its 12 September 2005 letter totaled \$2,565,112 but Appellant's Statement asserted a total amount as presented of \$2,574,213.33 referencing Rule 4, tab 160, appellant's 12 September 2005 letter and attached documentation.

	<u>Base Year</u> 1 Oct 98-30 Sep 99	<u>Option 1</u> 1 Oct 99-30 Sep 00	<u>Option 2</u> 1 Oct 00-30 Sep 01	<u>Option 3</u> 1 Oct 01-30 Sep 02	<u>Option 4</u> ²⁶ 1 Oct 02-31 Mar 03
Contract Revenues	611,535.00	2,503,829.73	1,191,241.72	1,405,517.67	533,890.00
Contract Costs:					
Direct Labor	355,149.35	1,618,060.59	995,019.93	1,336,477.21	452,138.00
Labor Fringe @ 19%	<u>67,478.35</u>	<u>307,431.59</u>	<u>189,053.79</u>	<u>253,930.67</u>	<u>85,906.22</u>
Subtotal	422,627.56	1,925,492.57	1,184,073.72	1,590,407.88	538,044.22
ODC's	<u>149,501.98</u>	<u>228,170.36</u>	<u>106,487.63</u>	<u>155,498.31</u>	<u>136,794.86</u>
Subtotal	572,129.54	2,153,662.93	1,290,561.35	1,745,906.19	674,839.08
Overhead	<u>137,311.09</u>	<u>430,732.59</u>	<u>283,923.50</u>	<u>593,608.10</u>	<u>242,942.07</u>
Subtotal	709,440.63	2,584,395.51	1,574,484.84	2,339,514.29	917,718.14
Profit (10%)	<u>70,944.06</u>	<u>258,439.55</u>	<u>157,448.48</u>	<u>239,951.43</u>	<u>91,778.11</u>
Total	780,384.69	2,842,835.06	1,731,933.33	2,573,465.72	1,009,559.26
Less Revenues	611,535.00	2,503,829.73	1,191,241.72	1,405,517.67	533,890.00
Claim Amount	168,849.69	339,005.33	540,691.61	1,167,948.06	475,669.26
					<u>Total Claim</u> \$2,692,163.95

(55833, Appellant's Statement, tab 2) Gray, in its post-hearing brief, reduced its total direct labor costs by \$42,175.10 to conform to proof presented in the hearing. The reduction was based upon an audit finding of \$44,417 in administrative salaries duplicated within the claimed direct labor costs in OY2 (*see* app. reply at 12, resp. to gov't PFF 57, Audit Report at 91-93). Applying burden rates, this reduced Gray's total claim from \$2,692,163.95 to \$2,624,811.16, a total reduction of \$67,352.79 (app. br. at 1-2).

55. The Audit Report questioned many of the Womack claimed costs and, in fact, the questioned costs for the Base Year and OY1 were found to exceed the amount claimed. The amounts claimed on OYs 2, 3 and 4 were found to exceed the amounts questioned. The net amount of costs which were not questioned was \$161,726. (Audit Report at 5) However, even in the case of costs that were not questioned, the Audit Report found that all the amounts verified do not "represent a reasonable basis for settlement with the contractor" "due to the significant FAR and Order on Proof of Cost non-compliances and inadequacies considered to impact the contractor's Statement of Claimed Costs" (Audit Report at 4). A summary of the Womack Audit Report's review is as follows:

²⁶ Although Appellant's Statement refers to these costs as incurred during performance of Option 4, Option 4 was never exercised. Instead, Option 3 was extended from 1 October 2002 through 31 March 2003 which is the period these costs were incurred (55833, Appellant's Statement, tabs 33-35).

	<u>Base Year</u>	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>	<u>Option 4</u>	<u>Total</u>
Amount Claimed	\$168,849	\$339,006	\$540,692	\$1,167,947	\$475,669	\$2,692,163
Amount Questioned	\$272,860	\$502,116	\$339,122	\$1,078,119	\$338,221	\$2,530,438
Difference	\$104,011	\$163,110	\$201,570	\$89,828	\$137,448	\$161,726

(Audit Report at 5)

DCAA WOMACK AUDIT FINDINGS

Claimed Direct Labor Costs

56. Gray's claimed amount consisted primarily of direct labor costs (55833, Appellant's Statement, tab 2). Appellant's Statement indicates that, like the WRAMC contract, Gray negotiated wage rates significantly higher than the prevailing SCA wage rate at time of award and paid wages at a rate higher than the SCA wage rate during performance of the contract (tr. 1/117-18; 55833, Appellant's Statement, tab 36 at 11). Appellant's Statement also indicates option year wages were proposed and negotiated at a 5% escalation factor at time of award (55833, Appellant's Statement, tab 36 at 3). Gray's total claimed amount of direct labor costs was \$4,756,845 (*id.*, tab 2; Audit Report at 54). Mr. McDonald prepared a summary of quarterly labor costs for the base and option years based upon payroll records prepared by the third party payroll services including only those records with state tax withholding for the state of North Carolina (tr. 1/58-9; 55833, Appellant's Statement, tabs 3, 4). Mr. McDonald limited his summary to only those records with North Carolina state tax withholdings because he assumed Gray only had one contract in North Carolina and any employees on that contract would live and work in North Carolina (*id.*). The individual payroll records include, Gray Personnel Inc. identification, the employee's name, employee social security number, wages paid, the time period of payment covered, and state tax withholding for North Carolina but do not include any information identifying the wages directly with a specific contract (55833, Appellant's Statement, tabs 5-8, 12-15, 19-22, 26-30, 33-35).

