ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

In *SUFI Network Services, Inc.*, ASBCA No. 54503, 04-2 BCA ¶ 32,714 (*SUFI I*), decided 17 August 2004, *recons. denied*, 04-2 BCA ¶ 32,788, the Board issued a declaratory judgment interpreting the captioned contract. That decision had three holdings:

> [I.] We hold that neither Mod. 5 nor any other contract provision required SUFI to remove restrictions on outgoing lodging guest calls accessing other long distance carriers when the parties cannot share their tolls or charges in accordance with the agreed ratio, whether such calls are initiated by dialing a purportedly "toll free" number such as 0130, 0800, 00800, or the DSN local network, or otherwise, and that the CO's order [on 15 January 2004] to remove such restrictions was a breach of contract.
>
> . . . .
>
> [II.] . . . We hold that respondent's failure to order SUFI to service new Ramstein and Spandahlem facilities and

> any other additional lodging facilities on the bases SUFI services under the Contract was not a breach of contract.
>
> . . . .
>
> [III.] We hold that respondent's breach decided in I. above was a material breach of the contract that permitted SUFI to stop performance of the contract. We sustain the appeal to the foregoing extent, and deny the balance thereof.

SUFI I, 04-2 BCA at 161,868-69.

On 1 July 2005, appellant submitted 28 monetary claims under the contract. ASBCA No. 55306 arises from appellant's 5 January 2006 appeal from the deemed denial of those claims by the contracting officer (CO). After the litigation commenced, on 17 April 2006 the CO issued a written decision denying said claims, except for $132,922 for the period February through August 2004 that he allowed on SUFI's "Calling Cards" claim. Appellant timely appealed from that decision, and the appeal was incorporated in ASBCA No. 55306. Each party has moved for partial summary judgment, citing the Rule 4 file, testimony in ASBCA No. 54503, and the exhibits and attachments to their motions. The parties have advised that they are in the process of settling, or have settled, 10 of the 28 claims (status reports 1 November 2006). Accordingly, we do not address the motions insofar as they relate to those 10 claims. Familiarity with the background facts in *SUFI I* is assumed.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. Contract No. F41999-96-D-0057 dated 26 April 1996 was a non-appropriated funds (NAFI) contract whose initial 10-year term was extended in March 2000 to 15 years, ending 25 April 2011 (R4, tabs 1, 11). The contract included, *inter alia*, clause H-27, which provided:

> 27. OPTION TO BUY EQUIPMENT
> Upon completion of the performance period of each site (10 years), and prior to removal of any contractor owned equipment, the Government shall have the option to buy existing equipment at fair market value which shall be negotiated between the [CO] and the contractor for each site.

clause I-2, DISPUTES (1979 DEC), which did not invoke the Contract Disputes Act (CDA) or explicitly address payment of interest, and the FAR 52.243-1, CHANGES-FIXED

PRICE-ALT I (AUG 1987) clause, which did not explicitly address constructive changes and whose ¶ (c) provided:

> The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the [CO] decides that the facts justify it, the [CO] may receive and act upon a proposal submitted before final payment of the contract.

(R4, tab 1 at H-5, I-1, -8, -11)

2. Modification No. 5 (Mod. 5), signed by CO Janice Jones on 26 March 1999 and by SUFI on 9 June 1999, added to the contract statement of work provisions relating to the Defense Switch Network (DSN), including DV suites and Prime Knight facilities (R4, tab 8).

3. SUFI's attorney Frederick Claybrook's 25 August 2004 letter to CO Cedric Henson stated in pertinent part (R4, tab 42):

> SUFI has asked me to inform you that it intends to cancel the contract due to your material breach and to stop work.
>
> SUFI realizes that an immediate cessation would inconvenience the guests at the lodging facilities. Thus, SUFI is prepared to negotiate with the Air Force a reasonable transition period on mutually acceptable terms. We would appreciate guidance of with whom the details of the transition should be negotiated.
>
> As the ASBCA has validated SUFI's understanding that it may block guest access to calling cards, SUFI will begin doing so next week, likely on Wednesday, September 1. . . .
>
> SUFI reserves all legal and equitable rights to pursue claims for past damages, lost profits, and other amounts due, whether due to breach, constructive change, partial termination, or otherwise.

