ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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OPINION BY ADMINISTRATIVE JUDGE JAMES ON
APPELLANT'S MOTION FOR RECONSIDERATION

On 24 December 2008 SUFI timely moved for reconsideration of the Board's 21 November 2008 decision in ASBCA No. 55306, 09-1 BCA ¶ 34,018 (*SUFI II*), with respect to Counts II, III, V, VII, IX, XIII, XVI, XVIII, XXVII, finding 11 labor rates and profit on breach damages. SUFI also requested a Senior Deciding Group decision and oral argument on the motion. On 24 February 2009 respondent submitted an opposition to the motion. On 18 March 2009 appellant requested clarification on whether interest is payable on the amount awarded for claim preparation costs. The board advised the parties that such request would be addressed and decided in our ruling on this motion for reconsideration. On 25 March 2009 appellant replied to respondent's opposition. We assume familiarity with the findings and holdings in our 21 November 2008 decision, and omit arguments repeated from the parties' 2007 briefs. The Chairman has considered and

denied SUFI's request to convene the senior deciding group for this reconsideration decision. The Board heard oral argument on the motion on 23 June 2009.

Count II, Front-Desk Phone Patching to DSN. Our 21 November 2008 decision on Count II excluded lost revenues for calls from Landstuhl front desk phones 4610 and 4617 and Ramstein front desk phone 4950 because the September 2003-August 2004 average monthly call data used in those calculations as the benchmark for the pre-patching period was "the very period of front-desk patching in issue." (09-1 BCA ¶34,018 at 168,271) The four phones for which we allowed recovery (Ramstein phones 4940, 4960, 4968, and Sembach phone 8910) used their respective July 2002-June 2003 average monthly call data as the benchmark for the minutes of use on those phones before patching to the DSN became prevalent. Call data for the same pre-patching period, however, was not available for the two Landstuhl phones and Ramstein phone 4950.

SUFI contends that for Landstuhl phones 4610 and 4617 it claimed $33,466.29 in lost revenues only for August 2003, based on average call data for September 2003 through August 2004, which did not overlap the claim period. We are persuaded that SUFI's contention is correct, and our 2008 decision erred in this respect. SUFI acknowledges that the period it used to calculate average monthly call data for Ramstein phone 4950 overlapped 12 of the 23 months of lost revenues it claimed for that phone. It proposes three alternative ways to base lost revenues for phone 4950: (1) use average monthly call data for Ramstein phones 4940, 4950, 4960 and 4968; (2) use average monthly call data for Ramstein phones 4940, 4960 and 4968; or (3) use only July-August 2003 call data. (App. mot. at 54-58) Respondent argues that the Board properly denied recovery for those phones for lack of proof (gov't opp'n at 14). We are persuaded that the alternatives SUFI suggests provide a reasonable basis for recovery. Therefore, we revise our original decision as follows.

On reconsideration, for Ramstein phone 4950 we use SUFI's second alternative, the average monthly call data for Ramstein phones 4940, 4960 and 4968 for the period July 2002-June 2003 as the pre-patching benchmark (app. mot. attach. F). To maintain consistent use of pre-breach call data, for Landstuhl phones 4610 and 4617 we use the average monthly call data for Ramstein phones 4940, 4960 and 4968 and Sembach phone 8910 for July 2002 through June 2003, as SUFI proposes (app. mot. attach. E at 2-3). Accordingly, in the nature of a jury verdict, we find additional lost revenue of $32,444.91 on the Landstuhl phones ($22,488.15 + $9,959.76) in August 2003 and $52,936.68 on Ramstein phone 4950 from July 2003 to May 2005, for a revised total lost revenue for Count II of $310,755.27. We grant SUFI's motion for reconsideration on Count II to the extent set forth above.

Count III, Failure to Remove Hallway/Lobby DSN Phones. Our 21 November 2008 decision on Count III held that the government failed to remove the hallway/lobby DSN phones from the lodgings as required by contract § E-2. We denied damages, however, because the call records did not distinguish between official and non-official

calls from those phones. (09-1 BCA ¶ 34,018 at 168,242) SUFI argues that the official/non-official call distinction is irrelevant because, if the hallway/lobby DSN phones had been removed as promised, all official calls as well as non-official calls that were made over those phones would have been made over the SUFI in-room phones for which it would have charged its commercial rates (app. mot. at 2-3, app. reply br. at 1). SUFI further argues that the government had the burden of going forward with evidence of the extent of the official use of the hallway/lobby DSN phones and that, in any event, the non-official use of those phones can be estimated from the call records for "surrogate" DSN phone 4619, the Delta Squadron DSN phones, or the hallway/lobby DSN phones themselves (app. mot. at 22-34, attach. B).