DCAA Questioned Nexus of Total Costs to the Contract

57. DCAA determined that the documentation included in Appellant's Statement was insufficient to demonstrate that Gray incurred the claimed direct labor costs. DCAA did not question that the majority of labor costs were incurred by Gray but did question their nexus to the contract. As in the WRAMC appeal, DCAA disagreed with appellant's assertion that tax withholding information on payroll service provider records was reliable to demonstrate that certain employees worked on specific contracts stating, "No job cost ledger or employees' names and/or identification numbers were provided...we have no way of verifying if the amounts claimed represent individuals actually working at Womack." (Audit Report at 3)

58. DCAA's reluctance to rely upon state withholding data to infer that the labor costs were incurred on the contract was based on the possibility that appellant had other contracts, government or commercial, within North Carolina (tr. 2/18, 19; *see also* Audit Report at 3, ¶ 3). DCAA took the same position as with the WRAMC contract, noting the possibility of other contracts was based on a Proposed Plan of Action provided by Gray prior to award in response to a Womack search letter issued by the contracting officer dated 7 August 1997 that stated Gray was a rapidly expanding business with sales (tr. 2/17-19; 55833, R4, tab 3 at 8). However, responding to specific statements made by the DCAA auditors, dated 10 November 2005, Gray stated, "As Gray's supporting documentation shows, Gray had no other clients or business in or near NC" (55833, R4, tab 164 at 4, ¶ 10). In addition, Mr. McDonald testified that appellant did not have another government contract in North Carolina during the life of the Womack contract to which labor expenses could be attributed (tr. 1/55, 139). The government did not question the foundation for Mr. McDonald's testimony on this issue or offer any credible evidence of other contracts within the state. We find Gray established a prima facie case that it did not have any other contracts in or near North Carolina during performance of this contract.

Questioned Costs: Unexplained Variance and Double Counting of Administrative Salaries

59. DCAA found an unexplained variance of \$280,000 in the fourth quarter of OY3 (third quarter of calendar year 2002) (Audit Report at 103-04). Appellant's Statement claims labor expenses of \$477,881 during that quarter (55833, Appellant's Statement, tab 25 at 4). That number was derived and substantiated from "ADP's incomplete report to NC Employment Security Commission" (*id.* at n.1). However, that document is missing pages 1 and 2 as well as the totals page (55833, Appellant's Statement, tab 29). The sum of the numbers that actually appear at tab 29 of Appellant's Statement is \$197,881. The unexplained variance is \$280,000. Mr. McDonald explained in his testimony that the basis for this gap in the total was substantiated by extrapolating from historical figures from other quarters to arrive at these totals relying upon the person who prepared the claim and extrapolated the missing numbers (tr. 1/116-17, 144, 145).

60. DCAA also determined there were unsubstantiated amounts in OY2 and OY3 where Appellant's Statement double counted the administrative salaries, including the administrative salary amounts in both the direct labor and the ODC cost categories. For OY2, \$44,417²⁷ of the administrative labor costs was inaccurately included in the Labor cost category:

²⁷ Gray's post-hearing brief conceded that there was duplication of administrative costs included within claimed direct labor costs and reduced the direct labor amount for OY2 by \$42,175.10. The difference between \$42,175.10 and \$44,417 is not explained. (App. br. at 1-2, ex. A-2)

<u>Cost Element</u>	<u>CY00, Q4</u>	<u>CY01, Q1</u>	<u>CY01, Q2</u>	<u>CY01, Q3</u>	<u>Total</u>
Claimed Direct Labor Total	\$241,635	\$197,720	\$295,992	\$155,658	\$891,005
Variance				<u>104,013</u>	<u>104,013</u>
Total Labor Amount*	\$241,635	\$197,720	\$295,992	\$259,671	\$995,019
Less Admin Salaries Total	<u>(17,039)</u>	<u>(10,717)</u>	<u>(14,275)</u>	<u>(2,386)</u>	<u>(44,417)</u>
Adjusted Direct Labor Total	\$224,596	\$187,003	\$281,717	\$257,285	\$950,602
ADP Qtr Summary	<u>\$241,636</u>	<u>\$197,720</u>	<u>\$295,992</u>	<u>\$259,671</u>	<u>\$995,019</u>
Questioned Direct Labor	\$17,040	\$10,717	\$14,275	\$2,386	\$44,417