4. CO Henson's 31 August 2004 letter responded to SUFI's 25 August 2004 letter and stated (R4, tab 43):

> The Air Force Services Agency (AFSVA) acknowledges SUFI's intent to block calling card access to other carriers and to cancel the contract in accordance with [*SUFI I*]. AFSVA appreciates the consideration given by SUFI to our lodging guests and agrees to negotiate with SUFI for a reasonable transition period on mutually acceptable terms. As the [CO], I will be the Air Force representative responsible for negotiating the terms of the transition period.

5. The parties exchanged e-mails and letters on 3 and 7 September, 14, 17, 21, 22 and 26 October, 23 November, 1, 2, 3, 7, 9, 14 and 17 December 2004, 2 and 3 February, and 16, 18 and 29 March 2005, concerning contract cancellation and "mutually acceptable" terms for the "transition period" (gov't mot., exs. C to E; app. mot., attachs. C, E; app. resp., attachs. C to H; 2d Myers aff., ¶ 7).

6. On 1 April 2005, Headquarters AFSVA issued a memorandum as follows:

> HQ AFSVA/SVC hereby transfers contracting authority to HQ USAFE/A7S to execute the attached contract modification with SUFI. Ms. Edith Hollins-Jones, HQ USAFE/A7SFC or any certified NAF/APF contracting officer within HQ USAFE may use this authority to execute this modification only.

The memorandum listed three attachments, including Modification No. 11 and an agreement to purchase SUFI equipment. (Gov't mot., ex. F)

7. On 1 April 2005 SUFI's Stephen Myers and CO Edith Hollins-Jones executed a "PARTIAL SETTLEMENT AGREEMENT" (PSA) that stated in pertinent part (gov't mot., ex. I):

> WHEREAS, the [ASBCA] in a decision in Docket No. 54503 [*SUFI I*] . . . found that the Air Force had materially breached Contract No. F41999-96-D-0057 ("Contract"); and
>
> WHEREAS, SUFI . . . has informed the Air Force Nonappropriated Funds Purchasing Office ("AFNAFPO") that it has canceled the Contract and that it intends to stop work but is willing temporarily to withhold exercising its right to stop performance under certain conditions and to give AFNAFPO . . . the opportunity to transition phone service

that was provided under the Contract by SUFI to the AF so that guest phone service will not be interrupted;

WHEREAS, the AF desires SUFI to continue providing long-distance phone service in guest rooms until it can otherwise provide for phone services;

WHEREAS, the AF desires to purchase the SUFI telephone system to facilitate the transition of phone services; and

WHEREAS, SUFI remains willing under certain conditions to continue providing long-distance service in guest rooms during the "Transition Period," which is the period beginning on the date of the ASBCA Decision and continuing until SUFI stops all performance and transitions performance to the Air Force ("Transition Date"),

NOW, THEREFORE, SUFI and the AF agree and covenant as follows on this 1st day of April 2005:

Covenants

1. (a) SUFI agrees to sell, and the AF to buy, SUFI's existing telephone system for . . . ($1,200,000), to be paid on the Transition Date. Also on the Transition Date, the AF agrees to pay SUFI . . . ($1,075,000) for SUFI's good will.

(b) SUFI and the AF will generate prior to the Transition Date a complete inventory of SUFI's equipment, including all infrastructure by device, type, and serial number; . . . .

. . . .

(d) SUFI will provide the system to the AF on the Transition Date in good working order, and, if it is in good working order, the AF will so certify on the Transition Date. The system and all its constituent elements will be provided "as is, where is," with no other warranties, express or implied.

2. (a) SUFI will continue to work after the execution of this agreement until the Transition Date, which is to be set by the AF on 10 business days notice but will be no later than May 31, 2005.

. . . .

(c) SUFI will continue to receive revenues from guest telephone services through and including the Transition Date under the terms of the Contract. The AF agrees (i) that it will continue to be bound by the Contract and its provisions during SUFI's continued performance in the Transition Period as if the Contract were still fully in effect, and (ii) both parties shall be responsible for any damages as if the Contract were still in effect for any of its acts or omissions during the Transition Period, except for events prior to the execution of this agreement.

. . . .

3. On the Transition Date, the AF will repay SUFI the . . . ($100,000) prepayment of unearned commissions paid by SUFI at the outset of contract performance.