SUFI's first argument – that it was to be the exclusive long distance provider of, and to be reimbursed for, all long distance calls – improperly conflates the scopes of the breach and the harm SUFI incurred thereby. Contract § B provided that SUFI was to receive no revenue for DSN calls, since ¶ 5.5.2 was deleted (*SUFI I*, finding 3). The contract impliedly limited DSN calls from guest room phones to the local base, since contract § C, ¶ 4.1.3 (as modified by SUFI's proposal), provided that SUFI would connect lodging guests to the government DSN "once adequate controls are developed with safeguards against fraud and toll skipping" and respondent answered Question 29: "DSN is 'For Official Use Only' and long distance calls are booked through the DSN operator" (*id*., findings 3, 8). SUFI's count III properly excluded local calls from the lost call revenues it calculated for surrogate phone # 4619 (ex. B205, tab 4A at 212). However, SUFI failed to show that if respondent had removed the lodging hallway/lobby DSN phones promptly pursuant to contract § E.2, all official and non-official, long distance calls guests placed over DSN phones could and would have been placed over the SUFI commercial network, rather then over another DSN phone elsewhere on the air base.

As to SUFI's second argument, the government carried its burden of going forward by producing the available Defense Information Systems Agency (DISA) call records for the hallway/lobby DSN phones (finding 109(b)). With respect to SUFI's third argument, we reaffirm our previous findings that the "surrogate" DSN phone (4619) and the Delta Squadron DSN phones were not hallway/lobby DSN phones and their call records were not probative of the claimed lost revenue from non-official calls on the hallway/lobby DSN phones.

We also reject SUFI's estimation of non-official calls based solely on duration of the call (app. mot. at 31) where, as in SUFI's case, the available call records indicate the time and regional destination of the call. We consider these data to be a more accurate basis for estimating the minutes of non-official long distance calls. On reconsideration, in an effort to determine whether the record contained any data that could be used for establishing a reasonable amount for SUFI to recover for this breach, we reviewed approximately 173,000 minutes of the 4,274,690 minutes for the 28 known hallway/lobby

DSN phone numbers recorded from September 1997 through December 2005. We have determined that 13% of those minutes were during other than normal duty hours at the locations called, and therefore more likely than not to have been non-official calls (R4, tab 326.2). Extending the monthly average call minutes and indicated percentage of non-official calls for the 28 known hallway/lobby DSN phones to the 15 hallway DSN "B" phones and the 95 DSN phones that were removed from the lodgings from 1996 to 2002 results in approximately 1,738,387 minutes for non-official calls on the hallway/lobby DSN phones over the life of the contract.[1]

Considering the personal cost to the caller of using the SUFI phones, we cannot conclude that all non-official calls placed ("free") over the hallway/lobby DSN phones would have been placed, in the absence of those phones, minute-for-minute over the SUFI phones at SUFI's commercial rates. Nevertheless, in the nature of a jury verdict, we find that the 1,738,387 minutes of non-official calls as determined above to be a fair and reasonable approximation of the non-official calls that in the absence of the hallway/lobby DSN phones would have been placed over the SUFI phones. To those minutes we apply the difference between SUFI's weighted average long distance revenue rate ($.8175) and its weighted average cost rate ($.1508) for a total lost revenue of $1,158,982.41. Accordingly, on SUFI's Count III we award the following:

A. Lost Revenues	$1,158,982.41
B. Extra Work	
Ansola, 8 hrs. @ $37.26	298.08
Broyles, 22.5 hrs. @ 21.15/hr	475.88
Total Recovery	$1,159,756.37

SUFI is entitled to $1,159,756.37, and to interest on such amount at the FRB's monthly Prime Rate from 1 July 2005 until payment of the $1,159,756.37 pursuant hereto. We do not decide here SUFI's claim preparation costs for Ms. Ansola (9.25 hours) and Messrs. Smith (22.5 hours) and Broyles (48.5 hours) on and after 14 September 2004, but instead, *infra* in this decision.