*Minor differences due to rounding

(Audit Report at 93) In addition, DCAA determined for OY3, \$49,380 of administrative labor was inaccurately included in the Labor cost category:

<u>Cost Element</u>	<u>CY01, Q4</u>	<u>CY02, Q1</u>	<u>CY02, Q2</u>	<u>CY02, Q3</u>	<u>Total</u>
Total Labor Amount	\$283,145	\$266,121	\$309,331	\$197,881	\$1,056,478
Less Admin Salaries Total	<u>(18,551)</u>	<u>(14,464)</u>	<u>(16,365)</u>		<u>(49,380)</u>
Adjusted Direct Labor Total	\$264,594	\$251,657	\$292,966	\$197,881	\$1,007,098
Claimed ADP Qtr Summary	\$283,145	\$266,121	\$309,331	\$477,881	\$1,336,478
Questioned DL Inadequate supporting documentation				<u>(280,000)</u>	<u>(280,000)</u>
Question Direct Labor (Admin)	<u>\$18,551</u>	<u>\$14,464</u>	<u>\$16,365</u>		<u>\$49,380</u>
Total Questioned Direct Labor	\$18,551	\$14,464	\$16,365	\$280,000	\$329,380

(Audit Report at 104)

61. DCAA questioned a total of \$373,797 in claimed direct labor costs presented in Appellant's Statement (Audit Report at 54). We find that the \$280,000 variance in OY3 is unsubstantiated by the record and agree with DCAA's findings regarding the duplication of costs in OY2 and OY3. Deducting those amounts from the total claimed labor costs, we find that Gray has demonstrated the following labor costs:

<u>Base Year</u>	<u>OY1</u>	<u>OY2</u>	<u>OY3</u>	<u>OY4</u>	<u>Total</u>
\$335,149	\$1,618,061	\$950,603	\$1,007,097	\$452,138	\$4,363,048

Fringe Labor Costs

62. Appellant's Statement applied a 19% labor fringe rate to the total direct labor costs for the base and option years (55833, Appellant's Statement, tab 2). Mr. McDonald

testified that the 19% fringe rate was not derived from documentation but rather was applied because that was the amount included in the original claim by the accountants that prepared the claim (tr. 1/64-5). However, he also stated his analysis of the claim indicated a higher rate during every period claimed (*id.*). Because the claim did not provide a cost breakdown by general ledger accounts and amounts for both pool and base for the claimed 19% fringe rate, DCAA used Appellant's "actual labor fringe rate proposed in the initial cost build up to the contractor's solicitation signed January 23, 1998" (Audit Report at 61, 82, 94, 105, 115-16). DCAA found that the original proposed fringe rate included 80 hours of vacation pay, 16 hours of personal days, and 80 hours of holiday pay, as well as, associated payroll taxes, health insurance, malpractice insurance and miscellaneous taxes per proposed labor category. Because there were eleven labor categories of hourly rates, DCAA chose a representative labor category for use in its calculations. Appellant's proposed Med-Surg. RN labor category was chosen as representative of the eleven labor categories to review the proposed fringe rate because a majority of the eleven proposed labor categories were the same hourly pay rate of \$19.00. DCAA's evaluation, based upon the Med-Surg. RN labor category, resulted in questioning the holiday pay expenses in their entirety and \$2400 of health insurance because they duplicated holiday pay expenses and health insurance costs already included within the hourly rate. DCAA also questioned \$382 of proposed payroll taxes due to questioning the labor fringe base (holiday pay expenses and health insurance expenses) and due to lack of support for miscellaneous tax expenses. (*Id.*) The result of DCAA's calculations was an adjusted labor fringe rate of 12.14% for the base year with a 5% escalation factor derived from appellant's costs build up worksheet. These calculations resulted in the following rates by contract period: 12.75% for Base Year; 13.38% for OY1; 14.05% for OY2; 14.76% for OY3; and 14.76% for OY4²⁸. (Audit Report at 63, 82, 94, 105, 115-16) Based upon the lack of insight into how Gray derived the 19% fringe rate in its claim and no evidence in the record to support that rate, we find DCAA's approach is a reasoned approach for determining a fringe rate. Accordingly, we find DCAA's findings to be the appropriate fringe rates.

ODCs

63. Gray's claim includes amounts referred to as ODCs that are costs associated with establishing, staffing and running Gray's management office in North Carolina (55833, Appellant's Statement, tabs 9, 16, 23, 30, 35). Appellant's Statement claims \$776,453 in total ODC costs (*id.*, tab 2). The ODCs are broken out as follows (Audit Report at 56, 79, 90, 101, 112):

<u>Base Year</u>	<u>Option Year 1</u>	<u>Option Year 2</u>	<u>Option Year 3</u>	<u>Option Year 4</u>
\$149,502	\$228,170	\$106,488	\$155,498	\$136,795

²⁸ DCAA did not apply a 5% factor to OY4 because it was a 6-month extension of OY3, thus using the same labor fringe rate.