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

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

5. SUFI and the AF mutually release each other with respect to the sale of the SUFI system and the $100,000 repayment of unearned commissions by SUFI to the Air Force, with such payments terminating all rights and responsibilities between the parties concerning the sale of the SUFI infrastructure, equipment, and good will . . . . In particular, these payments may not be recovered by the AF as damages, recoupment, setoff against other claims SUFI may have under the Contract, or in any other way. . . . Other than as stated in this agreement, neither the AF nor SUFI by

> executing this agreement and by continuing SUFI's performance during the Transition Period waives or affects in any way preexisting rights and defenses either party may have. In particular, the AF acknowledges that SUFI by continuing to work until the Transition Date does not waive any rights it may have to collect all damages otherwise available for the breaches declared by the ASBCA.
>
> . . . .
>
> 8. The parties represent that the individuals executing this agreement have authority to do so from, and on behalf of, their respective organizations.

The PSA was the attachment referred to as an agreement to purchase SUFI equipment in the 1 April 2005 memorandum (SOF, ¶ 6).

8. On 31 May 2005, effective 1 April 2005, Mr. Myers and CO Hollins-Jones signed contract Modification No. 11 (Mod. 11) whose Standard Form 30, Block 13C, stated: "THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: SECTION H, PARAGRAPH H27, OPTION TO BUY EQUIPMENT," whose Block 14 recited: "THE PURPOSE OF THIS MODIFICATION IS TO EXERCISE THE GOVERNMENT[']S OPTION TO BUY EXISTING CONTRACTOR OWNED EQUIPMENT. (SEE ATTACHED DOCUMENT)," and which attached the PSA. SUFI's 31 May 2005 letter stated that it disagreed with the foregoing statements, Mod. 11 "was not a negotiated part" of the PSA and it had signed the modification on those conditions and understandings. (R4, tab 14 at 1-2) On 31 May 2005 SUFI ceased providing telephone services. On 1 June 2005 the Air Force began operating the telephone system at Air Force lodgings. (App. mot., Ansola aff., ¶ 5)

9. The Air Force's 1 June 2005 memorandum to SUFI certified that "on 1 June 2005, USAFE [U.S. Air Forces in Europe] received from SUFI . . . the equipment and infrastructure as indicated in the [PSA], and such was in good working order" (app. mot., attach. H).

10. On 1 July 2005 SUFI submitted a $130,308,071.53 claim to the AFNAFPO CO for 29 items of alleged breaches of contract and constructive changes under Contract No. F41999-96-D-0057, one of which was not quantified (sub-item I.O below) (R4, tab 77 at i-vii, 13, SCL000105):

I. Revenue Reduction Claims

[A] Calling Cards
[B] Front Desk Patching
[C] Hallway and Lobby DSN Phones
[D] A&B Bed Switch, Use of PINs, and LTS Switch
[E] Other Operator Numbers and Patching
[F] Early DSN Abuse
[G] Delta Squad
[H] Prime Knight Lodgings
[I] Sembach/Kapaun Line Charge
[J] Kapaun Phone Shutoff
[K] German Troops Housing
[L] Missing Rooms
[M] Temporary Shutdowns
[N] AT&T Trailer
[O] General Lack of Cooperation [separate damages not itemized]
[P] Revenue Sharing

II. Lost Profits

III. Other Extra Work Claims

[A] New Hotel Assistance
[B] SIMS/LTS Interfaces
[C] Base Installations
[D] Aviano Misrepresentations
[E] Coordinated Message
[F] Change of Air Force Switches
[G] Security Inspection

IV. Transition and Shutdown Costs

[A] Severance & Shutdown Personnel Costs
[B] Office Lease
[C] Extra Transition Work
[D] Spares
[E] Miscellaneous Shutdown Expenses

The Board has added letters to identify the sub-items in the foregoing list. Twenty-two of the foregoing items included an amount for interest through June 2005. The 10 sub-

items settled or in the process of being settled are: I.A, I.B, I.D, I.M, III.G, IV.A, IV.B, IV.C, IV.D, and IV.E.

PLEADINGS

Appellant's First Amended Complaint in ASBCA No. 55306 alleges 28 counts including as Count XV the non-quantified sub-item I.O but omitting quantified sub-item I.P, and seeks "interest as provided in the [PSA] and reimbursement for legal fees and expenses related to the claim effort" (compl. ¶¶ 34-39, 42, 54, 63, 74, 97, 115, 126, 136, 148, 158, 169, 178, 188, 208, 217, 223, 236, 242, 263, 289, 302, 317, 329, 337, 351, 357, 363, 373, 378). Appellant's "Requests for Relief" also seek: "5. . . . attorneys' fees and the costs of this appeal" (compl. at 78).