Count V, Other Operator Numbers Patching. SUFI argues that: (1) "all calls placed through the [DSN] operator from the [lodging guest] rooms, whether for 'morale calls' or for any other reason, were in violation of the contract," should have been made over the SUFI long-distance system and thus damaged SUFI (app. mot. at 37); (2) direct [DSN] operator access numbers 113, 0, 480-4663 (the morale call number) and 6120 were improper because "operator access under Mod 5 was only allowed through the

[1] The estimated minutes are for 100 months usage on 43 phones, an average 37.8 months usage on the 95 removed phones, and an 11 percent "data gap" upward adjustment in the total calculated minutes, producing 13,372,205 minutes times 13% = 1,738,387 minutes (ex. B212; R4, tab 337 at 6).

commercial system," thus no 10-minute limit is appropriate to the damages calculation, "all such calls should have been made over SUFI's system" and the Board erred in applying USAFE's non-contractual 15-minutes, every 14-days, limits to morale calls from guest rooms (*id*. at 38); (3) the Board did not recognize SUFI's deduction of 10 minutes usage from each of the 34 indirect operator access numbers (*id*. at 39-41); and (4) in computing damages on AMC number 479-4440, "SUFI accounted for the local traffic (presumably official) by deducting from the usage for the months in which [respondent] provided push-button access[,] the average usage from other, 'non-abuse' months" (*id*. at 41-42). Respondent essentially repeats its Count III arguments (gov't opp'n at 7, 13-14).

With respect to SUFI's first argument, the contract required SUFI to provide "all facilities necessary [to connect] lodging facility guests to the Government DSN private switching network…once adequate controls are developed with safeguards against fraud and toll skipping" (R4, tab 1, ¶ 4.1.3 at C-35). Thus, SUFI's conclusion that all calls through the DSN operator from the lodging guest rooms violated the contract and should have been made on the SUFI long-distance commercial network is unsound.

SUFI's second argument proceeds from a false premise. Mod. 5 added SOW ¶ 3.1.1.3: "DSN service: The contractor shall provide DSN service connectivity for in-room use. The level of DSN service shall be limited to base level." (R4, tab 8 at 1) "In March-June 1999 when…Mod. 5 was executed, the parties understood that SUFI's 'base level' DSN service in guest rooms did not include [direct] access to [base] operator numbers '0' and '113', which SUFI continued to block" (finding 97). Proper morale calls were to be made on SUFI's DSN network (finding 150). Thus, SUFI was entitled to no compensation for such calls. The Board applied USAFE's 15-minute, every 14-days, criteria to identify abusive morale calls from guest rooms not because such criteria were in the contract, but because the parties so agreed in October 1998 (findings 149-51).

With respect to SUFI calculation of indirect operator calls and AMC number 479-4440 calls, we found that SUFI's lost revenues claim excluded calls less than 10 minutes so as to eliminate proper DSN calls from the call data for the 34 indirect operator phone numbers having 70 or more calls to a number (finding 166(b)), and SUFI subtracted the 1,094 minute monthly average usage for August-September 2003 and February-March 2004 from the alleged actual usage minutes for October 2003 through January 2004 for number 479-4440 (finding 167). We concluded that SUFI had adduced sufficient proof that lodging guests *could make* unofficial calls via DSN operator patching. However, local DSN calls did not result in any lost revenues. 09-1 BCA ¶ 34,018 at 168,253-54. SUFI does not point to any evidence overlooked by the Board that SUFI's data query excluded local DSN calls from the call record data on which it calculated damages for direct operator, indirect operator and AMC number 479-4440 calls. SUFI's call record data (ex. B88) display no lists showing local and long

distance phone calls supporting Count V. We deny the motion for reconsideration with respect to Count V.

Count VII, Delta Squadron. SUFI asserts that the Board's premises (in findings 202-203) for denying recovery for the period when SUFI substituted phones 6998/6999 in the Delta Squadron day room – the Air Force removed all DSN phones from the day room in early 2000 and SUFI did not threaten to remove phones 6998/6999 until 2003 – were in error, and the Board-calculated downward trend in calls from such phones "significantly reduced SUFI's proven damages" and was inconsistent with the record of consistently high usage rates for the entire contract performance period (*id.* at 42-53). Respondent's opposition does not address SUFI's Count VII arguments (gov't opp'n at 12).

The record shows that on or about 11 August 2001 Ms. Ansola first threatened to remove the two SUFI DSN phones from the day room and the Delta Squadron commander threatened to order his people not to use SUFI phones (R4, tab 82B at 2602), as SUFI contends. We correct the date to 11 August 2001 in the sixth line of finding 203 and in the fifth line of the fifth paragraph of the decision. 09-1 BCA ¶ 34,108 at 168,259, 168,262. We hold that such correction does not alter our 21 November 2008 ruling that respondent had no duty to remove the SUFI phones 6998/6999 from the day room. 09-1 BCA ¶ 34,018 at 168,262.