DCAA questioned the total amount of claimed ODCs on the contract based upon the fact there was no provision in the contract allowing appellant to be reimbursed directly for ODCs. DCAA found that appellant did not include any burdened rates per hour for claimed administrative salaries, applicable payroll taxes, and other direct costs found in the subject contract. (Audit Report at 63-64, 83, 95, 106, 116) As a result, DCAA concluded that these costs were included within appellant's proposed G&A rate (*id.*). DCAA's opinion that these costs were, and should be, included in Gray's G&A rather than claimed as direct costs was based in part on DCAA's determination that Gray intended to open a local office before it submitted its cost proposal and in fact that was their business practice to do so (Audit Report at 70, 86, 98, 109, 120). This conclusion was based upon the proposed plan of action attached to Gray's 7 August 1997 response to the government's search letter (*id.*). That plan stated that Gray would setup a local office during the fourth week after award prior to start of performance (55833, R4, tab 3 at 9). As a result, DCAA determined that Gray never intended to include rent and associated expenses as direct costs because the company business practice was to include those types of costs in their G&A rate (Audit Report at 70, 86, 98, 109, 120).

64. Although DCAA questioned the total amount claimed, the auditors employed alternate means to evaluate the individual expenses within each category of claimed costs (Audit Report at 66-70, 84-86, 96-98, 107, 117). DCAA found the claimed ODCs fell into three basic categories, administrative employee wages, payroll taxes, and other direct costs (*id.* at 64, 83-84, 95-96, 106, 117). The claimed ODCs included such expenses as answering services, recruiting/advertising, background checks, health and welfare insurance, office rent, office furniture, insurance, refuse service, building maintenance, janitorial service, computer services, professional liability insurance, office equipment, office supplies, legal, postage, telephone, delivery/messenger, travel, auto expenses and other miscellaneous disbursements (*id.*). The expenses DCAA questioned fell into three categories: math errors, shared costs with the WRAMC contract and classification errors (*id.* at 67-70, 84-86, 96-98, 107-09, 117-20). In accordance with DCAA's finding that all claimed ODCs are indirect rather than direct costs as claimed, classification errors are any expenses associated with the NC field office classified within appellant's statement as a direct expenses rather than an indirect expense (*id.*). As a result, by definition under DCAA's findings, any amounts referred to as classification errors are any amounts referenced as ODCs other than expenses classified as math errors or shared with the WRAMC contract (*id.*).

Administrative Employee Wages

65. Appellant's Statement provided a summary schedule of administrative salary amounts including the names of the administrative employees for each of the base and option years (55833, Appellant's Statement, tab 9 at 3, tab 11 at 4, tab 18 at 6, tab 30 at 2, tab 35 at 2). DCAA verified these salary amounts by quarter for the base years one through three by cross checking the names provided in Appellant's Statement against the

third party payroll provider and payroll records with North Carolina state withholding submitted as part of Appellant's Statement (Audit Report at 68, 85, 97, 108, 118). The individual payroll records include, Gray Personnel Inc. identification, the employee's name, employee social security number, wages paid, the time period of payment covered, and state tax withholding for North Carolina (55833, Appellant's Statement, tabs 9, 12-15, 19-22, 26-30, 33-35). Claimed wages for OY4 were based upon ADP "continuation sheets for report of employees' wages" summary sheets of all employees working in North Carolina (Audit Report at 118). DCAA was unable to verify the salaries for option year four using these documents because the documents were incomplete and were generated by ADP for the Employment Security Commission of North Carolina for state tax purposes (*id.*). The amount of wages claimed in Appellant's Statement, the amounts questioned and the amount verified by DCAA are as follows:

	<u>Base Yr.</u>	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>	<u>Option 4</u>	<u>Total</u>
Claimed ⁽²⁹⁾	\$80,354.00	\$69,282.51	\$54,854.98	\$88,160.84	\$39,048.35	\$331,700.68
Verified	\$80,354.00	\$69,283.00	\$44,418.00	\$49,380.00	-0-	\$243,435.00

(55833, Appellant's Statement, tab 4 at 4, tab 11 at 5, tab 18 at 6, tab 25 at 6, tab 32 at 6; Audit Report at 68, 85, 97, 108, 119) Based upon the record, we find Gray demonstrated it incurred the administrative wages verified by DCAA during the base year and options one through three in the total amount of \$243,435.

Payroll Taxes

66. DCAA evaluated the claimed payroll taxes, NC Worker's Compensation and Unemployment taxes, for the base year and option years one through three using a spreadsheet summary of applicable payroll taxes of the administrative personnel associated with the NC field office provided in Appellant's Statement (Audit Report at 68, 86, 97, 109, 119). The spreadsheet was provided by Gray on 30 September 2009 (*id.*). DCAA evaluated the claimed payroll taxes for option year four using a profit and loss spreadsheet report dated 1 August 2004 that was provided as part of Appellant's Statement (Audit Report at 119). The following is a summary of DCAA's findings:

²⁹ There are minor differences between the amounts claimed in Appellant's Statement and the numbers in the Audit Report due to rounding.