Respondent's 18 May 2006 answer to the amended complaint in ASBCA No. 55306 stated (at 54-56):

> The Respondent asserts the affirmative defenses of (1) accord and satisfaction for SUFI claims of Early DSN abuse, Delta Squadron, Prime Knight [by virtue of Mod. 5], and Transition and Shutdown expenses; (2) waiver of breach damages by SUFI continuing performance [from September 2004 to May 2005]; (3) *res judicata* regarding the two new lodging facilities [at Ramstein and Spangdahlem, decided in *SUFI I*]; (4) statutory law and NAFI Contract Disputes clause bar to any interest claims; (5) lack of notice [of SUFI's constructive change claims] under the Changes clause; and (6) lack of jurisdiction to award Equal Access to Justice Act attorney fees and expenses under the NAFI contract.

Respondent's answer does not specify what statutory law allegedly bars SUFI's interest claim.

DECISION

The parties filed simultaneous motions for partial summary judgment, each raising several grounds, primarily relating to respondent's affirmative defenses. We address the affirmative defenses in order and then turn to the remaining grounds for each motion.

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *U. S. Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001). The fact that both parties have moved for partial summary judgment and assert that there are

no genuine issues of material fact with respect to each such motion, does not relieve the tribunal of its duty to evaluate each motion on its merits and decide whether summary judgment is appropriate. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

I. Accord and Satisfaction

Appellant moves for summary judgment on the accord and satisfaction defense, and respondent opposes the motion upon the ground that there are genuine issues of material fact. To the defense that Mod. 5, executed in 1999, constituted an accord and satisfaction of SUFI's Early DSN Abuse, Delta Squadron and Prime Knight claims, appellant argues that Mod. 5 did not settle SUFI's 2005 monetary claims regarding DSN service within the guest lodging rooms, but only clarified how such DSN service was to be provided in the future; Mod. 5 did not state expressly that it was an accord and satisfaction; the record of the parties' negotiations for Mod. 5 discloses no apparent intent to release SUFI's foregoing claims; and there was no meeting of the minds of the parties that Mod. 5 was intended as an accord and satisfaction of any SUFI claim (app. mot. at 1, supporting memo at 2-4, 6-9, 2d Myers aff., ¶ 3, and Ansola aff., ¶ 3).[1]

To show a genuine issue of material fact regarding the parties' meeting of the minds to resolve DSN issues, respondent cites CO J. Jones' declaration that Mod. 5 "resolved the DSN issues that SUFI had from the beginning of the contract to the execution of" Mod. 5, and the 28 June 2001 e-mail of SUFI's Cecilia Ansola who stated that in "June [1999] – Modification was signed in regards to DSN. We all thought this would resolve the DSN issue" (gov't opp'n at 6-7, ex. A, ¶ 4; R4, tab 85A at SCL002717).

[1] The Board does not address the accord and satisfaction defense insofar as it relates to the Transition and Shutdown expenses.

Decision on Accord and Satisfaction

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

II. Waiver of Breach Damages by Continuing Performance

Both parties move for partial summary judgment on whether, by continuing performance and re-blocking calling card calls, appellant waived the right to claim damages other than those that arose during the 15 January to 1 September 2004 period of the breach held in *SUFI I*.

Respondent argues that by continuing to perform the contract from 17 August 2004 until 31 May 2005, "SUFI waived its remedy of stopping performance" and waived its right to damages arising from the calling card breach found by the Board except for damages incurred from 15 January 2004, when the CO ordered removal of calling card blocking, to 1 September 2004 when SUFI re-blocked calling card calls; that "the contract continued to be in effect until the end of the transition period on 31 May 2005"; that SUFI's blocking of telephone calls on 1 September 2004 "mooted the breach" arising from the CO's 5 November 2003 order to remove restrictions on outgoing lodging guest calls accessing long distance carriers other than SUFI, as held in *SUFI I*, "thus removed the basis for SUFI's right to stop performance of the contract," and hence "the Board lacks jurisdiction over any and all of SUFI's claims arising from the breach" (gov't mot. at 15-19).