SUFI contends that respondent chose to defend Count VII solely on the issue of entitlement without addressing quantum, so the Board must award the dollar amount claimed, unless patently unreasonable, citing *CFI Construction Co.*, DOTCAB Nos. 1782, 1801, 87-1 BCA ¶ 19,547 at 98,783-84. Respondent argued in August 2007 that SUFI failed to mitigate damages by failing to remove the two SUFI DSN phones and its damage calculations were speculative and based on false assumptions about the volume, length and type of use (official v. unofficial) of calls made from the day room phones (gov't post-hearing br. at 152-53). Therefore, SUFI's contention of no government defense to the Count is unsound.

In the absence of actual 1999 phone call data for phones DSN 1 and DSN 2, the Board found that SUFI's application of average monthly phone call data for phones 6998/6999 from April 2000 to May 2005, to phones DSN 1 and DSN 2 in 1999-2000, was inaccurate, and that the call data for phones 6998/6999 in 2000-2001, more accurately reflected the lost revenues for phones DSN 1 and DSN 2 in 2000-2001. The Board is not bound by the theories raised by the parties but may base its decision on a different theory of relief or defense, providing the facts have been adequately developed in the record. *See B.V. Construction, Inc.*, ASBCA Nos. 47766 *et al*., 04-1 BCA ¶ 32,604 at 161,352; *Overhead Electric Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,463, *aff'd*, 795 F.2d 1019 (Fed. Cir. 1986) (table); *Southland Mfg. Corp.*, ASBCA No. 16830, 75-1 BCA ¶ 10,994 at 52,353.

On reconsideration we eliminate our derivation of a downward trend in calls for 1999-2000 from the calls in 2000-2001. We multiply the 19,149 average minutes per month for 2000 (162,768 ÷ 8.5) by 8 months in 1999 and by 4 months in 2000, producing 153,192 and 76,596 minutes, respectively, and apply thereto SUFI's weighted average revenue and cost rates for 1999 and 2000 (finding 208), producing total lost revenues of $182,352.10 (1999: 153,192 x $0.8966-0.1185 = $119,198.70; 2000: 76,596 x $0.9014-0.0769 = $63,153.40). Additionally, we allow the April 2000 extra work of Messrs. Broyles (3.5 hrs. @ $21.15/hr.) and Congalton (14.25 hrs. @ $41.14) to install, set-up and reconfigure the switch for the two DSN phones, totaling $660.28 and the phones, jacks and wiring out-of-pocket expenses of $360.00 plus 10% profit, totaling $396.00. With the foregoing revisions, the total award on Count VII is $183,408.38.

Count IX, Sembach/Kapaun Line Charge. SUFI argues that by denying its $1 line charge per day per room for the Kapaun NCO Academy, the Board "isolated the wrong fact issues" -- whether SUFI knew COTR Sellers had contracting authority and whether existing DO No. 4 for Kapaun lodgings had been withdrawn -- which are immaterial, and "ignored precedent" on equitable estoppel. According to SUFI, the material facts are that SUFI's Mr. Stephens submitted proposals to AFNAFPO reflecting the agreement he negotiated with USAFE and COTR Sellers on the Kapaun line charge, Stephens understood from COTR Sellers on 18 March 1998 that the "contracting office" would modify DO No. 4 to include the Kapaun line charge and in April 1998 respondent decided not to modify DO No. 4 without so advising SUFI until August 1998, when the Kapaun LFTS installation was nearly complete. (App. mot. at 60-64) Respondent contends that the Board's conclusion that the Kapaun line charge lacked CO authorization is supported by its findings of fact (gov't opp'n at 14).

SUFI contends that "the CO promise[d that DO No. 4] would be modified as agreed upon in Germany" (app. mot. at 62). We disagree. Based on his 18 March 1998 conversation with COTR Sellers, Mr. Stephens understood that the "contracting office would issue…a modified [DO] for Kapaun" reflecting the $1 per day per room line charge (R4, tab 86A at 2790; tr. 1/237). Such evidence does not show that on 18 March 1998, or at any other time, a CO told COTR Sellers, or promised to SUFI, that he or she would modify DO No. 4 to include the line charge for Kapaun.

We applied the estoppel criteria in *Emeco Industries, Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973). We denied recovery on the basis of *Emeco*'s fifth estoppel element, that COTR Sellers had no authority to modify DO No. 4 to include a line charge (finding 3). Moreover, Mr. Sellers did not represent to SUFI that an authorized CO had promised so to modify DO No. 4. Mr. Stephens' understanding of, and reliance upon, the oral advice of COTR Sellers, an intermediary between SUFI and the CO, were inappropriate and unreasonable, since Mr. Stephens knew that the contracting office did not intend to issue an additional DO for Kapaun (finding 189). SUFI should have

confirmed with a CO respondent's intent to modify DO No. 4 to add the line charge. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 64-65 (1984) (no estoppel when Medicare recipient failed to confirm oral advice of intermediary with agency Secretary).

The estoppel cases SUFI cites are inapplicable. In *USA Petroleum Corp. v. United States*, 821 F.2d 622, 624, 626-27 (Fed. Cir. 1987), the contract specified use of defective government "strapping tables" that led to over-measurement of product delivered. The court found government breach based on the *Spearin* doctrine. However, it ruled that the contractor could assert an estoppel as a defense against the government's right to recover the overpayment by restitution, holding that the government may not deny responsibility for its own error in contracting (facts and issues not present in the instant Count IX). In *American Electronic Laboratories, Inc. v. United States*, 774 F.2d 1110, 1115 (Fed. Cir. 1985), the court applied estoppel when the CO, who knew of the contractor's cost overrun, authorized $900,000 in added funding and induced continued performance, issues not present in the instant claim.

Moreover, a party invoking estoppel against the government also must show affirmative government misconduct. *See United Pacific Insurance Co. v. Roche*, 401 F.3d 1362, 1366 (Fed. Cir. 2005) ("if equitable estoppel is available at all against the government some form of affirmative misconduct must be shown in addition to the traditional requirements of estoppel"; no affirmative misconduct shown when contractor itself drafted mistaken "Whereas" provision); *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000) (failure of agency patent lawyers to call the inventor's attention to the legal consequences of the "on-sale bar" invalidating his patent was not affirmative misconduct sufficient to give rise to an estoppel). We do not regard Mr. Stephens' accusations of "deceit" by COTR Sellers as proof of affirmative misconduct. We deny the motion for reconsideration with respect to Count IX.

Count XIII, Temporary Shutdowns. Our 21 November 2008 decision on Count XIII stated: "We adjust SUFI's claimed $536,274.59 net lost revenues by subtracting $65,559.02 for Ramstein Buildings 538 and 541 because their 'prior' year revenues included portions of the shutdown period (finding 179) without other data by which we can establish the correct prior year's revenues." 09-1 BCA at 168,256. SUFI argues that the record provides other data by which to determine the prior year's revenues for those buildings: (1) use "simple arithmetic" to recalculate the lost revenues: $12,637.63 ÷ 9 x 12 = $16,850/year or $1,404/month for Building 538, and $10,300.89 ÷ 11 x 12 = $11,237/year or $936/month for Building 541 (citing R4, tab 90A at 2894, 2883) or (2) run "the full, correct twelve months prior…from the call records (Ex. B88)" (app. mot at 58-60).[2] Respondent contends that the Board properly denied

[2] For Count XIII, ex. B88 designates the 12-month periods used to derive average monthly revenues, but does not display the underlying call record data.

some damages due to appellant's methodologically unsound calculations (gov't opp'n at 14).

Since SUFI has pointed to record evidence by which we can establish the prior year's revenues for Ramstein Building Nos. 538 and 541, we are persuaded to eliminate our exclusion of such revenues and to substitute the newly identified revenue data for the lost revenue calculations in the table for Buildings 538 and 541 (ex. B205, tab 14A at 400). Such substitution produces $83,035.74 in lost revenues for Building Nos. 538 and 541. We grant appellant's motion for reconsideration on Count XIII.

Count XVI, Lost Profits. SUFI argues that the Board erred by: (i) calculating the 15-year contract term to start at contract award, rather than on the date of system installation per site, (ii) denying lost profits for the Rhein-Main lodging facility in June 2005 on the invalid basis that "Rhein-Main would have been closed on 30 June 2005 even if there had been no breach" and (iii) excluding interest on lost profits after the date of payment of lost profits, contrary to the Partial Settlement Agreement (PSA) (app. mot. at 64-68). Respondent contends that the Board is bound by its finding 37 in *SUFI I* (04-1 BCA ¶ 32,714 at 161,863) with respect to the 25 April 2011 date concluding the 15-year contract term and properly found no interest due on monthly increments of lost profits allocable to months after payment of the Board's decision (gov't opp'n at 15).

Bilateral Contract Modification No. 008 (Mod 8) stated on Standard Form 30, Block 14: "THE TERM OF THE CONTRACT HAS BEEN EXTENDED FIVE (5) YEARS, EFFECTIVE APR 26, 1996 THRU APR 25, 2011" and revised § H.29 to state: "The performance period for each site will commence upon actual completion of installation, inspection and acceptance by the ordering NAFI for the system ordered for that particular site and shall not exceed a period of 15 years from that date" (R4, tab 11 at 1, 4). Our 21 November 2008 decision on Count XVI (09-1 BCA ¶ 34,018 at 168,284) used 25 April 2011 as the end date of the unperformed years because Mod. 8 so specified for the expiration of the 15-year *contract term.* Section H.29, as modified, did not specify a 15-year performance period for each site after site acceptance. It stated only that the performance period for each site "shall not exceed" a period of 15 years, which was consistent with the revised term of the contract. SUFI raised no issue of ambiguity on this point when it executed Mod. 8.

PSA, ¶ 4(a), provided for "interest on any amounts paid…by judgment from the earlier of (i) the date of receipt of the claim or (ii) the date damages are actually incurred, until payment" (ex. B70). Our 21 November 2008 decision on Count XVI, ¶ I, 09-1 BCA ¶ 34,018 at 168,286, was not contrary to, but followed PSA ¶ 4(a) precisely, and is consistent with SUFI's closing statement: "All principal amounts derived after discounting should collect interest from July 1, 2005, until payment" (app. mot. at 68).

On reconsideration, we agree that our original decision was in error, and that SUFI is entitled to lost profit at the Rhein-Main lodging for the one month (June 2005) between the 31 May 2005 termination of SUFI's work under the contract and 30 June 2005 when that facility was closed for reasons unrelated to the breach. We recalculate the total lost profit due under Count XVI for the period 1 June 2005-25 April 2011 using the same Steps A-I set forth in our 21 November 2008 decision (09-1 BCA ¶ 34018 at 168,284-86). The principal changes are the addition of one month's lost revenue at Rhein-Main, the addition of the Count III lost revenues, and the revision of the lost revenue amounts for Counts II, VII and XIII. As so revised we increase the award of lost profits under Count XVI from $636,497 to $2,273,601.

Count XVIII, SIMS/LTS Interfaces. SUFI argues that the Board erred in: (i) declining to award damages for the purchase, installation and maintenance of the Tiger call system, because CO Jones knew, or had reason to know, of the replacement of the SIMS by the GC-DOS, and hence knew of COTR Sellers' request that SUFI replace the GC-DOS computers with the Tiger system, (ii) finding that SUFI paid $20,000 each for GC-DOS computers (ex. B17), which should have been $22,000 each (ex. A36) (app. mot. at 76-83), and (iii) irrespective of the CO's knowledge, COTR Sellers had authority to interpret (or misinterpret) the contract to require certain technical characteristics purportedly lacking in the GC-DOS but present in the Tiger system (*id*. at 83-85). Respondent argues that the Board found these arguments in SUFI's 2007 briefs unpersuasive and their repetition does not merit reconsideration (gov't opp'n at 4).

SUFI cites the testimony of CO Jones (tr. 3/265-66) to try to show that she knew of COTR Sellers' July 1998 direction for SUFI to print all guest charges on a single bill which led to SUFI's replacement of the GC-DOS with the Tiger system (finding 63). We have reviewed the evidence cited at the end of finding 63. The only evidence referring to installing the Tiger system was Mr. Stephens' testimony, that contract specialist Charlotte Guilmenot never "said no, don't do that" (tr. 2/74-75). CO Jones testified that she knew of, and was concerned about, dual billings for room and telephone charges in "the 1997 period right after the cut over" (tr. 3/266), but said nothing about COTR Sellers' July 1998 direction to SUFI. The Board cannot infer from CO Jones' knowledge of GC-DOS in 1997 that she knew or had reason to know of Sellers' 1998 direction. We conclude that such evidence does not support our statement in finding 63 that "SUFI told Ms. Guilmenot of such actions," *i.e.*, replacement of GC-DOS with Tiger system. Thus, we correct finding 63 (09-1 BCA ¶ 34,018 at 168,229-30) by deleting its last sentence and substituting therefore: "The record contains no proof that SUFI told Ms. Guilmenot about installing the Tiger system."

With respect to SUFI's other argument, COTR Sellers' letter of appointment authorized him to assure that the contractor performed "in strict accordance with the contract terms and conditions" but expressly did not authorize him "to direct the contractor to perform work unless explicitly provided for in the contract" (*SUFI I*, supp.

R4, tab 202 at 4). Contract § H.2 provided that the CO was the only person authorized to approve changes in any contract requirements and such changes directed by persons other than the CO "will be considered to have been without authority' (finding 3). Contract § H.22 provided that "Only the [CO] is authorized to redirect the effort or in any way modify any of the terms of this contract.… [I]f the contractor believes that technical guidance given involves a change to the scope of the contract, he will immediately notify the CO pursuant to FAR 52.243-7, 'Notification of Changes'" (finding 219). Accordingly, COTR Sellers had no authority to alter the contract by ordering SUFI to provide the Tiger system and SUFI did not notify the CO that it considered COTR Sellers' direction to provide the Tiger system a contract change. *See Jerry Dodds dba Dodds & Associates*, ASBCA No. 51682, 02-1 BCA ¶ 31,844 at 157,352-53.

As to the cost of each GC-DOS computer, Mr. Stephens testified that he wrote the B17 memorandum "when I was actually looking at the invoices" (tr. 2/77). Such invoices are not in the record to substantiate either a $22,000 or $20,000 unit cost. Therefore, rather than to hold SUFI had failed to prove any amount paid for GC-DOS computers, the Board allowed the lower of the two figures. Aside from our foregoing correction of finding 63, we deny appellant's motion for reconsideration with respect to Count XVIII.

Count XXVII, Spare Parts. The government concedes on reconsideration that it did not contest the quantum of this claim and that appellant was entitled to recover $125,292.65 (gov't opp'n at 16). We conclude that our holding mistakenly deducted $67,000 and that SUFI is entitled to recover the amount of $125,292.65. SUFI's motion is granted with respect to Count XXVII.

Extra Work Hourly Rates (finding 11). SUFI argues that it is entitled to the "fair market value" of the "extra work" performed by its employees and consultants under the breach and constructive change Counts of its claim, including overhead costs and profit, rather than the "unburdened cost rate" derived from their "annual salaries (including bonuses and education allowances) and hourly rates" in Board finding 11 (app. mot. at 69-76). Respondent's opposition does not address compensation for employees and consultants under change and breach counts (gov't opp'n at 15-16).

For those Counts for which recovery has been allowed for extra work that is compensable under an equitable adjustment clause of the contract, SUFI is entitled to the actual cost incurred, including allocable indirect cost, and a reasonable profit on that cost. *States Roofing Corp.*, ASBCA No. 54854, 08-2 BCA ¶ 33,912 at 167,808. For those Counts for which recovery has been allowed for extra work that is compensable only as breach damages, SUFI is entitled "to be made whole for the damages it suffered from, but not to make a profit from the breach." *Northern Helex Co. v. United States*, 634 F.2d 557, 563 (Ct. Cl. 1980). SUFI has not proven that the fair market value of the extra work

under the breach counts was any greater than its actual cost, including allocable indirect cost, incurred performing the extra work.

With respect to SUFI's argument for overhead, according to Mr. Myers, SUFI's extra work claims were "part of SUFI's overhead" (tr. 14/6) and according to Ms. Ansola, the compensation of Messrs. Smith, Broyles and Congalton and of Ms. Ansola was in SUFI's 2004 "Operating Expenses" and "SG&A Expenses" (tr. 5/37). The record does not show which costs SUFI classified as "overhead" and whether SUFI added overhead costs to overhead expense items, to G&A costs or to the compensation of any employee or consultant (ex. B205, tab 17D at 445-57). SUFI's claim for overhead on the direct cost of extra work fails for lack of proof.

SUFI correctly asserts that Ms. Ansola's salary increased from $55,000 in 1996 to $100,000 in 2005 (tr. 5/53-54; app. mot. at 72 n.31). We revise Ms. Ansola's salary to $77,500, the average for that decade. We grant reconsideration to the extent of revising Ms. Ansola's annual salary, rate per hour and record cite in finding 11, respectively, to "$77,500", "$37.26" and "Tr. 2/222-23, 5/53-54, 1435-37." Accordingly, we adjust the amounts held recoverable for Ms. Ansola's extra work hours in the following counts:

Count	Hours @ $37.26
I	45.75 hrs. = $1,704.65
II	18.25 hrs. = $ 680.00
III	8 hrs. = $ 298.08
IV	32.75 hrs. = $1,220.27
V	21.0 hrs. = $ 782.46
XI	2.5 hrs. x 2 = $ 186.30
XIII	41.5 hrs. = $1,546.29
XVIII	150.75 hrs. = $5,616.95
XXIII	16.75 hrs. = $ 624.11
XXVI	48.5 hrs. = $1,807.11

Moreover, due to revision of Ms. Ansola's hourly rate, we revise the claim preparation costs granted (09-1 BCA at 168,290) as follows:

Count	Revised Amount
I	$10,179.47
II	2,016.26
III	1,984.47

IV	460.33
V	2,109.74
VII	906.16
VIII	358.60
	25.00*
IX	62.50*
X	330.79
XI	653.32
XII	715.20
	31.25*
XIII	1,555.09
XVIII	1,461.17
	75.00*
XIX	25.00*
XX	50.00*
XXIII	185.65
XXVI	3,968.19
Total:	$27,153.19

* Stephens' consulting fees.

Finally, since the amounts awarded for lost revenues have been modified in this decision, we revise findings 337 and 338 as follows:

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

Count	Amount Due
I	$ 188,637.80
II	310,755.27
III	1,158,982.41
IV	414,046.00
V	2,448.91
VII	182,353.10
X	0
XI	0
XII	368,916.75
XIII	553,751.31
XIV	0
Total:	$3,179,891.55

In finding 338, revise the third sentence to state:

> In the nearly six years from July 2000 through May 2005, the sum of SUFI's actual monthly revenues plus our adjusted lost monthly revenues ranged from about $114,000 in July 2002 to $144,000 in February 2004, and in no month exceeded the $200,000 threshold specified for 1% revenue sharing during those six years.

Profit. SUFI's Counts uniformly did not claim profit on extra work, but claimed 25% profit on "out-of-pocket" costs (findings 30, 46, 72, 83, 108, 127, 140, 148, 165, 178, 199, 210, 217, 226, 239, 247, 254, 265, 270, 272, 295 and 306). Contract Modification No. 7, ¶¶ 3.11.1-3.11.2, provided for 25% profit on additional work and facility renovations requested and funded by the Lodging Facility Manager (R4, tab 1 at C-18). We are not persuaded that such provisions address profit recoverable for constructive changes or breach damages. *See Clauss Construction*, ASBCA No. 53953, 04-1 BCA ¶ 32,627 at 161,437 (Board allowed 9.15% prime contractor profit and 10.8% subcontractor profit for constructive change); *Western Alaska Contractors, J.V.*, ASBCA No. 46033, 95-1 BCA ¶ 27,392 at 136,559 (Board allowed 10% profit for idle equipment, rental and demobilization costs due to government failure to provide barge). The 10% profit we allowed on out-of-pocket costs is consistent with the foregoing precedents.

Clarification. With respect to SUFI's 18 March 2009 request for clarification, our decision on all counts in which monetary damages were awarded uniformly contained the phrase "with interest thereon at the FRB's monthly Prime Rate from [a stated date] until

payment is made…pursuant to this decision." Omission of that phrase in our holding on claim preparation costs was an oversight. We clarify our decision to add Count II to the table of Counts and Amounts of claim preparation costs (09-1 BCA at 168,290) in the amount of $1,984.47 (Ansola, $344.66 for 9.25 hrs. at $37.26/hr; Broyles, $1,025.78 for 48.5 hrs. at $21.15/hr. and Smith, $614.03 for 22.5 hrs. at $27.29/hr.) and to revise the total recoverable claim preparation costs to $27,153.19, reflecting the Ansola hourly rate change. We add, after the table of Counts and Amounts of claim preparation costs, the following provision: "We hold that SUFI is entitled to recover $27,153.19, with interest thereon at the FRB's monthly Prime Rate from 1 July 2005 until such $27,153.19 is paid pursuant to this decision."

We revise the table of principal amounts recoverable at the Conclusion of our decision (09-1 BCA ¶ 34,018 at 168,290-91) to state:

Count	Amount
I	$ 194,968.00
II	312,730.71
III	1,159,756.37
IV	417,448.98
V	3,231.37
VI	0
VII	183,408.38
VIII	128,559.23
IX	758,463.00
X	162.86
XI	1,042.88
XII	368,916.75
XIII	567,349.64
XIV	0
XV	0
XVI	2,273,601.00
XVII	0
XVIII	153,245.12
XIX	20,368.79
XX	6,473.06
XXI	0
XXII	0
XXIII	1,118.68
XXIV	199,780.00
XXV	1,083.20
XXVI	2,191.57
XXVII	125,292.65
XXVIII	150.00
Rev. Sharing	0
Claim Prep.	27,153.19
Total:	$6,906,495.43

SUFI is entitled to interest on each of the monetary components of such $6,906,495.43 to

the extent stated in our holdings above and in the original decision. We grant the motion for reconsideration to the extent set forth above, and deny the balance of such motion.

Dated: 15 July 2009

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

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

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

Dated:

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