	<u>Base Yr.</u>	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>	<u>Option 4</u>	<u>Total</u>
Claimed	\$13,947	\$6,595	\$7,927	-0-	\$5,734	\$34,203
Error/Duplication	(\$1,423)	-0-	-0-	\$12,739 ^{30]}	(\$5,734)	\$5,582
Shared w/ WRAMC	(\$11,144)	-0-	-0-	-0-	-0-	(\$11,144)
Verified	\$1,380	\$6,595	\$7,927	\$12,739	-0-	\$28,641

(*Id.* at 67, 84, 96, 107, 117) Although DCAA questioned \$11,144 in cost shared with the WRAMC contract, we find these costs are directly attributable to the Womack contract based upon the facts of this case (*see* tr. 1/48). Based upon the record, we find Gray presented adequate documentation to demonstrate it incurred \$39,785 in claimed payroll taxes broken out by contract period as follows:

<u>Base Yr.</u>	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>	<u>Option 4</u>	<u>Total</u>
\$12,524	\$6,595	\$7,927	\$12,739	0	\$39,785

Other Office Administrative Costs

67. DCAA evaluated the claimed other administrative costs associated with the NC field office for the base year and option years one through three by reviewing a spreadsheet provided as part of Appellant's Statement (Audit Report at 69, 86, 98, 109, 119-20). The spreadsheet in Appellant's Statement used by DCAA to verify the claimed amounts is the same one submitted in the 12 September 2005 revised claim (*id.*; 55833, Appellant's Statement, tab 9 at 7, tabs 16, 23 at 3, tab 30 at 9; R4, tab 160 at 17-20, 39-44, 56-63, 79-86). DCAA evaluated the other administrative expenses claimed for Option 4 using a profit and loss spreadsheet report dated 1 August 2004 that was provided as part of Appellant's Statement (Audit Report at 120). The following is a summary of DCAA's findings:

	<u>Base Yr.</u>	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>	<u>Option 4</u>	<u>Total</u>
Claimed	\$55,201	\$152,293	\$ 43,706	\$ 67,338 ^{31]}	\$92,013	\$410,551
Error/Duplication	(\$ 377)	(\$22,019)	(\$ 137)	-0-	(\$ 196)	(\$ 22,729)
Shared w/ WRAMC	(\$38,866)	(\$44,518)	(\$17,557)	-0-	-0-	(\$100,941)
Verified	\$15,959	\$ 85,756	\$ 26,013	\$67,338	\$91,817	\$286,883

(Audit Report at 68, 85, 96, 108, 118) Although DCAA questioned \$100,941 in administrative costs shared with the WRAMC contract, we find these costs are directly

³⁰ Although Appellant's Statement failed to claim NC Worker's Comp. or Unemployment expenses during this period, DCAA verified \$12,739 in such costs.

³¹ The Audit Report at 109 questioned \$67,383 of claimed ODCs. However, the numbers appear to have been transposed. The figure of \$67,338 appears to be the correct figure based upon the summary of calculations on pages 107/108 of the audit.

attributable to the Womack contract based upon the facts of this case (*see* tr. 1/48). Based upon the record, we find Gray has demonstrated a total of \$387,822 in office administrative costs broken out by contract period as follows:

<u>Base Yr.</u>	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>	<u>Option 4</u>	<u>Total</u>
\$54,824	\$130,274	\$43,569	\$67,338	\$91,817	\$387,822

In summary, Gray has demonstrated incurred ODCs in the following amounts.³²

	<u>Base Yr.</u>	<u>OY1</u>	<u>OY2</u>	<u>OY3</u>	<u>OY4</u>	<u>Total</u>
Wages	\$ 80,354	\$ 69,283	\$44,418	\$ 49,380	-0-	\$243,435
Payroll Taxes	\$ 12,524	\$ 6,595	\$ 7,927	\$ 12,739	-0-	\$ 39,785
Expenses	\$ 54,824	\$130,274	\$43,569	\$ 67,338	\$91,817	<u>\$387,822</u>
Total	\$147,702	\$206,152	\$95,914	\$129,457	\$91,817	\$671,042

Overhead /G&A Rate

68. Appellant's Statement applied the following overhead/G&A rates:

- 24% for Base Year – October 1, 1998 through September 30, 1999
- 20% for Option Year 1 – October 1, 1999 through September 30, 2000
- 22% for Option Year 2 - October 1, 2000 through September 30, 2001
- 34% for Option Year 3 - October 1, 2001 through September 30, 2002
- 36% for Option Year 4 – October 1, 2002 through March 31, 2003

(Audit Report at 71) However, the G&A rates are not substantiated by any documentation and there is a complete absence of documentation regarding the indirect cost pool (tr. 1/88-89, 134). Mr. McDonald testified he was unable to review any underlying documentation to calculate appellant's claimed G&A rates on this contract because of Gray's accounting practices and, as a result, included the rates that were prepared by the accountants who prepared the claim (*id.*).