On this issue, appellant argues that ¶ 5 of the PSA expressly stated that "[n]either the Air Force nor SUFI by . . . continuing performance during the Transition period waives or affects in any way preexisting rights and defenses either party may have," *i.e.*, "SUFI's continuing to perform during the Transition Period . . . is not a waiver" (app. mot. at 6). Appellant further argues that SUFI promptly canceled the contract, as acknowledged in the PSA, and throughout the Transition Period notified the CO of SUFI's reservation of rights to recover breach damages; SUFI stopped performance in part on 10, 16, 21 and 25 March 2005; in material breach situations, the non-breaching party may continue performance for a reasonable period without waiving its right to terminate; SUFI's 1 July 2005 claim did not include damages for calling card calls themselves during the Transition Period, when it mitigated damages by reblocking calling card access; and such reblocking did not "moot" any portion of SUFI's calling

card claim for the period February through August 2004, which SUFI reserved on 25 August 2004 and in the PSA, ¶ 5 (app. resp. at 2-17, 18-27, 27-29; 2d Myers aff., ¶ 7.w, y, aa, bb).

Respondent argues that since the penultimate sentence in ¶ 5 of the PSA provided that respondent did not waive its defenses to SUFI's claims, SUFI's motion to bar the government's affirmative defense of waiver should be denied and respondent's motion "should be sustained as a matter of law" (gov't opp'n at 11-12).

Decision as to Waiver

The parties do not dispute the material fact that SUFI provided telephone services at German guest lodgings from 17 August 2004 to 31 May 2005, except for partial service stoppages on 10, 16, 21 and 25 March 2005. They disagree whether such continued performance was under the contract or whether SUFI cancelled the contract and performed under the PSA, and whether by such performance SUFI waived its remedy of stopping performance and recovering monetary damages.

We grant appellant's motion on this issue and deny respondent's. Respondent agreed in PSA ¶ 5 that:

> [N]either the AF nor SUFI by executing this agreement and by continuing SUFI's performance during the Transition Period waives or affects in any way preexisting rights and defenses either party may have. In particular, the AF acknowledges that SUFI by continuing work until the Transition Date does not waive any rights it may have to collect all damages otherwise available for the breaches declared by the ASBCA.

Furthermore, when a contractor gives prompt notice of the government's material breach, states that the contractor does not waive its rights and remedies by its willingness to discuss a modified agreement, continues performance in the exercise of reasonable business judgment to mitigate damages, and such continued performance does not damage the breaching party or cause it to change its position, no waiver of material breach has occurred. *See Northern Helex Co. v. United States*, 455 F.2d 546, 552-54 (Ct. Cl. 1972). As we consider these points decisive, we do not consider the parties' other arguments.

III. Claim for Interest

Both parties move for summary judgment on whether the PSA's interest provision was void *ab initio* because of statutory and contractual bars. On this issue, it is undisputed that no statute or clause in Contract No. F41999-96-D-0057 as of April 1996 provided for government payment of interest on contractor claims, the CDA provision for payment of interest on contractor claims is not applicable to this NAFI contract (SOF, ¶ 1), and ¶ 4 of the PSA expressly provided for payment of such interest (SOF, ¶ 7).

Respondent argues that SUFI's claim for interest on the claimed damages is barred because "the NAFI, as an instrumentality of the United States Government, has . . . sovereign immunity from assessment of interest . . . which immunity was not waived by" ¶ 4 of the PSA; CO Hollins-Jones was authorized only "to execute Modification No. 11 which states in block 14 'The purpose of this modification is to exercise the Government's option to buy existing contractor owned equipment,'" so she "lacked authority to enter an agreement to award interest" to SUFI; and the PSA ¶ 4(a) interest provision was "void ab initio" because the CO lacked authority to agree thereto, since such clause was not among the mandatory NAFI contract provisions required by DoD Directive 4105.67, 30 July 2002, ¶ 4.5, which states that in executing NAFI procurements, responsible government officials shall include certain mandatory clauses, such as the Changes clause, or by Air Force Manual 64-302, 24 October 2002, ¶ 6.1, which states in relevant part that NAFI agreements "shall contain only those clauses and certifications required for the purpose of complying with Federal law, DoD requirements, and protecting the interests of the NAFI" (gov't mot. at 22-25, exs. F, L at 3, O at 15). Respondent does not identify any statute, clause or provision in DoD Directive 4105.67 or AF Manual 64-302 that precludes a provision for payment of interest in an agreement such as the PSA. Respondent cites *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947), and other cases holding that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in a relevant statute or contract.