69. DCAA rejected the claimed G&A rates on the basis the auditors were unable to determine from Appellant's Statement which expenses were included in G&A because no general ledger or source documents were made available for verification of accuracy of expenses included in the income statement for each period (Audit Report at 73).³³ As a result, DCAA used alternative means to calculate G&A rates on the contract based upon appellant's overhead/G &A rate proposed in the initial cost build up to appellant's proposal for award (*id.*). Their analysis determined that appellant applied a G&A rate of 14.50% in its proposal to each of the labor categories for the base year and applied a 5% escalation

³² All numbers rounded.

³³ The audit findings for each option year just refer back to the base year findings (Audit Report at 88, 99, 110, 111, 121).

factor for the base year and the out years. The fourth year was a six-month extension and the contractor applied the same rate as the prior year (*id.*). Using alternative means to calculate the G&A and using that same escalation method appellant proposed, DCAA determined the following G&A rates:

15.23% for Base Year – October 1, 1998 through September 30, 1999
15.99% for Option Year 1 - October 1, 1999 through September 30, 2000
16.79% for Option Year 2 - October 1, 2000 through September 30, 2000
17.62% for Option Year 3 - October 1, 2001 through September 30, 2002
17.62% for Option Year 4 ^[34] - October 1, 2002 through March 31, 2003

(Audit Report at 73) Based upon the lack of insight into how Gray derived the G&A rates in its claim and no evidence in the record to support them, we find DCAA's approach is a reasoned approach for determining a G&A rate. Accordingly, we find DCAA's findings to be the appropriate G&A rates.³⁵

Profit

70. Like the WRAMC appeal, Appellant's Statement applies a 10% profit rate on the claim (55833, Appellant's Statement, tab 2). DCAA questioned the 10% profit rate applied to the base and option years (Audit Report at 73). In the alternative, DCAA evaluated the applied profit rate using the actual profit rate proposed by appellant in its initial cost build-up to its proposal for award (*id.* at 74). Their evaluation found the as awarded profit rate was 5% (*id.*). When asked how the 10% profit rate in Appellant's Statement was derived, Mr. McDonald stated that the 10% rate was based upon the profit rate included in the original claim and that rate was reasonable based upon the risk assumed by Gray on the contract (tr. 1/179). Based upon the lack of insight into how Gray derived the 10% rate in its claim and no evidence in the record to support it, we find DCAA's approach is a more reasoned approach for determining a profit rate. Accordingly, we find the appropriate profit rate is 5%.

³⁴ The 5% escalation factor was not applied to OY4 because this period was a six-month extension of OY3 using the same overhead/G&A rate.

³⁵ We note that DCAA's findings result in the anomaly of a different G&A rate during the Base Year and OY1 than the G&A rate applied during the same time period on the WRAMC contract (15.23%, 15.99% vs. 14.56%). The difference results from the data available to DCAA in each case. We find both approaches reasonable given the data available in the record.

Revenues

71. Appellant's Statement includes a total amount of \$6,246,015 in revenue which is deducted from the asserted costs to arrive at the total claimed amount, broken out by contract period as follows:³⁶

<u>Base Yr.</u>	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>	<u>Option 4</u>	<u>Total</u>
\$611,535	\$2,503,830	\$1,191,242	\$1,405,518	\$533,890	\$6,246,015

(55833, Appellant's Statement, tab 2). In his testimony, Mr. McDonald stated that in his opinion the revenue figures in Appellant's Statement are supported by documentation based upon the Womack Pricing Audit and the Rule 4 documents he reviewed in support of this number (tr. 1/94-97). Mr. McDonald opined during his testimony that the auditor's findings in the Womack Pricing Audit indicated to him that the auditors verified the revenues and were satisfied with the numbers (*id.*). We find no indication in the audit referenced by Mr. McDonald that the auditors verified revenues. That was not the stated purpose of the audit and revenue information is not referenced within the audit. (55833, Appellant's Statement, tab 36 at 1; tr. 1/96) As to support in the Rule 4 file, Mr. McDonald testified that he supported the revenue figures in Appellant's Statement using information found in the Rule 4 file (tr. 1/94, 95). Appellant's Statement breaks out the hours billed multiplied by the hourly rate for each category of nurse to arrive at the total amount of revenue during the contract period for the base and option years one through three with footnotes to the source documents. Mr. McDonald derived the hours billed from Gray's revised claim of 12 September 2005. (55833, Appellant's Statement, tab 3 at 2, tab 10 at 2, tab 17 at 3, tab 24 at 2) However, the revised claim that forms the basis of the total revenue number consists of spreadsheets and does not contain any contemporaneous source documentation such as invoices, etc. (55833, R4, tab 160). In addition, Mr. McDonald testified that no documentation existed for the final option year, option year four (tr. 1/46).