Appellant argues that the plain language of PSA, ¶ 4(a), entitles it to interest; respondent's assertion that ¶ 4(a) was *void ab initio* because the CO lacked authority to agree to it on the ground that such an interest provision violated DoD Directive 4105.67 and AF Manual 64-302, is unsound; SUFI's sale of its telephone system to respondent was the "quid pro quo" for respondent's agreement in PSA ¶ 4 to pay interest on SUFI's claims; SUFI's Mr. Myers, who participated in the negotiation of the PSA in March 2005, would not have agreed to the PSA without its interest provision; at no time was SUFI informed by AFNAFPO or USAFE personnel that such interest provision was "void"; and the government's sovereign immunity does not apply here where there is an express contract clause and public policy favors enforcement of settlement agreements (app. mot. at 2, supporting memo at 11-14, app. resp. at 38-44; 2d Myers aff., ¶¶ 8-10).

Decision on Interest

The federal government is immune from awards of interest except "where expressly agreed to under contract or statute." *See Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986). To recover interest on a contractor claim, absent statutory authority, the contract clause for payment of interest must be affirmative, clear-cut, and unambiguous. *Thayer-West*, *supra*, 329 U.S. at 590. We are persuaded that the PSA ¶ 4 interest provision is no less affirmative, clear-cut and unambiguous than the pre-CDA "Payment of Interest on Contractors' Claims" clause that authorized such interest in *J. F. Shea Co., Inc. v. United States*, 754 F.2d 338, 339-40 (Fed. Cir. 1985) (the only disputed issue was whether the interest rate was fixed or variable) and *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1155 (Fed. Cir. 1983).

The 1 April 2005 Headquarters, AFSVA, memorandum unequivocally authorized CO Edith Hollins-Jones of HQ USAFE/A7SFC to execute Mod. 11 and the attached 1 April 2005 PSA. PSA ¶ 8 represented that the parties to the PSA had authority to execute that PSA. (SOF, ¶¶ 6, 7) Accordingly, respondent's arguments that CO Hollins-Jones lacked authority to agree to award interest to SUFI and PSA ¶ 4(a) was *void ab initio* are untenable.

DoD Directive 4105.67 required certain mandatory clauses such as the Changes clause in NAFI contracts, and AF Manual 64-302 prescribed "only those clauses . . . required for the purpose of complying with Federal laws, DoD requirements, and protecting the interests of the NAFI." Those documents were not referenced in the SUFI contract and did not forbid the PSA ¶ 4(a) interest clause. Respondent has raised no basis for "second-guessing" whether the PSA interest provision protected the interests of the NAFI. We hold that respondent is not entitled to judgment as a matter of law on the affirmative defense that the CO lacked authority to agree to the ¶ 4 interest provision and such provision was "void ab initio." We hold that appellant is entitled to partial summary judgment on this issue.

IV. Changes Clause Notice

Appellant argues that respondent's affirmative defense of lack of notice of constructive changes fails because the contract's FAR 52.243-1, CHANGES-FIXED PRICE-ALT I (AUG 1987) clause in effect in April 1996 required no notice of constructive changes, applicable decisional law does not require notice of constructive changes, the CO's 17 April 2006 denial of SUFI's claims on their merits, rather than lack of notice of constructive changes, waived such notice, and respondent cannot show any prejudice (app. mot. at 2, supporting memo at 2-4, attach. A). Respondent argues that "there are genuine issues of material fact relating to whether SUFI filed a notice of Constructive

Change with the [CO] for these claims prior to final payment and whether the Government is prejudiced by the lack of timely notice." CO Hollins-Jones stated that "SUFI did not submit written or verbal notice of any constructive changes to me prior to the final payment of $2,275,000.00" that occurred on 1 June 2005, and on 25 July 2006 CO Henson declared that "SUFI did not submit written or verbal notice to me entitled 'Notice of Constructive Change' . . . prior to the final contract payment" and failure to notify him "in a timely fashion prejudiced my investigation of these issues since SUFI's contract was effective from April 1996 to June 2005" and "Air Force . . . personnel involved have limited recollection of the facts associated with these issues" (gov't opp'n at 17-18; ex. B, ¶¶ 7-8, ex. C, ¶¶ 3-4).

Decision on Changes Clause Notice

With respect to the issue of lack of notice of constructive changes, the FAR 52.243-1, CHANGES-FIXED PRICE ALT I (AUG 1987) clause in Contract No. F41999-96-D-0057 did not explicitly address constructive changes. Its ¶ (c) required SUFI to "assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order," although the CO could receive and act upon a proposal submitted before final payment. (SOF, ¶ 1)

Appellant cites ASBCA precedents holding that the predecessor to the 52.243-1 CHANGES-FIXED PRICE clause in the NAFI contract in dispute did not require notice of constructive changes within thirty days. The 30-day notice requirement did not preclude consideration of constructive change claims, because there was no "actually effective" order to start the notice period running. *MECO, Inc.*, ASBCA No. 9849, 65-2 BCA ¶ 5132 at 24,166; *see also Burton-Rodgers, Inc.*, ASBCA No. 5438, 60-1 BCA ¶ 2558 at 12,419-20. Respondent does not cite authority to the contrary.

Even where a Changes clause expressly requires written notice of constructive changes within a specified period of time, lack of such notice does not *ipso facto* bar recovery therefor, but the government must prove that it was prejudiced by such lack of notice. As summarized in *Grumman Aerospace Corp.*, ASBCA Nos. 46834 *et al.*, 03-1 BCA ¶ 32,203 at 159,185:

> In *A.R. Mack Construction Co., Inc.*, ASBCA No. 50035, 01-2 BCA ¶ 31,593 at 156,139-40 we recently summarized the state of the law on written notice requirements as follows:
>
> > The Government can be placed upon notice of a claim by being made "aware of the operative facts" thereof. [Citations omitted.] Where responsible Government

> officials are aware or should be aware of the facts giving rise to a claim, strict compliance with a contract's written notice requirements is not required. [Citations omitted.] Oral notice . . . may be furnished to responsible Government representatives. [Citations omitted.]
>
> The burden is on the Government to establish that it was prejudiced by the absence of the required notice. This burden cannot be satisfied by allegation, but must be supported by evidence in the record. [Citation omitted.] When the Government has knowledge of the underlying facts giving rise to a claim, it is unlikely it will be prejudiced in its investigation and defense thereof.

Moreover, even when such prejudice is proven, it does not bar recovery, but rather increases the contractor's burden of persuasion of the constructive change claim. In *Hunt Building Corp.*, ASBCA No. 31775, 89-1 BCA ¶ 21,196 at 106,969-70, the construction contract's Changes clause expressly required written notice of constructive changes. The Board found that government personnel had no knowledge or notice of the contractor's "overzealous inspection" claim, and were prejudiced by loss of records and recollection of witnesses' recollection of details due to filing the claim two and one-half years after beneficial occupancy of the buildings. Nonetheless, we denied the appeal on its merits, stating:

> We have also held that failure to file a claim in time merely increases the claimant's burden of persuasion which offsets any resulting prejudice caused the Government. See *Progressive Enterprises, Inc.*, ASBCA No. 17360, 73-2 BCA ¶ 10,065 . . . . Thus, where we have found the Government to have been prejudiced by appellant's untimely filing of its claim, we may still address the merits of the claim pursuant to the aforementioned stricter standard of proof.

See also M. M. Sundt Construction Co., ASBCA No. 17475, 74-1 BCA ¶ 10,627 at 50,425 (when government is prejudiced by tardy notice of claim, "the prejudice will be taken into consideration in the determination of timeliness, or the burden of persuasion which must be sustained by the appellant"). Here there is no showing of prejudice beyond the CO's conclusory affidavit described above, which we do not deem sufficient to bar appellant's claims or defeat its motion.

Additionally, on 17 April 2006 CO Henson decided SUFI's 1 July 2005 claims on their merits without asserting any unawareness of the operative facts or prejudice due to lack of notice. *See Grumman, supra*, 03-1 BCA at 159,185 (CO waived written notice by deciding merits of constructive change claim). Finally, we do not construe payment of the amounts due under the PSA for the existing telephone system and good will as final payment for purposes of the contract's Changes clause, when both parties understood and agreed in the PSA that SUFI's claims were in process. Accordingly, appellant is entitled to judgment as a matter of law on this issue. *Schuster Engineering, Inc.*, ASBCA Nos. 28760 *et al.*, 87-3 BCA ¶ 20,105 at 101,799-800 (no "final" payment when contractor submitted claims before and after payment of a voucher marked "8th and FINAL PAYMENT").

V. Equal Access to Justice Act

With respect to respondent's affirmative defense of lack of jurisdiction to award EAJA attorneys' fees and expenses under the NAFI contract, since appellant is not a prevailing party and has not submitted an EAJA application in this appeal, its "Request for Relief" No. "5. . . . attorneys' fees and the costs of this appeal" is premature and is stricken from page 78 of its First Amended Complaint.

VI. Lost Profits

Respondent's motion raises the issue of whether appellant can recover lost profits generally, and in particular, lost profits for "new Ramstein and Spahgdahlem facilities." Respondent argues that SUFI elected to continue to perform and to cease performance on 31 May 2005 pursuant to the PSA, so it cannot recover profits lost thereafter; SUFI's lost profits claim is "purely speculative" because the contract was a "no-cost contract" in which neither government payment nor any profit "was guaranteed"; and SUFI cannot recover "lost profit" for "new Ramstein and Spangdahlem facilities" because there is no basis to claim that AFNAFPO would have ordered SUFI's telephone services for such facilities (gov't mot. at 20-22). Respondent does not explicitly raise the issue of *res judicata* with respect to new facilities.

Appellant argues that SUFI did not "waive" its right to claim lost profits by continuing to work in the Transition Period; the fact that the contract did not "guarantee" any payment or any profit to SUFI is not a requirement for recovery of profit lost due to a material breach; lost future profits were foreseeable as shown in the contract's long distance revenue-sharing arrangement (R4, tab 1 at B-1, ¶ 5.2; 2d Myers aff., ¶ 15), such lost profits were the result of respondent's material breach held in *SUFI I*; SUFI's measure of damages is reasonably certain, confirmed by the 21 April 2006 DCAA audit report on SUFI's claim: "We verified the contractor's methodology used to calculate project lost profits" (although DCAA "questioned $47,489,315.39 of the claimed

$67,510,838.19") (app. resp. at 29-35, attach. I at 17-18); and the Board's statement in *SUFI I* that SUFI had no contractual right to provide telephone services to new lodging facilities at Ramstein and Spangdahlem, 04-2 BCA at 161,868, does not preclude SUFI from proving the probability or likelihood that, "but for its breach," respondent would have ordered such additional telephone services, for which SUFI cites Mr. Myers' view that "it is highly likely that the Air Force would have asked SUFI to service the new hotels . . . at Ramstein and Spangdahlem" due to the added expense of a new system, SUFI's capacity to provide service, confusion and costs of an independent system unconnected with SUFI's system, 1999 AFNAFPO statements that SUFI would provide such service and previous additions of new facilities to SUFI's contract. (App. resp. at 35-38; 2d Myers aff., ¶ 12)

Decision on Lost Profits

SUFI's performance under the PSA did not impair its reserved rights to claim lost profits, for the reasons analyzed above in part II. The parties genuinely dispute whether SUFI can adduce evidence that its lost profits were reasonably certain, not speculative, and whether SUFI can adduce evidence that respondent would have ordered telephone services at new facilities at Ramstein and Spangdahlem but for the CO's material breach of the contract. Accordingly, we deny respondent's motion for partial summary judgment on the issue of lost profits.

VII. Claim Preparation Fees and Expenses

Appellant moves for summary judgment on its entitlement to legal fees and expenses related to its claim effort. It argues that it is entitled to recover its costs of claim preparation and negotiation prior to litigation or as an element of a constructive termination for convenience (app. mot. at 2, supporting memo at 3-8). Respondent argues that FAR 31.205-47(f) makes claim preparation costs "expressly unallowable" and the case precedents SUFI cites for recovering such costs are distinguishable (gov't opp'n at 18-21). Appellant counters that the FAR is not applicable to this NAFI contract.

Decision on Claim Preparation Costs

This issue is not ripe for decision on summary judgment costs for lack of sufficient record facts to resolve the issue. Appellant's motion is denied.

CONCLUSION

We grant appellant's motion for partial summary judgment with respect to issues II, III and IV above, and deny the balance of appellant's motion. We deny respondent's

motion for partial summary judgment in its entirety. We strike Request for Relief No. 5 in the amended complaint.

Dated: 8 November 2006

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

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55306, Appeal of SUFI Network Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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