72. DCAA questioned all of the revenues contained in Appellant's Statement finding the numbers submitted to be unsubstantiated because appellant did not provide supporting documentation stating, "Without visibility of the actual billings to the government, we were unable to verify the accuracy of the amount deducted from the claimed incurrences" (Audit Report at 74).³⁷ In addition, DCAA contacted the contracting officer to verify the total revenue amounts from the contracting officer's records or DFAS. As of the time of the hearing there was no response from the contracting officer or DFAS. (tr. 2/95-98). However, DCAA reviewed a previous audit of the subject claim, the REA Audit dated 13 July 2006, to determine the amount of contract revenue and found that their

³⁶ All numbers are rounded.

³⁷ The Audit Report findings for each of the option years refer back to the base year finding at note 9.

office had requested Gray provide a summary of the billings and access to actual billing documents for verification purposes. Gray submitted a spreadsheet, obtained from the contracting officer, reflecting total revenues. (Audit Report at 74, 88, 99, 111, 121) Based upon this spreadsheet, provided to Gray by the contracting officer, the REA Audit found the following amounts of revenue on the contract:

<u>Base Yr.</u>	<u>OY1</u>	<u>OY2</u>	<u>OY3</u>	<u>OY4</u>	<u>Total</u>
\$611,535	\$2,503,830	\$1,191,242	\$1,405,784	\$533,307	\$6,245,698

(R4 tab 166, REA Audit at 9, 12, 14, 15, 16) The total REA Audit revenue findings are very close to the \$6,246,015 claimed in Appellant's Statement and verified by DCAA (55833, Appellant's Statement tab 2, Audit Report at 54). Based upon the fact the government presumably knew how much it paid under the contract and that Gray obtained the revenue spreadsheet from the contracting officer, we find that appellant was paid revenues in the amount of \$6,245,698.

73. Based upon the above, we find the record indicates the following costs, fringe, G&A and profit, less revenue:

	<u>Base Year</u>	<u>OY1</u>	<u>OY2</u>	<u>OY3</u>	<u>OY4</u>
Labor	\$335,149	\$1,618,061	\$950,603	\$1,007,097	\$452,138
Fringe	12.75%	13.38%	14.05%	14.76%	14.76%
	<u>42,731</u>	<u>216,497</u>	<u>133,560</u>	<u>148,648</u>	<u>66,736</u>
Subtotal	377,880	1,834,558	1,084,163	1,155,745	518,874
ODCs	<u>147,702</u>	<u>206,152</u>	<u>95,914</u>	<u>129,457</u>	<u>91,817</u>
Subtotal	525,582	2,040,710	1,180,077	1,285,202	610,691
G&A @	15.23%	15.99%	16.79%	17.62%	17.62%
	<u>80,046</u>	<u>326,310</u>	<u>198,135</u>	<u>226,453</u>	<u>107,604</u>
Subtotal	605,628	2,367,020	1,378,212	1,511,655	718,295
Profit @ 5%	<u>30,281</u>	<u>118,351</u>	<u>68,911</u>	<u>75,583</u>	<u>35,915</u>
Total Costs	635,909	2,485,371	1,447,123	1,587,238	754,210
Revenues	611,535	2,503,830	1,191,242	1,405,784	533,307
	24,374	(18,459)	255,881	181,454	220,903
					Net Total:
					\$664,153

DECISION

ASBCA No. 55833 WOMACK APPEAL

PARTIES' CONTENTIONS

As in the WRAMC appeal, appellant asserts the government is liable for the difference between appellant's incurred costs and revenues received during performance. However, the factual basis underlying appellant's Womack appeal differs from that in WRAMC. In this appeal, appellant contends the Womack hospital ordered nursing services substantially in excess of the maximum hours that appellant relied upon to structure its awarded contract. By ordering the excess hours the government constructively changed the contract by modifying the anticipated method and manner of performance which caused an increase in appellant's costs to perform the contract (app. br. at 3). Appellant asserts the method and manner of performance was changed by both ordering hours in excess of contract estimated amounts and ordering services with no corresponding line item or pricing in the contract (app. br. at 5). Appellant also contends it was unable to bill for all services rendered because of a breakdown in contract administration and, as in WRAMC, characterizes its claim as "essentially one of *quantum meruit* – the contractor incurred costs in performing work, which work was accepted by the Government, but not paid for by the Government" (app. br. at 4, 5).³⁸

As in WRAMC, the government concedes entitlement but counters appellant has failed to prove the government's actions caused appellant any monetary harm (gov't br. at 1). The government's rebuttal falls into four general categories. First, the majority of appellant's claim is for labor costs which are either the direct labor of the nurses or the administrative labor incurred in establishing and operating the local satellite offices to manage each contract, claimed as ODCs. Since there are no job ledgers or similar documents that explicitly connect the costs to this contract, the government contends that appellant has not proven the labor costs claimed were incurred on this contract. Second, in regard to the claimed ODCs, even if appellant can prove the nexus between the administrative labor costs and this contract, they were included in appellant's overhead when it prepared its proposal for award and therefore should not be reimbursed as a direct expense. Third, the government further asserts that the government requested appellant provide documentation to support its claims on numerous occasions, which it has failed to do, and DCAA has conducted numerous audits on appellant's claims but these efforts have not provided sufficient proof to demonstrate government harm or to quantify any harm. Finally, even if appellant can prove all of the above, the government asserts appellant was

³⁸ As in our decision in WRAMC, resort to the concept of *quantum meruit* is not necessary nor appropriate in this appeal. *Perri v. United States*, 340 F.3d 1337, 1344 (Fed. Cir. 2003).

paid for all the work it billed, so it has been fully compensated for any impact the government caused. As a result, the government concedes entitlement but takes the position that appellant is not entitled to any monetary compensation for government actions.

DISCUSSION

As in the WRAMC appeal, the crux of this appeal is whether appellant has proven causation - that the claimed increased costs were incurred on this contract and were the result of the government's actions - and, if so, by what amount. *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991).

Our findings above resolve the parties' contentions to the extent necessary regarding the allocability of the claimed costs to this contract (the government's first point). Mrs. Johnson stated that appellant did not have any other contracts in North Carolina and Mr. McDonald testified in this regard as well. The government did not challenge the foundation for these statements nor did it offer any credible evidence to the contrary. (Findings 47, 58) The only evidence proffered by the government on this issue is a Proposed Plan of Action letter that appellant submitted in 1997 in support of its proposal on the contract (finding 58). We find the government's proposed evidence is unpersuasive in this regard and conclude appellant has established the nexus between its claimed direct labor and administrative labor (ODC) costs and this contract. We also disagree with DCAA's conclusion that the ODCs were included in the G&A rates (the government's second point). Mrs. Johnson testified that she did not include any costs in G&A for a local management office because her plan was to manage the contract using a virtual office as she had done on other contracts (finding 41). We do not find DCAA's rationale persuasive enough to establish these costs were included within G&A. As a result, we conclude they were not.

Although appellant established the allocability of the claimed costs to this contract, and that the ODCs were not included in the G&A rates, it still bears the burden of proof to establish the nexus between the government's actions and any increased costs claimed. The basis of appellant's claim is that the government changed the requirements of the contract requiring a more expensive manner of performance than contemplated in its pricing for this contract and, as a result, it incurred unanticipated increased costs (finding 44). The record establishes that not only did the government order hours substantially exceeding the estimated hours but also that both government and appellant contract administration collapsed causing gaps within the documentary record making it difficult, and in many cases impossible, to reconstruct the financial impact of the government's actions (finding 39). The majority of appellant's claim is for increases in unreimbursed direct labor costs but appellant's claim is structured in such a way that it is impossible to specifically quantify any increased direct labor costs associated with government actions without assuming all of appellant's increased costs were caused by the government.

However, the government concedes entitlement and confronted with the government's clear liability we conclude the government's actions had increased cost impact upon appellant. Accordingly, we consider whether we may make an award on the basis of a jury verdict.

With regard to the first required element to establish a jury verdict award - clear proof of injury, the government concedes entitlement. Appellant has, therefore, established injury. The second element is that there is no more reliable method for computing damages. Given the change to appellant's manner of performance and the resulting adverse impact on the contract records, it was impracticable to prove actual damages. The third element is that evidence is sufficient for a court to make a fair and reasonable approximation of damages; given the evidence in the record, as we found in the WRAMC appeal, we can do so here. For example, the major portion of appellant's claim is for direct labor costs and ODCs. For the most part, we have evidence from payroll records and other documentation of the costs incurred (findings 56, 61, 63-67). In those areas where there is a lack of direct records, such as G&A, fringe, profit, etc., we have access to information to approximate the applicable rates (findings 62, 68-72). As a result, we conclude, contrary to the government's remaining arguments, that the evidence allows us to make a fair and reasonable approximation of the damages incurred.

As in WRAMC, we believe the evidentiary record here fully supports application of a jury verdict. We are not persuaded, in light of the previously encountered problems on the WRAMC contract, that it was reasonable for appellant not to plan for any costs associated with setting up an office in North Carolina. On the other hand, there is no question that the change caused the North Carolina office expenses to be far more onerous, and the government has conceded entitlement. We found appellant demonstrated actual burdened costs after revenues of \$664,153 (finding 73). In the nature of a jury verdict, we conclude that appellant is entitled to recover 85% of that amount \$564,530 (85% of \$664,153) as a result of the government's actions.

CONCLUSION

Appellant's WRAMC appeal (54652) is sustained in the amount of \$52,069.30 for the reasons above. Interest pursuant to 41 U.S.C. § 7109 is to run from 26 April 2004. Appellant's Womack appeal (55833) is sustained in the amount of \$564,530 for the reasons stated above. Interest pursuant to 41 U.S.C. § 7109 is to run from 29 August 2005.

Dated: 31 December 2012



JOHN J. THRASHER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



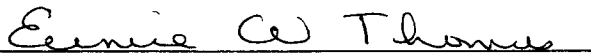
OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 54652, 55833, Appeals of Gray Personnel, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals