

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Joe Phillips) ASBCA No. 57280
)
Under Contract No. DAKF10-01-D-0015)

APPEARANCES FOR THE APPELLANT:

G. Scott Walters, Esq.
Joyce Thrasher Kaiser & Liss LLC
Atlanta, GA

Thomas J. Kelleher, Jr., Esq.
Garrett E. Miller, Esq.
Smith, Currie & Hancock LLP
Atlanta, GA

Jeffrey L. Arnold, Esq.
Andrew S. Johnson, Esq.
Arnold, Stafford, Randolph
Hinesville, GA

APPEARANCES FOR THE GOVERNMENT:

Raymond M. Saunders, Esq.
Army Chief Trial Attorney
LTC Eugene Y. Kim, JA
MAJ Samuel E. Gregory, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE SCOTT

Joe Phillips timely appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from the contracting officer's (CO's) denial of his \$642,442 claim for the government's breach of his firm fixed-price (FFP) requirements contract (hereafter sometimes Contract No. 0015) to provide rental and servicing of portable chemical latrines (PCLs) and portable handwash stations (PHWSs) at Fort Stewart, Georgia, and surrounding areas. The parties stipulated that the government concedes entitlement and the only remaining issue is quantum (*see* finding 1). After a hearing in Hinesville, Georgia, initial briefing was complete in June 2012 and supplemental briefing was complete in October 2012.

PRELIMINARY MATTER—APPELLANT’S MOTION TO STRIKE

In its reply brief appellant moved to strike the government’s responses to its proposed findings of fact (PFFs) 28, 50 and 51 on the grounds that they rely in part upon alleged facts and evidence that are not part of the record in this appeal and that they pertain to a “partnership, sole proprietorship, or contractor/subcontractor relationship” (app. reply at 36), that the government allegedly did not raise at hearing. PFF 28 pertains to appellant’s allegation that Mr. Phillips and Mr. Darvon Freeman “worked the Contract as a joint venture partners” (app. br. at 8, ¶ 28). The government’s lengthy response consists of many subparts. Appellant has not identified the specific portions to which it objects. We infer that they are the government’s reference to Internal Revenue Service (IRS) Publication 541 (“Partnerships”), with an internet citation, concerning a federal tax return schedule said to be required to report partnership income, and the government’s reference to its Central Contractor Registration (CCR) and its attachments to its brief of CCR search results for Joe Phillips and Joe’s Portable Toilets (Attachment 1) and for Freeman Contracting (Attachment 2). (Gov’t br. at 7-8, ¶ 28 d, at 11-12, ¶ 1)

PFF 50 concerns Mr. Phillips’ 2006 federal income tax return. We infer that appellant objects to the portion of the government’s response that refers to IRS Publications 541 and 334 (said to define “sole proprietor”) and cites to their internet locations (gov’t br. at 16 fns.7, 8). PFF 51 concerns expenses reported on Mr. Phillips’ 2006 federal income tax return. We have not been directed to, and have not identified, any alleged objectionable part of the government’s response.

The government responded in part to appellant’s motion to strike in a footnote, essentially stating that Contract No. 0015 contained a clause requiring appellant to register in the CCR and that CCR data was publically available on the internet. The government contends that “[h]ad appellant properly claimed, plead and proved his business relationships, such late inclusion of this data would not have been an issue” (gov’t reply br. at 11-12 n.2).

Board Rule 28(a) provides in pertinent part that the Board’s decisions “will be made solely upon the record, as described in Rule 13.” Rule 13 provides in pertinent part:

- (a) The record upon which the Board’s decision will be rendered consists of the documents furnished under Rules 4..., to the extent admitted in evidence, and the following items, if any: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, post-hearing

briefs, and documents which the Board has specifically designated to be made a part of the record....

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing....

Post-hearing briefs are not to be used to introduce new evidence. Even if the proffered material lacks evidentiary value, it constitutes improper argument and will be disregarded. *USD Technologies, Inc.*, ASBCA No. 31305, 87-2 BCA ¶ 19,680 at 99,616-17, *aff'd on other grounds*, 845 F.2d 1033 (Fed. Cir. 1988) (table); *accord Dick Pacific/GHEMM, JV*, ASBCA Nos. 54743, 55255, 09-2 BCA ¶ 34,178 at 168,951.

The government's post-hearing brief's references and citations to IRS publications 334 and 541 and to the CCR, and its inclusion of CCR attachments 1 and 2, were unacceptably late. Under the Board's 1 September 2011 amended pre-hearing order, exhibits were to be identified, exchanged, and filed with the Board by 28 October 2011, prior to the hearing. Further, the government did not seek to offer any of the material at issue at the hearing and has not persuaded us of any good cause for that omission.

However, we disagree with appellant that the government failed to address the issue of the business relationship between Messrs. Phillips and Freeman at the hearing. Our findings, below, and record citations, include references to the government's questioning of appellant's principal witnesses concerning that relationship.

Accordingly, we grant appellant's motion to strike with respect to IRS Publications 334 and 541, the CCR, and attachments 1 and 2 to the government's post-hearing brief. We otherwise deny it.

FINDINGS OF FACT

The Stipulation

1. The parties stipulated in pertinent part as follows:¹

1. On August 24, 2001, the Government awarded [Contract No. 0015] to Appellant, a [FFP] requirements contract, with no stated minimum or maximum. The Contract was for a base period, and four one-year options. The

¹ The Board has added citations to quotations and has omitted captions.

Contract was extended and amended fourteen (14) times, and remained in effect until February 29, 2008.

2. Pursuant to the Contract, Appellant was to:

Furnish all plant, labor[,] equipment, materials, supplies, and transportation necessary to provide rental and servicing of [PCLs] at Fort Stewart, GA and surrounding areas for the period of 01 Sep 2001 thru 31 Aug 2002.

[(R4, tab 1 at 2 FFP Contract Line Item No. (CLIN) 0001)]
The scope of work was increased through modifications to require rental, service, and supplies for [PHWSs].

3. The geographic parameters of the Contract stated that the “[s]ervices provided under this [C]ontract shall be performed within the boundaries of Fort Stewart, GA and within a 150 mile radius of those boundaries” [(R4, tab 1 at 23, § C.1.2.2.)]. Fort Stewart was defined as “[a]ll areas within the reservation boundaries of Fort Stewart, Georgia, including the cantonment area and portions of Liberty, Long, Evans, Bryan, and Tattnall counties” [(*id.* at 25, § C.2.8)].

4. [Stipulation concerning claim and appeal omitted.]

5. During the performance period under the Contract, there were three major Forward Operating Base (FOB) exercises at Fort Stewart, resulting in the award of four (4) contracts to support the PCL and PHWS requirements: W9124M-07-P-0180 [Contract No. 0180], W9124M-07-P-0192 [Contract No. 0192], W9124M-08-P-0055 [Contract No. 0055], and W9124M-08-P-0074 [Contract No. 0074].

6. *The 2nd Brigade Combat Team (BCT) HMRE*: This exercise ran from February 22, 2007 through March 15, 2007. This requirement was performed by a third party contractor, Deployed Resources[,] under [Contract No. 0180] and was awarded while the Government was [a] party to the requirements contract with Appellant. [Contract No. 0180] called for rental, supply, and daily servicing of 296 PCLS and

29 PHWSs. The exercise was conducted on Fort Stewart, and [Contract No. 0180] was awarded by the Army Contracting Command (ACA).

7. *The 4th BCT Vanguard Focus Exercise*: This exercise ran from February 15, 2007 through March 10, 2007 with the requirements performed by the third party contractor TVI Corporation under [Contract No. 0192]. This contract was also awarded while the Government was a party to the requirements contract with Appellant. [Contract No. 0192] called for rental, supply, and daily servicing of 336 PCLs and 88 PHWSs. The exercise was conducted on Fort Stewart, and [Contract No. 0192] was awarded by ACA.

8. *The 76th BCT Exercise*: This exercise ran from December 21, 2007 through March 15, 2008 with the requirements performed by two third-party contractors, Mahaffey Fabric Structures, Inc. and Military Training Solutions, under [Contract No. 0055] and [Contract No. 0074], respectively. These contracts were also awarded while the Government was a party to the requirements contract with Appellant. [Contract No. 0055] called for rental, supply, and daily servicing of 115 PCLs and 30 PHWSs. [Contract No. 0074] called for rental, supply, and daily servicing of 227 PCLs and 73 PHWSs. The 76th BCT Exercise was conducted on Fort Stewart, and both of the foregoing contracts were awarded by ACA.

9. The parties stipulate that [Contract No. 0015] was a requirements contract, and the Government was required to utilize the Appellant for supply and servicing of all PCLs and PHWSs for Fort Stewart, GA during the term of the Contract. Specifically, the parties stipulate that the requirements described in Paragraphs 5 through 8, above, should have been ordered by the Government from the Appellant pursuant to the Contract.

10. In light of this stipulation, the parties agree that entitlement is conceded by the Government and the only remaining issue to resolve on the appeal is a determination of reasonable quantum based on agreed on or proven quantities

of PCLs, PHWSs, frequency of servicing, and duration of the rental, supply, and servicing requirements under these other contracts.

(Ex. A-79 at A1570-73) The government does not concede that all requirements at issue were in place during the entire terms of the four contracts addressed in paragraphs 5 through 8 of the stipulation, sometimes referred to as the “FOB” contracts. For example, the government notes that the stipulation does not state that the parties agreed upon precise numbers or dates. Rather, the stipulation provides that reasonable quantum will be based upon agreed or proven numbers of PCLs and PHWSs, servicing frequency, and duration of the requirements under those contracts. (*See* gov’t br. at 21, ¶ 71)

Contract No. 0015—Background, Provisions and Performance

2. Mr. Phillips had extensive prior experience as a government contractor. He had bid and performed contracts at Fort Stewart and Hunter Army Airfield in Georgia since 1979. He held a contract with the government, similar to Contract No. 0015, for supply and servicing of PCLs and PHWSs from 1990 until 1997. (Tr. 1/32-33, 2/131; app. br., agreed PFFs² 25, 26)

3. Before the dispute at issue, Mr. Phillips had some experience providing services for FOB type exercises at Fort Stewart, where a large number of troops are brought in for training and housed in tents (tr. 1/64-65).

4. The Directorate of Contracting at Fort Stewart awarded Contract No. 0015 to Mr. Phillips in the estimated amount of \$581,175 for the base period 1 September 2001 through 31 August 2002, with four option periods, extending through 31 August 2006 (R4, tab 1 at 1, 2, 18, tab 2 at 1).

5. Mr. Freeman had worked at Fort Stewart as Mr. Phillips’ employee for about four and one-half years in connection with an earlier PCL and PHWS supply and servicing contract between Mr. Phillips and the government (tr. 1/227; agreed PFF 31). Mr. Phillips’ 1 September 2001 Quality Control Plan for Contract No. 0015 named himself as owner, appointed Mr. Freeman project manager, and stated that Mr. Freeman was “a full time employee” (R4, tab 3 at second and third pages). Their arrangement was that Mr. Phillips “would do the office work and [Mr. Freeman] would run the job” (tr. 1/231). Mr. Phillips had the money, paid the bills (other than labor payments, which Mr. Freeman apparently paid (finding 26)), and did the paperwork and Mr. Freeman took

² We refer to those of appellant’s PFFs, or parts thereof, that are undisputed and supported by the record, as “agreed PFF.”

care of the field work. They agreed to split the net contract proceeds equally, including the proceeds from this appeal. (Tr. 1/39-40, 146, 148-49, 282, 293-94, 2/101) As of the end of Contract No. 0015, Mr. Freeman served as the project manager for the successor contractor to Mr. Phillips and also owned his own port-a-let company (tr. 1/236-37).

6. Mr. Phillips contends that he had an oral joint venture or partnership agreement with Mr. Freeman (tr. 1/34-35, 38-40, 145-46, *see also* tr. 1/230-31, 282 (Freeman testimony about going into business with Mr. Phillips in connection with the contract)). There is no documentation of any such agreement or of any subcontract agreement. Mr. Phillips' Federal income tax returns for 2006-08 contain Schedule E information concerning partnership income, but the referenced partnerships are for a laundromat and an entity entitled "Folsom and Phillips, LLC," not shown to be relevant to this appeal (ex. A-21 at 323-24, A-54 at 1086, A-72 at 1262). Mr. Freeman was not a signatory to the contract. The government asserts that he is "clearly" a subcontractor to Mr. Phillips' portable toilet service (*e.g.*, gov't br. at 17, ¶ 53, gov't br. at 47, ¶ 199 *and see* gov't br. at 61 ("it is obvious that these men structured their business affairs with one another as sole proprietor contractor to sole proprietor subcontractor and reported as such to the IRS")). On his federal income tax returns, Mr. Phillips referred to payments to Mr. Freeman as subcontracting expenses (*see* tr. 1/317, 2/101 and below concerning Phillips' and Freeman's sole proprietorships tax schedules). We find that Mr. Freeman is properly characterized under the circumstances of this appeal as Mr. Phillips' subcontractor under Contract No. 0015.³

7. Contract No. 0015 included the Federal Acquisition Regulation (FAR) 52.216-21, REQUIREMENTS (OCT 1995) clause, which provides in part:

(a) This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract....

(b) ...[T]he Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause....

(c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies

³ *See also* FAR 44.101 ("*Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor...").

or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

(R4, tab 1 at 32-33)

8. Under the contract's scope of work, Phillips was to provide "all labor, personnel, equipment, materials, supplies, supervision and other items and services" necessary for the rental and servicing of the PCLs (R4, tab 1 at 22, § C.1.1., *see also* § C.4. (except for government-furnished storage area, contractor to furnish "all labor, material, and equipment necessary for the rental, servicing, relocation and maintenance of [PCLs]") (R4, tab 1 at 25). Specification § C.5. identified specific tasks the contractor was to perform, including in part:

C.5.1. Rental of [PCLs] shall include contractor coordination with the POC as shown on Call Orders, delivery of the latrines to the stipulated site, set-up for operation, and subsequent removal from the premises.

C.5.1.2. Service of the [PCLs] shall include the complete removal of all waste, trash, and debris from the interior of the latrine. Service shall also include the cleaning of the inside of the waste tank, the cleaning and application of cleaner to the toilet seat, and the replenishment of toilet tissue. The waste tank shall be recharged with sufficient quantity of chemical to insure an odorless unit.

C.5.1.3. Relocation of units shall include pickup, transport, placement, and service by the contractor. An additional service charge shall not be due the contractor if the order for unit relocation falls on regular service day.

C.5.2. The contractor shall be responsible for the preparation of all latrine sites to assure that the units are stabilized and easily accessible.

C.5.3. The contractor shall repair and repaint the latrine units as required to maintain the units in watertight, fly tight, sanitary, and neat-appearing condition.

C.5.4. The contractor shall have 48 hours from time of notification by the COR [CO's representative] when a unit is in need of repair to either repair the unit, or replace the unit with another unit.

C.5.5. The contractor shall be responsible for and bear the cost of all minor repairs, defined as repairs for normal wear and tear, for such items as broken or damaged toilet tissue holders, toilet seats, doors, door latches, door locks, coat hooks, and repair of unit cracks and holes.

(R4, tab 1 at 26)

9. FFP subCLINs covered specific rental, service and relocation requirements, for example, the monthly rental of PCLs, covering 175 latrines for 12 months (subCLIN 0001AA) and the servicing of monthly rental PCLs on Mondays, Wednesdays, and Fridays (175 latrines at 13 service days per month) (subCLIN 0001AB) (R4, tab 1 at 2-5 (base period), at 6-21 (options)).

10. The specifications allowed the contractor to empty waste and to refill his clean water tank at specified areas. The government-furnished storage area was said to be large enough to store about 500 portable latrines, vehicles and trailers. The government supplied water in the storage area, but not electricity. (R4, tab 1 at 25 (specifications §§ C.3.1.1., C.3.1.2., C.3.3))

11. Bilateral Modification (Mod.) No. P00004, effective 5 December 2003, changed the estimated quantities of PCLs rental and servicing for the current and remaining option periods at a net contract price increase of \$724,340 (R4, tab 11 at 1-2).

12. Bilateral Mod. No. P00005, effective 11 February 2004, added the rental and servicing of PHWSs on Fort Stewart and surrounding areas, for the current and remaining option periods, increasing the estimated contract price by \$22,735 (R4, tab 12 at 1-8).

13. Bilateral Mod. No. P00011, effective 22 February 2007, added FFP subCLIN 6001AS for the provision of soap and paper towels at hand wash stations in the estimated quantity of 368 at the unit price of \$20, for an estimated total of \$7,360. The contract price was increased by that amount to an estimated \$6,747,928.31. The performance period was 23 February 2007 to 15 March 2007. On about 22 March 2007 the contractor was paid \$7,360 for providing the 368 soaps and paper towels. Appellant has not rebutted the government's contention, as the record suggests, that the service was in

support of the 2nd BCT exercise covered by Contract No. 0180, below. (R4, tab 21 at 1-2; supp. R4, tab 42 at fifth-seventh pages, tab 50 at GOV14; ex. A-38)

14. On 27 February 2007 Mr. Phillips sought to recover a stated 25% increase in his labor, supply and fuel costs. Bilateral Mod. No. P00012, effective 27 February 2007, among other things, extended the contract term for the period 1 March 2007 through 31 May 2007; apparently increased unit prices based upon cost increases; and added FFP subCLIN 7001AS, in the estimated quantity of one, at the estimated price of \$20, for the provision of soap and paper towels at hand wash stations. The contract price increased by \$273,777.75, to an estimated \$7,021,706.06. (R4, tabs 22, 23 at 1-2, 10; tr. 2/139-40)

15. Bilateral Mod. No. P00013, effective 29 May 2007, among other things, extended the contract term for the period 1 June 2007 through 30 November 2007 and added FFP subCLIN 8001AS, in the estimated quantity of one, at the estimated price of \$20, for the provision of soap and paper towels at hand wash stations (R4, tab 24 at 1, 9).

16. On 29 November 2007 CO Willie Barnett issued a justification document for other than full and open competition, approved by Fort Stewart's Director of Contracting, for a three-month contract extension due to the need to evaluate an award protest under an ongoing procurement to provide portable latrine requirements for the next five years (ex. A-43 at A594-98). The justification stated in part:

The intended contractor is Joe Phillips who has extensive knowledge of the Fort Stewart training layout. His company has provided excellent service in the past at competitive rates.

(*Id.* at A595) The CO determined the cost to the government to be fair and reasonable based upon a stated comparison with an Independent Government Estimate (not of record) and prices previously paid for the same items (*id.* at A597).

17. Bilateral Mod. No. P00014, effective 30 November 2007, extended the contract period through 29 February 2008 and increased its price by \$285,076.50 to an estimated \$7,833,986.81. Unlike Mod. Nos. P00011-P00013, although it included subCLINs for hand wash stations, Mod. No. P00014 did not include a subCLIN for soap and paper towels. (R4, tab 27 at 1-24)

18. In 2001, shortly after award of Contract No. 0015, Mr. Phillips purchased 451 PCLs to meet the government's contract requirements. He also bought two trucks for servicing them. (R4, tab 3 at fourth page; tr. 1/232; agreed PFFs 32, 33)

19. Mr. Phillips' Quality Control Plan included three latrine delivery trailers. He designed them and had them built for use under Fort Stewart's sometimes difficult road conditions. (R4, tab 3 at 4th page; ex. A-83 at A1593; tr. 1/76-77)

20. Mr. Phillips' operation was conducted out of the government-furnished yard on Fort Stewart, for which he was not required to compensate it. He had no problem obtaining water to refill the water tanks on his trucks. The government did not charge him for the fresh water he needed to service PCLs and PHWSs. (Tr. 1/85, 217, 310; agreed PFF 35, agreed portion of PFF 36)

21. The only place Mr. Phillips dumped "black water" (sewage) regularly was at Fort Stewart's waste control station. He might have dumped it at Fort Oliver but did not have standing permission to do so. He also had a 1,000-gallon temporary holding tank at his Fort Stewart yard. The government did not charge him to dispose of black water. (Tr. 1/110-11, 190-91, 308; agreed PFF 38, agreed portion of PFF 39)

22. Relying upon a somewhat uncertain memory, rather than records, Mr. Phillips testified that, in connection with a 2006 FOB exercise, he owned about 750 PCLs. He needed about 850 for that exercise and stated that he acquired the balance from local business personnel at no cost. At the start of 2007 he had no more than 850 PCLs. Only about 803 were documented as of the hearing. Of these he purchased 196 in about January 2007 in preparation for another FOB exercise. He confirmed that records kept by his accountant/tax preparer George Stafford could be relied upon as representative of his business activities. (See ex. A-80; tr. 1/65-67, 77-78, 152, 314, 316, 2/85)

23. As of 1 January 2006 Mr. Phillips had four trucks. He purchased a fifth in November 2006 and a sixth in January 2007. (Supp. R4, tab 38 at GOV19-22; ex. A-80 at A1576)

24. After trying commercially available pumper trucks that he found unsuitable for Fort Stewart's roads, Mr. Phillips assembled his own by joining a heavy-duty truck (typically a Ford F-350), a custom-built flat bed, a commercially-produced "Best" brand palletized tank and pump assembly, a lift-gate and a heavy-duty bumper with winch (tr. 1/159-61; see exs. A-14, -16, -17, -33.1). Each truck had a 400-gallon black water tank, a 200-gallon fresh water tank and a 35-gallon auxiliary fresh water tank (agreed PFF 47).

25. In the last two full years of Contract No. 0015 (2006 and 2007) and the last two months of the contract (1 January 2008 through 29 February 2008), contract performance was profitable (see agreed PFF 48).

Phillips' and Freeman's Federal Income Tax Returns

26. Mr. Phillips received all income from Contract No. 0015 then provided an amount to Mr. Freeman, which Mr. Stafford recorded as a subcontract expense on Mr. Phillips' income tax returns and income to Mr. Freeman. Mr. Phillips testified that, according to their joint venture or partnership in 2001 concerning the portable toilet contract, Mr. Freeman took half the profit. Mr. Phillips paid the bills and they divided what was left. However, according to Mr. Stafford, Mr. Freeman managed the labor and paid all labor expenses. As set forth below, the Phillips subcontract expense and Freeman income numbers on their federal income tax returns were identical in 2007 but not in 2006 and 2008. The reasons for the differences are unclear. (Tr. 1/38-40, 144, 2/101-03)

(a) Mr. Phillips' 2006 federal income tax return, Form 1040, Schedule C, "Profit or Loss From Business (Sole Proprietorship)" reported gross receipts of his sole proprietorship for his portable toilet service of \$595,858. The Schedule declared expenses of \$451,069, which consisted of \$121,017 in depreciation; \$4,171 for insurance other than health insurance; \$1,925 in legal and professional services; \$145 in office expense; \$10,115 in repairs and maintenance; \$13,749 for supplies; \$224,764 in "SUB-CONTRACT" expense; \$36,465 for fuel; \$33,635 in credit card discount fees; and \$5,083 for communications expense. As with his returns below, Mr. Phillips did not list any separate expense for business use of his home. He reported a net profit of \$144,789 for tax year 2006, a 24.3% profit margin ($\$144,789/\$595,858$).⁴ (Supp. R4, tab 38 at GOV8-9)

(b) Mr. Freeman's 2006 federal income tax return, Form 1040, Schedule C, reported gross receipts of his sole proprietorship for his portable toilet service of \$220,619 and declared expenses of \$89,847, including car and truck expenses of \$14,018, contract labor of \$9,913, insurance other than health insurance of \$7,524, office expense of \$78, taxes and licenses of \$5,364, and wages less employment credits of \$52,950. He reported a net profit of \$130,772 for tax year 2006. (Ex. A-22 at A335)

27. (a) Mr. Phillips' 2007 federal income tax return, Form 1040, Schedule C, reported gross receipts of his sole proprietorship for his portable toilet service of \$719,758 (supp. R4, tab 46 at GOV5; agreed PFF 56). The Schedule declared expenses of \$515,292, which consisted of \$225 for advertising; \$95,560 in depreciation; \$14,443 for insurance; \$23,752 for legal and professional services; \$274 for office expense;

⁴ Figured as a percentage of expense, \$144,789 represents a profit of 32% ($\$144,789/\$451,069$). Since the parties have argued quantum based on profit margin (revenue less expense (including overhead) over revenue), we proceed on that basis.

\$14,616 for repairs and maintenance; \$5,534 for supplies; \$1,562 for taxes and licenses; \$4,574 for utilities; "SUB-CONTRACT" expense of \$293,260; \$37,709 for fuel; \$20,011 for credit card discount; \$3,637 for consultants; and \$135 for drug testing. Mr. Phillips reported a net profit of \$204,466 for tax year 2007, a 28.4% profit margin (\$204,466/\$719,758). (Supp. R4, tab 46 at GOV5-6)

(b) Mr. Freeman's 2007 federal income tax return, Form 1040, Schedule C, reported gross receipts of his sole proprietorship for his portable toilet service of \$293,260 and declared expenses of \$100,750, including car and truck expenses of \$13,095, contract labor of \$14,084, insurance other than health insurance of \$6,106, legal and professional services of \$600, office expense of \$153, repairs and maintenance of \$349, taxes and licenses of \$5,534, and wages less employment credits of \$60,829. He reported a net profit of \$192,510 for tax year 2007. (Ex. A-53 at A1018)

28. (a) Mr. Phillips' 2008 federal income tax return, Form 1040, Schedule C, reported gross receipts of his sole proprietorship for his portable toilet service of \$209,380. The Schedule declared expenses of \$151,708, which consisted of \$9,442 in depreciation; \$325 in insurance; \$6,625 in legal and professional services; \$193 in office expense; \$11,442 in repairs and maintenance; \$7,360 in supplies; \$1,223 in utilities; "SUB-CONTRACT" expense of \$88,461; \$9,889 for fuel; \$6,758 for credit card discount and \$9,990 for consultants. Mr. Phillips reported a net profit of \$57,672 for tax year 2008, a 27.54% profit margin (\$57,672/\$209,380). (Ex. A-72 at A1257-58) Mr. Phillips' average annual profit rate for 2006-08 was 26.75% ($24.30\% + 28.40\% + 27.54\% = 80.24\%/3 = 26.75\%$).

(b) Mr. Freeman's 2008 federal income tax return, Form 1040, Schedule C, reported gross receipts of his sole proprietorship for his portable toilet service of \$89,601 and declared expenses of \$30,646, including car and truck expenses of \$14,099, depreciation and "section 179 expense deduction" of \$2,657, insurance other than health insurance of \$1,521, office expense of \$95, repairs and maintenance of \$2,734, supplies of \$181, taxes and licenses of \$582, wages less employment credits of \$5,220, and other expenses of \$3,557. The "other expenses" included fuel of \$2,408, drug testing of \$105, bank fees of \$167, and casual labor of \$877. He reported a net profit of \$58,955 for tax year 2008. (Ex. A-73 at A1289-90)

29. Mr. Phillips' federal income tax returns for 2006-2008 report no salary or wages (supp. R4, tab 38 at GOV4, tab 46 at GOV1; ex. A-72 at A1253). There is no evidence that he had any contracts other than Contract No. 0015, or any other work for which he was compensated, during the periods at issue in this appeal. Thus, we find that all of the business income and all of the administrative expenses listed on Schedule C of his 2006-2008 federal income tax returns are attributable to Contract No. 0015.

30. Mr. Freeman believes that he was not engaged in any contracting activities other than for Contract No. 0015 during the 2006-08 period at issue in this appeal and that all of the business expenses on his tax returns for that period were due to that contract. He and Mr. Phillips “partnered” on a “railroad contract” at one time but he believed it had ended by the time of Contract No. 0015. (Tr. 1/285-86)

FOB Contracts

31. During the term of Contract No. 0015 the government entered into the following four FOB contracts with other contractors containing PCL and PHWS supply and servicing requirements identified in the parties’ stipulation. Two went into effect in early 2007 and two in late 2007 extending into March 2008. (Agreed PFF 68)

32. Contract No. 0180, effective 1 February 2007, was in support of mission readiness for the 2nd Brigade Combat team, 3rd Infantry Division, to be conducted 22 February-15 March 2007. The parties have not stated that an option to extend through 3 April 2007 was exercised. The contractor was responsible for site preparation, mobilization and demobilization of four FOB sites for sleep tents, mess and command and control facilities for 4,783 soldiers. The contract included FFP line items for supply and servicing of PCLs and PHWSs. CLIN 1012 called for 350 PCLs to be spread among the four FOB sites such that there would be one toilet for every 15 soldiers. Mod. No. P00001, effective 8 February 2007, reduced the number of PCLs to 296 and recommended daily servicing. (Supp. R4, tab 39 at GOV1, 9-11, 31, 35, 76, 78-79) It also added CLIN 1015, which called for 29 PHWSs on a firm fixed-price basis, “complete with soap, water, paper towels and trash receptacles [sic]” (*id.* at GOV79). The parties agreed that the government diverted the requirement for the “rental, supply, and daily servicing of 296 PCLs” and for the 29 PHWSs (finding 1 (stip. ¶¶ 6, 9)). Their stipulation did not mention soap, water, paper towels or trash receptacles. Appellant contends, and the government disputes, that Contract No. 0180 contained diverted soap and paper towel requirements.

33. Contract No. 0192, effective 6 February 2007, contained numerous FFP CLINs for PCLs and PHWSs and required their daily servicing. It called for one PCL per 10 soldiers and one PHWS per 50 personnel per FOB. (Supp. R4, tab 40 at GOV1, 6 (Info. CLIN 0004), at 19-27 (CLIN 0004), at 27 (CLIN 0005)) The contractor was to “refill, repair, and replace (if necessary) all hand washing stations daily” (*id.* at GOV6 (Info. CLIN 0004)). We have not located a specific soap and paper towel reference at the cited contract page or elsewhere, but the government agreed with appellant’s proposed finding that the contract required the furnishing of soap and paper towels (agreed PFF 80). The parties stipulated that the government diverted the supply and servicing of 336

PCLs and 88 PHWSs over the course of the contract, and the PCL and PHWS requirements lasted 24 days (15 February 2007—10 March 2007) (finding 1 (stip. ¶¶ 7, 9); agreed portion of PFFs 77-82) Their stipulation did not mention soap or paper towels. Appellant contends, and the government disputes, that Contract No. 0192 contained diverted soap and paper towel requirements.

34. Contract No. 0055, effective 27 November 2007, contained many FFP CLINs for PCLs and PHWSs (supp. R4, tab 44 at GOV1; agreed portion of PFFs 83-84). The latrines included “supplies and daily cleaning” (*e.g.*, supp. R4, tab 44 at GOV12 (CLIN 0001AR)). The parties stipulated that the contract required supply and servicing of 115 PCLs. However, Cathleen Thomas, a contractor hired by Fort Stewart’s contracting office who had considerable cost and pricing and other government contract experience, including as a former government employee, found 125 PCLs after all contract modifications were included. Also, while the parties stipulated that 30 PHWSs were diverted, Ms. Thomas found that the contract provided for only 20. It required daily servicing of PCLs and PHWSs. The performance period spanned 86 days (15 February 2007 – 10 March 2007) but the CLINs contained different performance periods for particular requirements. Ms. Thomas’ report, which appellant has not controverted in this regard, summarizes the details and we adopt this portion of it. (Finding 1 (stip. ¶¶ 8, 9); supp. R4, tab 55 at 4, 5 (top table), at 10; tr. 2/125-34; agreed PFF 88) Appellant does not contend that Contract No. 0055 contained any diverted soap and paper towel requirements (app. reply br. at 14; *see also* app. br. at 22-25, ¶¶ 119-120, app. br. at 29, ¶ 144).

35. Contract No. 0074, effective 4 December 2007, required the supply and servicing of 227 PCLs and 73 PHWSs. The performance period was 86 days (21 December 2007—15 March 2008) but the CLINs contained different performance periods for particular requirements. Ms. Thomas’ report, which appellant has not controverted in this regard, summarizes the details and we adopt this portion of it. The contract stated that “[e]very day cleaning and refill is a requirement to include all supplies.” (Finding 1 (stip. ¶ 8); supp. R4, tab 45 at GOV1, -38, ¶ 11, at 51, ¶ 11, tab 55 at 5, 6, 10; agreed PFFs 91, 92) Appellant does not contend that Contract No. 0074 contained any diverted soap and paper towel requirements (app. reply br. at 14; *see also* app. br. at 23, ¶¶ 122-125).

36. The modifications to Contract No. 0015 that added soap and paper towel requirements, commencing with Mod. No. P00011, effective 22 February 2007, were not operative until after soap and paper towel provisions were already in effect under FOB Contract Nos. 0180 and 0192. Mod. No. P00001 to Contract No. 0180, which added such provisions, was effective 8 February 2007 and Contract No. 0192, which contained such provisions, was effective 6 February 2007. (Findings 13-15, 32, 33) Thus, as discussed

below, we find that the government did not divert soap and paper towel requirements from appellant and that such revenues and costs are not pertinent to its breach recovery.

Claim and Conceded Liability

37. By letter dated 23 February 2010 to the Directorate of Contracting, sent by certified mail, counsel submitted a \$642,442 CDA claim alleging, *inter alia*, government breach of Mr. Phillips' Contract No. 0015. Mr. Phillips certified the claim. The record does not appear to reflect the date the CO received it but we infer that it was no later than 26 February 2010. The claim amount was based upon "Profit and Overhead 80%" of a stated grand total of \$803,053 in diverted PCL and PHWS supply and servicing requirements, including soap and paper towel supply, under the FOB contracts. The claim did not mention Mr. Freeman, any joint venture or partnership, or any "pass through" subcontractor claim. Similarly, appellant's complaint names Mr. Phillips as the party to this appeal and alleges that the government caused him to lose a total of \$644,792 in profits through its breach of his requirements contract. It does not mention Mr. Freeman or any joint venture or partnership or any "pass through" subcontractor claim. By final decision dated 25 May 2010 the CO denied Mr. Phillips' claim and this timely appeal ensued. (R4, tabs 29, 34, 36, 37; agreed PFFs 95, 96; *e.g.*, compl. ¶¶ 1, 256 and "WHEREFORE" clause at 60)

38. The government has conceded liability to Mr. Phillips for four separate contract breaches (agreed PFF 102; *see also* finding 1 (stip. ¶ 10)).

Quantum—Anticipated Revenues From Diverted Contracts

39. The parties agree that appellant's damages are the "amount of profits Phillips would have realized had the diverted PCL and PHWS supply and service requirements been placed under the Contract" (agreed PFF 103). They disagree on the applicable costs and revenues and appropriate profit.

40. Mr. Phillips relied upon his accountant, Mr. Stafford, to calculate the anticipated revenues from the diverted PCL and PHWS requirements and the estimated costs to perform those requirements. Mr. Stafford relied upon information furnished to him by Messrs. Phillips and Freeman. He did not perform an audit but prepared tax returns and a schedule "taken directly" from Mr. Phillips' and Mr. Freeman's tax returns for 2006, 2007, and 2008 (tr. 2/7). (Agreed PFFs 104, 105; tr. 1/316, 318-20, 2/91-92; ex. A-82 REV) The government relied upon analyses by Ms. Thomas and Mr. Frederick Cavedo, who was Chief of the Operations and Maintenance Division of the Department of Public Works at Fort Stewart and who supervised CORs under Contract No. 0015 (supp. R4, tabs 53, 55; tr. 1/301, 2/205-06, 208).

41. Mr. Stafford estimated alleged total anticipated revenues of \$773,389.61 had Mr. Phillips performed the diverted requirements under the four FOB contracts. He calculated the anticipated revenue under Contract No. 0180 at \$100,416.55. (Ex. A-82 REV at A1582.1) The government calculated total maximum revenue to Mr. Phillips under that contract at \$88,236.55 (supp. R4, tab 55 at 7). The \$12,180 difference pertains to Mr. Phillips' claim for revenue under CLINs 6001AS and 7001AS covering soap and paper towels. The government asserts that those CLINs did not apply to his requirements Contract No. 0015. (Agreed portions of PFF 107 and disagreement over ¶ e) As discussed below, we agree with the government and accept its calculation of appellant's maximum possible revenue under Contract No. 0180 of \$88,236.55.

42. Mr. Stafford calculated anticipated revenue had Mr. Phillips performed the diverted requirements under Contract No. 0192 at \$150,204 (ex. A-82 REV at A1582.1). The government calculated total maximum revenue to Mr. Phillips under that contract at \$122,044 (supp. R4, tab 55 at 7). The \$28,160 difference pertains to Mr. Phillips' claim for revenue under CLINs 6001AS and 7001AS covering soap and paper towels. The government asserts that those CLINs did not apply. (Gov't resp. to PFF 112 and n.13; agreed portions of PFF 113 and disagreement over ¶ e) As discussed below, we agree with the government and accept its calculation of appellant's maximum possible revenue under Contract No. 0192 of \$122,044.

43. Mr. Stafford calculated anticipated revenues had Mr. Phillips performed diverted requirements under Contract No. 0055 at \$169,308.20. He used the entire 86-day period of the exercise described in the stipulation (21 December 2007—15 March 2008). (Tr. 2/21-22; ex. A-82 REV at A1582.1; *see* finding 1 (stip. ¶ 8)) The government alleges that this method overstates the PCL and PHWS requirements in Contract No. 0055, because it called for different requirements on different dates, and that the correct total revenue figure is \$138,080.20, as set forth in Ms. Thomas' analysis (supp. R4, tabs 44, 55 at 10). We agree with the government that Contract No. 0055 called for different requirements on different dates and accept its calculation of appellant's maximum possible revenue under that contract of \$138,080.20.

44. Mr. Stafford calculated anticipated revenues had Mr. Phillips performed diverted requirements under Contract No. 0074 at \$353,460.86. He used the entire 86-day period of the exercise described in the stipulation (21 December 2007—15 March 2008). (Ex. A-82 REV at A1582.1; *see* finding 1 (stip. ¶ 8)) The government alleges that this method overstates the PCL and PHWS requirements in Contract No. 0074, because it called for specified units of PCLs and PHWSs over specified days, and that the correct total revenue figure is \$185,418.34, as set forth in Ms. Thomas's analysis (supp. R4, tabs 45, 55 at 10). We agree with the government that Contract No. 0074 called for specified

requirements over specified dates and accept its calculation of appellant's maximum possible revenue under that contract of \$185,418.34.

45. We find that Mr. Phillips has supported total anticipated revenue had he performed the diverted requirements under the four FOB contracts of \$533,779.09 (\$88,236.55 + \$122,044.00 + \$138,080.20 + \$185,418.34).

Quantum—Anticipated Costs To Perform Diverted Work

46. In her cost analysis on behalf of the government, Ms. Thomas used appellant's labor rates, fuel computations, and PCL supply unit calculations. Unlike appellant, she added an overhead markup of 15% of Mr. Phillips' estimated costs, based upon her experience. She did not look at his cost records and was unaware of whether he had any office or administrative staff. Considering costs based upon the actual diverted work under the FOB contracts, which she found to be less work than that assumed by Mr. Phillips, and applying her 15% general and administrative (G&A) cost rate, Ms. Thomas calculated that he would have incurred costs of at least \$318,041.56. (Supp. R4, tab 55 at 8-9, 11-12; tr. 2/184-85)

47. Mr. Stafford estimated that Mr. Phillips' total costs, had he performed the diverted FOB contract work, would have been \$158,833.74, composed of labor, fuel, PCL supplies, PHWS supplies, equipment maintenance and repair, and credit card discount costs (ex. A-82 REV at A1582.2).

Labor Costs

48. At the time of Mr. Phillips' proposal for Contract No. 0015, the government had estimated that it would take four to five minutes to clean each PCL. Mr. Phillips stated that it would take about two minutes to clean a PCL and that he could do about 15 per hour, including travel time. (Tr. 2/250) He did not address the other work requirements under Contract No. 0015 (see finding 8). Ms. Thomas and Mr. Cavedo used appellant's rate of 15 units serviced per truck per hour (or 120 services per person per 8 hour day) in preparing their analyses. Although certain units under the FOB contracts were close together in a relatively small area and could be serviced faster, which Mr. Phillips described would have been "like Christmas" to him (tr. 1/102), Mr. Stafford estimated Mr. Phillips' labor costs by applying the relevant \$19.95 fully burdened hourly prevailing wage rate to an estimated 15 PCL and PHWS units per hour service rate across Fort Stewart as a whole. (R4, tab 27 at 45-46; ex. A-82 REV at A1582.2; tr. 1/102, 2/28-30, 122; agreed portions of PFFs 127, 129, 136; see also app. br. at 25, ¶ 129; gov't br. at 32-33, ¶ 128)

49. The parties agree that Mr. Phillips would have had to hire additional employees to meet the additional FOB requirements and that he could have done so at the required government rates (tr. 2/121; agreed PFF 130). They disagree about the additional hours of labor that would have been required for the additional work. In early 2007 the labor under Contract No. 0015 was performed largely by Mr. Freeman, two full-time and two part-time employees. The part-time laborers had other full-time jobs and worked on the contract during the evenings or on vacation. According to Mr. Phillips, acquiring labor was never a problem. Per Mr. Freeman, had appellant received the additional work, for both 2007 and 2008 it "probably" would have had to hire at least two, if not three, more full-time personnel in addition to the five laborers working on Contract No. 0015 (tr. 1/264). Appellant would have run all five of its trucks and all workers would be working "probably" 12-13 hours per day (tr. 1/264-65). (Tr. 1/104, 264-65, 289) On re-direct examination Mr. Freeman stated that the same employee would not work the full period; part-time employees would replace full-time; Mr. Phillips would not pay one person over 50 hours per week; and he would instead hire additional employees (tr. 1/295-96). He did not specify the number of additional employees that would have been required to avoid overtime payments. Mr. Stafford testified that it would not be uncommon for personnel to work "14-hour days, 12-hour days" on the large enterprise at issue (tr. 2/57), and his written analysis assumed trucks working 14 hours a day (ex. A-84 (corrected); tr. 2/60, 88).

50. Mr. Stafford estimated that there would have been labor costs to satisfy the PCL/PHWS servicing requirements under FOB Contract Nos. 0180 and 0192 of \$9,538.76 and \$13,534.08, respectively (\$23,072.84, combined), and labor costs under Contract Nos. 0055 and 0074, combined, of \$50,899.10, for a grand total of \$73,971.94 (ex. A-82 REV at A1582.2; tr. 2/30-31).

51. Ms. Thomas used her analysis of the actual items and number of days involved in the FOB contract work to estimate labor costs but otherwise applied Mr. Stafford's rates. For Contract Nos. 0180 and 0192 she estimated total labor costs of \$23,043.58, virtually identical to Mr. Stafford's estimate. For Contract Nos. 0055 and 0074, combined, she estimated labor costs of \$30,688.42, over \$20,000 less than Mr. Stafford's estimate. The government attributes the difference to appellant's alleged overstatement of diverted requirements under Contract Nos. 0055 and 0074. Ms. Thomas' grand total estimate was \$53,732 (without applying G&A). (Supp. R4, tab 55 at 7-11)

52. Mr. Cavedo noted that Mr. Phillips' Contract No. 0015 work would have overlapped with the diverted FOB work and that there would have been a "big jump" in work when the FOB work was in effect (tr. 2/228, 231). Relying upon call orders and Mr. Cavedo's workload analysis (supp. R4, tabs 50, 53; tr. 2/226-48), the government contends that appellant has not acknowledged in its labor analysis that there would have

been a significantly increased workload under the FOB contracts, in addition to the ongoing work required under Contract No. 0015. The government alleges, *inter alia*, that appellant has underestimated its labor costs under the FOB contracts; has overstated the availability of part-time employees, particularly on peak FOB work days during the normal week, shown on the Cavedo analysis; overtime payments would have been necessary; the lengthy work days likely would have included work in the dark that would have taken more time than daytime work; and appellant failed to consider hiring, administration, training and drug testing costs associated with new employees. The government also notes that Ms. Thomas' labor analysis did not include the alleged overtime and other additional labor-related expenses. (*See gov't br. at 33, ¶¶ 129-30, at 43-46, ¶ 195*) The government's challenges to the labor analyses are reasonable.

53. Although it is clear that Mr. Phillips would have incurred significantly increased labor costs in performing the combined Contract No. 0015 and diverted FOB contract work, the record does not support a precise finding in this regard. Ms. Thomas' labor analysis recognizes that there was less diverted work under the FOB contracts than Mr. Stafford assumed. However, she omitted likely additional labor costs. We find that the additional labor costs would have been more than the \$53,732 calculated by Ms. Thomas (finding 51), and we have taken this into consideration in reaching our quantum determination, below.

Fuel Costs

54. Mr. Stafford estimated that fuel costs had Mr. Phillips performed the diverted work in early 2007 were \$2.46 per gallon. In late 2007 and early 2008 they would have been \$3.47 per gallon. Using 15 units per man per hour for servicing, he arrived at an estimated unit rate to determine the amount of fuel that would have been consumed on a daily basis. For Contract No. 0180 he estimated use of 54.17 gallons of fuel per day and total estimated fuel costs of \$2,931.50. Under Contract No. 0192 he estimated use of 70.67 gallons of fuel per day for total estimated fuel costs of \$4,172.16. The government agrees with these figures for these contracts. (*Ex. A-82 REV at A1582.2; tr. 2/34-35; agreed PFFs 134-40*)

55. The parties disagree about estimated fuel costs for Contract Nos. 0055 and 0074. Mr. Stafford estimated the combined fuel costs for these contracts at \$22,132.82 and the total estimated fuel costs for all four FOB contracts at \$29,236.48 (*ex. A-82 REV at A1582.2*). Ms. Thomas estimated fuel costs for Contract Nos. 0055 and 0074 at \$15,346.13 and for the four contracts at a minimum of \$24,865.86 (without G&A) (*supp. R4, tab 55 at 8, 11*). The government's estimate is less due to its contention that diverted requirements did not cover the entire FOB contract periods. The government considers this a conservative estimate on the alleged ground that appellant would have had to use

additional trucks to meet all requirements and actual fuel costs would have been higher (gov't br. at 34-35, ¶ 143). As noted, we have concluded that the government is correct that the periods of diverted requirements under Contract Nos. 0055 and 0074 differed. We have also concluded, below, that the number of trucks that would have been in use during the combined Contract No. 0015 and FOB contract periods is uncertain but that appellant likely would have needed additional trucks for which he has not accounted. Due to the additional trucks, we find that reasonable estimated fuel costs for the four FOB contracts are more than the \$24,865.86 calculated by Ms. Thomas and we have taken this into consideration in reaching our quantum determination.

Supply Costs

56. Mr. Phillips' supply costs under the FOB contracts would have included daily costs for toilet paper and chemicals for PCL servicing under all four contracts. His estimated unit costs for chemicals and toilet paper in 2007 would have been \$0.50 per PCL. Under Contract No. 0180, such estimated PCL supply costs would have been \$3,256.00 and under Contract No. 0192 they would have been \$4,032.00. (Exs. A-39, -66, -82 REV at A1582.2; tr. 2/36-42; agreed PFFs 144-47) Mr. Phillips' unit costs for PCL supplies increased slightly in late 2007 and early 2008 such that his estimated PCL supply unit costs during this time period, for toilet paper and chemicals, were \$0.52 per unit (tr. 2/42; agreed PFF 153). Additional PHWS soap and paper towel costs would have applied only to Contract Nos. 0180 and 0192, if those had been diverted requirements. Mr. Phillips' costs for supplying them under those contracts would have been \$2.19 per unit. Under Contract No. 0180 he would have incurred estimated costs totaling \$1,333.71. Under Contract No. 0192 he would have incurred estimated costs totaling \$3,083.52. (Ex. A-33.3 at A505, ex. A-34.1 at A509, ex. A-82 REV at A1582.2; tr. 2/43-44; agreed PFFs 148-52)

57. As above, the parties disagree about estimated supply costs for Contract Nos. 0055 and 0074. The government's estimate is less due to its contention that diverted requirements did not cover the entire contract periods. Mr. Stafford estimated the PCL supply costs for these contracts at \$15,294.24 and the estimated total of PCL and PHWS costs for all four FOB contracts at \$26,999.47 (\$3,256.00 + \$1,333.71 + \$4,032.00 + \$3,083.52 + \$15,294.24) (ex. A-82 REV at A1582.2). Ms. Thomas estimated PCL supply costs for Contract Nos. 0180 and 0192 at \$7,288 and for Contract Nos. 0055 and 0074 at \$10,015.36, for total PCL supply costs for the four contracts of \$17,303.36 (without G&A) (supp. R4, tab 55 at 9, 11). She did not use PHWS soap and paper towel items in computing FOB contract revenues or expenses (*id.* at 6, 9, 11). Because we have agreed with the government that the periods of diverted requirements under Contract Nos. 0055 and 0074 differed, and that soap and paper towel requirements were not diverted

(findings 34-36, 42), we accept its calculation of estimated PCL supply costs under the four FOB contracts of \$17,303.36

Equipment Maintenance and Repair Costs

58. Mr. Phillips would have incurred costs to repair and maintain equipment used to satisfy the PCL and PHWS requirements diverted to the four FOB contracts. He owned and operated several pump trucks to service the PCLs and PHWSs at Fort Stewart. The trucks were kept under warranty and serviced every 3000-3500 miles. (Tr. 1/128; agreed PFFs 156, 157, 159) Routine service (changing oil and air and fuel filters) on the trucks typically cost about \$200 (tr. 1/131). Mr. Phillips incurred varying costs for other truck work, repair and service (*see ex. A-18 at 154, 156, 181, ex. A-52 at 948, 949, 963*). Tires were a significant cost (tr. 2/44).

59. For 2007 Mr. Phillips estimated his equipment repair and maintenance costs at \$1,250 per month. This was based upon total annual repair and maintenance costs of \$14,965, which included \$349 in such costs incurred by Mr. Freeman and reported on his federal income tax return. (Tr. 2/44-48; ex. A-53 at A1018, ex. A-54 at A1079; agreed PFFs 161, 163) The government concedes that “there is no reason to challenge this figure for purposes of the present cost analysis” (gov’t br. at 37, ¶ 162). Thus we find that appellant’s total annual repair and maintenance costs for 2007 were \$14,965.

60. Mr. Stafford estimated that Mr. Phillips’ additional equipment repair and maintenance costs to perform the diverted Contract No. 0180 would have been \$980 (\$1,250 per month/30 days per month x 22 days); for Contract No. 0192, they would have been \$1,061.67 (\$1,250 per month/30 days per month x 24 days); and for Contract Nos. 0055 and 0074, they would have been \$3,583.33 (\$1,250 per month/30 days per month x 86 days) (ex. A-82 REV at A1582.2), resulting in total estimated equipment repair and maintenance costs to satisfy the alleged PCL and PHWS requirements diverted to all four of the FOB contracts of \$5,625.

61. Mr. Phillips estimated that, during performance of the PCL and PHWS requirements under Contract No. 0015, he had three trucks traveling 120 miles per day and two traveling 50 miles per day (tr. 3/130). The government contends that this is inconsistent with the number of trucks shown on his depreciation schedule (ex. A-80; gov’t br. at 36, ¶ 160). The government also alleges that Mr. Phillips’ cost analysis omits the consideration that, according to his claim, had he received the diverted requirements, he would have run the same number of trucks for considerably longer periods of time; this would have resulted in substantial increases in their wear and tear and, with usage as much as 50 percent per day greater than typical, maintenance and repair issues would have been greater than without the diverted work (gov’t br. at 37, ¶¶ 164-67). The

government's contentions are reasonable. Moreover, as we further address below, we find it most likely that appellant would have required more trucks than he has cited to perform both the Contract No. 0015 work and the diverted FOB contract work.

Ms. Thomas did not address equipment repair and maintenance costs separately. She included maintenance in her analysis of truck costs, below (tr. 2/157). We therefore find that additional equipment repair and maintenance costs would have been at least the \$5,625 calculated by Mr. Stafford, with more of such costs taken into consideration in Ms. Thomas' truck cost analysis, which we have accepted (finding 66).

Estimated Credit Card Discount Costs

62. The government typically paid Mr. Phillips for contract services by credit card and likely would have paid for the diverted FOB contract requirements by credit card. Mr. Phillips incurred transactional costs for processing the credit card payments. For calendar year 2007 he incurred credit card discount costs of \$20,011. Mr. Stafford determined a unit cost for this item based upon a percentage of overall revenue earned. In 2007 Mr. Phillips had overall income under Contract No. 0015 of \$719,758. The credit card discount cost equated to about 3% of revenue ($\$20,011/\$719,758$). In calculating Mr. Phillips' estimated credit card discount costs had he received the diverted work requirements, Mr. Stafford applied this percentage to his estimate of anticipated revenues under the four FOB contracts. (R4, tab 1 at 28, ¶ 2; supp. R4, tab 38 at GOV9, tab 46 at GOV6, tab 49 at GOV11; ex. A-54 at A1079, ex. A-82 REV at A1582.2; tr. 2/48; agreed PFFs 168-74) Although the parties agree that Mr. Phillips' credit card discount cost was about 3% of revenue, as noted, they disagree about the revenues he would have earned under the four FOB contracts. Because we agree with the government's assessment of probable revenues (findings 41-45), we also agree with its computations that Mr. Phillips' credit card costs would have been about \$2,647.10 under Contract No. 0180 ($\$88,236.55 \times 3\%$), \$3,661.32 under Contract No. 0192 ($\$122,044.00 \times 3\%$), \$4,142.41 under Contract No. 0055 ($\$138,080.20 \times 3\%$) and \$5,562.55 under Contract No. 0074 ($\$185,418.34 \times 3\%$), for total credit card costs of \$16,013.38.

The government contends that appellant's analysis excludes several cost categories, as follows.

Trucks, PCL, PHWS

63. The parties disagree strongly concerning the number of trucks Mr. Phillips would have needed and the PCL and PHWS services he could accomplish per week, including his existing required work under Contract No. 0015 and his additional requirements had he received the FOB contract work (e.g., app. br. at 35 ("No Additional Costs for PCL, PHWSs, Trucks, or G&A"), app. br. at 37, PFF 195; gov't br. at 43-46;

app. reply at 28-30). In his cost analysis, based upon information received from Messrs. Phillips and Freeman, Mr. Stafford assumed that Mr. Phillips would not have incurred more costs for trucks (excluding fuel, treated separately), PCLs or PHWSs if he had had to perform the diverted work in addition to his work under Contract No. 0015. Mr. Stafford assumed truck usage at 14 hours per day, seven days a week, 15 services per hour. He opined that Mr. Phillips would not have incurred extra truck costs because he paid cash for his trucks and had sufficient on hand. (Exs. A-84, -82 REV at 1582.2; tr. 2/29, 49, 59-60, 87-88) However, Mr. Stafford had no expertise in the portable toilet business and Messrs. Phillips and Freeman were the sources of his information. In Ms. Thomas' view, Mr. Stafford omitted costs of providing additional trucks, PCLs and PHWSs that Mr. Phillips would have needed, as well as contract administration costs. She included additional truck costs (excluding fuel but including insurance and maintenance) of \$12,240.04 for Contract Nos. 0180 and 0192, combined, and \$19,041.77 for Contract Nos. 0055 and 0074 combined, for a grand total of \$31,281.81. (R4, tab 55 at 9, 12; tr. 2/154, 157)

64. The government contends that, as of 27 January 2007, Mr. Phillips had six trucks and five pump units. Although he likely had six trucks during the first two FOB exercises (15 February—10 March 2007 and 22 February—15 March 2007), to perform that work and his Contract No. 0015 work, it is unclear whether he secured a sixth pump unit in time to be of much use during the exercises. Based upon a depreciation schedule prepared by Mr. Stafford and Mr. Phillips' tax records, the government demonstrated that Mr. Phillips had six trucks at the beginning of 2007 and that he sold two in the summer of 2007 (15 July and 15 August 2007). This left four trucks available for the two later FOB exercises (21 December 2007—15 March 2008), which Mr. Phillips stated were not big, and for Mr. Phillips' Contract No. 0015 work. Mr. Phillips testified that he had five F-350 Ford trucks in 2007. At some point after the first two FOB exercises he sold the cab and chassis of one of the trucks but kept the pumping unit body, leaving him with four trucks and an extra body as of 15 August 2007. Mr. Phillips acknowledged some confusion on his part in keeping up with the number of trucks available to perform the work. (Exs. A-53, -54 at A1094, ex. A-80; tr. 1/74-75, 174-79, 2/49)

65. Mr. Cavedo calculated that, at various times, Mr. Phillips had an inadequate number of trucks to perform his Contract No. 0015 work and the FOB contract work, including as much as an eight-truck deficiency on 28 February 2007 (supp. R4, tab 53; tr. 2/233-35, 237). However, Mr. Cavedo's analysis was based upon four trucks, at least in part, and the parties appear to agree that Mr. Phillips had five to six trucks for the first half of 2007 (*see above* and tr. 2/62). As reflected in part above (finding 49), Mr. Phillips asserts that he would have organized his routing for maximum efficiency and would have run his trucks 7 days a week at 12 hours per day, using readily available part-time labor for the additional hours of work, beginning at 4 to 5 PM (tr. 1/108-10). He had done this

before, in 2006, when he only had three trucks and “had to run it hard” (tr. 1/110), and earlier when he only had two.

66. The parties’ evidence regarding trucks is confusing and conflicts. We find appellant’s contention that Mr. Phillips would have not have incurred any more truck costs had he received the FOB work to be unreasonable. In the nature of a jury verdict, we find that truck costs would have been one-half of the government’s \$31,281.81 estimate, or \$15,640.91. (*See* finding 63)

67. Regarding PCLs, Mr. Freeman testified that he and Mr. Phillips probably would have had to borrow or rent about 250 to 300 more for the 2007 FOB exercises (tr. 1/265-66).

68. Mr. Cavedo prepared spreadsheets showing the total amount of PCLs, PHWSs and work that would have been required of Mr. Phillips to complete his work under Contract No. 0015, based upon call orders, and to perform the diverted FOBs, based upon the contracts’ requirements (supp. R4, tab 53; tr. 2/210-11, 226-29). The spreadsheets demonstrate that there were occasions during the FOB exercises in February and March 2007 when Mr. Phillips would have required over 400 more PCLs than he established he had at the time. For example, entries for 28 February 2007 show that 1,285 PCLs would have been needed to satisfy all requirements but Mr. Stafford’s analysis showed that Mr. Phillips had only 803 PCLs plus 45 PHWSs (for a total of 848 units). Mr. Phillips had the 803 PCLs in inventory at the end of Contract No. 0015, 112 of which were purchased on about 28 February 2007, when two of the FOB exercises were nearly half-way complete. Under Mr. Cavedo’s analysis, for a total of at least 16 days Mr. Phillips would have had to acquire at least 400 more PCLs to satisfy FOB requirements. For many days during the FOB work he would have had to acquire at least 120 more PHWSs to meet all requirements. (Supp. R4, tab 53 (2/28/07 entries and total PHWS columns); ex. A-80; tr. 2/77, 84-85, 87; *see* finding 1 (stip. ¶¶ 6, 7))

69. During FOB exercises under Contract No. 0015 there were times when Mr. Phillips did not have enough PCLs to meet the requirements. The last time he had to make arrangements in order to meet requirements was for a 2006 FOB. He testified that he had about 750 PCLs; the requirement was for at least 850; he was about 104 PCLs short; and he was able to borrow 50 to 75 at no charge from small local area businesses. He did not state how he obtained the remainder he needed or any cost involved. (Tr. 1/65-67)

70. Contrary to Mr. Cavedo’s analysis, Mr. Phillips testified that, while he had only about 750 PCLs for the 2006 FOB exercise under his contract, he bought 196 in January 2007 in anticipation of one of the diverted FOB exercises, and had about 925 to

950 PCLs in February/March 2007. However, the records he cited showed purchases in September 2006 of a total of 84 PCLs and, in January 2007, of a total of 112 PCLs (exs. A-11 to -13, exs. A-24 to -27). He testified that he would have needed about 300 more for the FOB exercises in question. He identified the months of January, February and March as the slowest time of year for PCL providers and testified that he could have “easily probably” (tr. 1/89), acquired 200 PCLs for free from local personnel. Otherwise, he could have rented them from Blu-John, a large provider in Savannah, Georgia, for \$25 per month, at an additional cost of about \$6 per month to pick them up and return them. Mr. Freeman testified that, to meet the FOB 2007 requirements, he and Mr. Phillips would have needed about 250 to 300 more PCLs and “probably” (tr. 1/266), would have had to borrow them, or rent them from Blu-John at \$25 per month. Mr. Freeman had borrowed PCLs previously from friends who had borrowed from him and Mr. Phillips. Mr. Freeman contended that they were not competitors because, unlike appellant, they did not seek military contracts. Messrs. Phillips and Freeman named local individuals from whom they thought they probably could have obtained PCLs at no cost. (Tr. 1/66-67, 88-91, 266-67) The government strongly disputes that appellant would have been able to acquire the large number of PCLs required for free at any time and particularly during the slow season when providers would have sought the additional revenue. It adds that appellant has not included any cost for transporting the PCLs to their required locations under the FOB contracts, which would have been substantial given the limited carriage capacity of appellant’s trucks. Appellant, who bears the burden of proof, did not call any of the alleged PCL providers to testify. Standing alone, the testimony of interested parties that they might have acquired many PCLs at no cost does not persuade us.

71. Mr. Phillips had about the same inventory of PCLs in early 2008 to satisfy the government’s requirements as he did after 28 February 2007 (ex. A-63 at A1119 (listing 700 new and used PCLs), ex. A-80; tr. 1/279; agreed portion of PFF 182).

72. In 2007-08 Mr. Phillips would have had to procure additional PHWSs to meet the requirements diverted to the FOB contracts. He testified that he had 30 to 40 or more on hand and that the government’s requirement was for 113 or 117. He stated that he could have obtained the additional PHWSs he needed at no cost from other local vendors but again did not call any of them to testify. Again, his unsupported testimony does not persuade us. If Mr. Phillips had to obtain the PHWSs from Savannah, it would have cost him \$25 per unit. Mr. Cavedo’s spreadsheets show that Mr. Phillips would have needed as many as 121 more PHWS than the 45 Mr. Stafford evaluated he had on hand. (*See* supp. R4, tab 53 (6 March 2007 entries showing peak requirement of 166 units); tr. 1/125-26, 2/85-7)

73. During the pendency of Contract No. 0015, maintenance on PCLs and PHWSs was minimal and maintenance costs were negligible (tr. 1/133-36; agreed PFF 190).

74. Under the 2007 FOB Contract Nos. 0180 and 0192, the requirements for PCL and PHWS supply and servicing totaled 5,243 units during any 7-day period when full PCL and PHWS supply and servicing under those contracts was required, such as 22-28 February 2007. Excluding the 2007 FOB contracts, the total PCL and PHWS requirements for the 22-28 February 2007 period totaled 3,549. (Supp. R4, tab 53; ex. A-84; tr. 2/61-62; agreed PFFs 193, 194)

75. As noted, Mr. Stafford did not include any additional PCL or PHWS acquisition costs in his analysis. Ms. Thomas used Internet research to find what it would cost to rent a construction site model PCL. Because the price was higher than what the government was paying Mr. Phillips under his contract, she used the contract's pricing. Ms. Thomas included additional PCL and PHWS costs of \$58,361.35 for Contract Nos. 0180 and 0192, combined, and \$91,013.50 for Contract Nos. 0055 and 0074 combined, for a total of \$149,374.85. (R4, tab 55 at 9, 12; ex. A-82 REV at 1582.2; tr. 2/154, 157)

76. Again, the parties' evidence conflicts to the point that we are unable to make a precise finding. We find appellant's assumption that Mr. Phillips would have incurred no additional PCL and PHWS acquisition costs had he received the FOB work to be unreasonable. In the nature of a jury verdict, we find that additional PCL and PHWS costs would have been one-half of the government's \$149,374.85 estimate (finding 75), or \$74,687.43.

Subcontract Expenses

77. As we found above, for 2006, 2007 and 2008 Mr. Phillips reported receipts of \$595,858, \$719,758 and \$209,380, respectively, on Schedule C of his federal income tax returns. He included subcontract expenses of \$224,764, \$293,260 and \$88,461, respectively. Fuel, supply and repair and maintenance expenses were listed separately on his returns, but not labor. Mr. Phillips' subcontractor, Mr. Freeman, was responsible for the labor portion of Contract No. 0015 and he paid the labor expenses as noted. We infer that a portion of the subcontractor expenses on Mr. Phillips' returns was attributable to labor expenses for which he reimbursed Mr. Freeman and other contract work-related expenses incurred by Mr. Freeman as reflected on Mr. Freeman's returns. We infer that the remainder of each subcontract expense payment was Mr. Freeman's share of the profit Mr. Phillips had agreed to split with him. The labor and other expenses included on Mr. Freeman's 2006 tax return were \$89,847, leaving a balance of \$134,917 (\$224,764-\$89,847) as the profit component of Mr. Phillips' subcontract expense payment

to Mr. Freeman during 2006.⁵ The labor and other expenses included on Mr. Freeman's 2007 tax return were \$100,750, leaving a balance of \$192,510 (\$293,260-\$100,750) as the profit component of Mr. Phillips' subcontract expense payment to Mr. Freeman during 2007. The labor and other expenses included on Mr. Freeman's 2008 tax return were \$30,646, leaving a balance of \$57,815 (\$88,461-\$30,646) as the profit component of Mr. Phillips' subcontract expense payment to Mr. Freeman during 2008. (See findings 26-28) The total profit Mr. Phillips paid to Mr. Freeman during 2006-08 was \$385,242 (\$134,917+\$192,510+\$57,815). This represents 25.26 % of the total \$1,524,996 (\$595,858+\$719,758+\$209,380) in revenue for 2006-08. Thus, we find that, of his revenues of \$533,779.09 on the diverted contract work (finding 45), Mr. Phillips would have had to pay \$134,832.60 ($\$533,779.09 \times .2526$) to Mr. Freeman as his share of profits. Mr. Phillips' additional subcontract expenses for labor and other costs, had he received the diverted FOB contract work, are accounted for elsewhere in our findings.

Insurance and G&A Costs

78. Mr. Phillips carried workman's compensation, general liability and vehicle insurance. The government contends that the increase in business, had Mr. Phillips received the diverted work, would have necessitated some increase in insurance coverage, whether for workman's compensation, vehicles, or general accident or business coverage. Mr. Phillips acknowledged that he carried whatever general liability insurance was required. He stated that workman's compensation insurance costs were tied to his payroll and included in his labor costs. He was uncertain about any additional vehicle coverage or insurance costs in general. (Tr. 1/137-38, 199, 220-21)

79. Regarding G&A expenses, at the hearing, appellant's counsel represented that Mr. Phillips had included some administrative costs in his cost calculations, citing appellant's supplemental interrogatory responses, but he did not identify the costs and we have not located them (ex. A-78; tr. 2/178). In its reply brief appellant now asserts that "Phillips did not include any indirect overhead costs in his estimate because he had none" (app. reply at 30). The government does not agree. Referring to expenses on his tax returns (see findings 26-28), the government asserts that Mr. Phillips would have had increased overhead costs, had he received the diverted work, including utilities costs; significant costs to maintain his labor subcontract with Mr. Freeman or additional drug testing costs for about six required new employees; increased management responsibilities; and additional communications gear. (Gov't br. at 46, ¶ 198)

⁵ Where there is a discrepancy between Mr. Phillips' tax return and Mr. Freeman's (for 2006 and 2008), we use the number from Mr. Phillips' return for analysis.

80. Mr. Phillips did not have an office or other building for which he paid rent (tr. 1/136; agreed PFF 197). He had converted a bedroom in his home to an office. He did not have a secretary. As noted, there was no electricity at the field supplied to him by the government and he was not required to pay it any rent or to pay for the water it gave him (findings 10, 20). He paid his accountant \$150-\$200 per month. (Tr. 1/136-38) Mr. Phillips and his employees used two-way radios to communicate with one another. He speculated that he "probably" had enough radios on hand for additional employees had he received the diverted work but, if not, he would have given up his own and one his wife used. (Tr. 1/139)

81. However, in addition to expenses addressed separately above, Mr. Phillips included expenses on the sole proprietorship Schedule C of his federal income tax returns for 2006-08 that are apparently G&A and are attributable to his performance of Contract No. 0015, his only established source of work for those years. Respectively, they include office expenses for 2006-08 of \$145, \$274 and \$193; insurance expenses of \$4,171, \$14,443 and \$235; and legal and professional services expenses of \$1,925, \$23,752 and \$6,625. He included communications expenses for 2006 of \$5,083; advertising, taxes and licenses, utilities, consultant and drug testing expenses for 2007 of \$225, \$1,562, \$4,574, \$3,637 and \$135; and utilities and consultant expenses for 2008 of \$1,223 and \$9,990. The total Schedule C business expenses Mr. Phillips reported for 2006-08 were \$1,118,069 ($\$451,069 + \$515,292 + \$151,708$). (Supp. R4, tab 38 at GOV8-9, tab 46 at GOV5-6; ex. A-72 at A1257-58; see findings 26-28) Thus, for 2006, Mr. Phillips' G&A expenses totaled \$11,324 ($\$145 + \$4,171 + \$1,925 + \$5,083$). His G&A base for that year was \$439,745 ($\$451,069 - \$11,324$). His 2006 G&A rate was 2.58% ($11,324/439,745$). For 2007, Mr. Phillips' G&A expenses totaled \$48,602 ($\$274 + \$14,443 + \$23,752 + \$225 + \$1,562 + \$4,574 + \$3,637 + \135). His G&A base for 2007 was \$466,690 ($\$515,292 - \$48,602$). His 2007 G&A rate was 10.41% ($48,602/466,690$). For 2008, Mr. Phillips' G&A expenses totaled \$18,266 ($\$193 + \$235 + \$6,625 + \$1,223 + \$9,990$). His G&A base for 2008 was \$133,442 ($\$151,708 - \$18,266$). His 2008 G&A rate was 13.69% ($18,266/133,442$). We find that Mr. Phillips' average G&A rate for 2006-08 was 8.89% ($2.58 + 10.41 + 13.69 = 26.68/3 = 8.89$)

Total Expenses

82. In summary, contrary to Mr. Phillips' \$158,833.74 cost estimate, we find that, had he performed the diverted FOB work, in addition to his Contract No. 0015 work, he would have incurred additional costs of more than \$373,166.62 (labor, more than \$53,732+fuel, more than \$24,865.86+PCL supplies, \$17,303.36+equipment repair and maintenance, at least \$5,625+credit card discount, \$16,013.38+truck costs, \$15,640.91+PCL and PHWS acquisition, \$74,687.43+profit share of subcontract expense,

\$134,832.60+G&A, \$30,466.08 (\$342,700.54 total of other expenses x 8.89%).
(Findings 47, 53, 55, 57, 61, 62, 66, 76, 77, 81)

Quantum-Anticipated Profits

83. Mr. Phillips contends that his total anticipated profits, had he performed the diverted requirements under the four FOB contracts, would have been \$614,555.87, based upon alleged total anticipated revenues of \$773,389.61 (finding 41), less alleged total estimated costs of \$158,833.74 (finding 47). This yields a profit margin of 79.5% (or, as a percentage of his estimated costs, 386.9%). (Ex. A-82 REV at 1582.1, 1582.2) The government contends that Mr. Phillips' stated anticipated costs are highly inaccurate and that the claimed 79.5% profit rate is unreasonably in excess of the average 26.75% annual profit reflected in Mr. Phillips' income tax returns for 2006-08 (finding 28). The government notes that Mr. Phillips would not have received income from soap and paper towel CLINs because, as we have found and discuss below, they were not diverted work (finding 36). The government principally urges that the Board should base its profit finding upon Mr. Phillips' historical level of profit for the years at issue and, on that basis, he would not have received more than \$142,785.91 in profit, which is 26.75% of the estimated gross revenues of \$533,779.09 on all four FOB contracts (finding 45). Alternatively, the government alleges, using appellant's computation method, that Mr. Phillips would not have received more than \$215,737.53 in profit under the FOB contracts (\$533,779.09 gross revenues less \$318,041.56 in government-estimated expenses (finding 46)). (Gov't br. at 2) While the government asserts that appellant improperly excluded a large portion of the subcontracting expense Mr. Phillips would have had to pay to Mr. Freeman (gov't br. at 47, 61), the government did not quantify that expense in its calculations, as we have done (finding 77).

84. In attesting that his portable toilet business was profitable, Mr. Phillips stated that he and Mr. Freeman did "all right"; they took a \$10,000 draw every month; one time they took a \$20,000 bonus; he spent \$200,000 in 2006 when he and Mr. Freeman had the money in the bank; and they bought land together via the "partnership" and wrote a check for it (tr. 1/139). In his profit comments Mr. Phillips also mentioned cleaning barracks (tr. 1/140). It is unclear that this applied to his toilet business. He did not specify the time periods, bank account(s) involved, or details of the referenced transactions.

85. Mr. Phillips acknowledged that his claim is based upon a significant profit margin that differed from his normal profit margin. In this connection, he stated that the government started unofficially using a rate of 25 soldiers per toilet on three times a week service, on one or two toilets grouped together, which was profitable for him. Then, the government went to 10 soldiers per toilet at seven days a week service, ranging from one or two toilets at a time to 20 in a row and 80 in an area. The latter toilets were in good

shape, did not require toilet tissue replacement in every one, and did not take much to maintain them. He could service 15 toilets per hour and would have had lower fuel costs. (Tr. 1/141-42)

86. We are not persuaded that Mr. Phillips' profit rate would have jumped dramatically from the average 26.75% on work he performed under Contract No. 0015 to the claimed 79.5% for work he did not perform. There was no evidence that Mr. Phillips ever enjoyed such a high profit margin in his toilet business or came close to doing so.

87. The government's preferred method of applying Mr. Phillips' 26.75% average historical profit rate for 2006-08 to the \$533,779.09 in anticipated gross revenues on the FOB contracts (finding 45) yields a profit of \$142,785.91. When we follow appellant's method of computing profit, which is also the government's alternative method, we arrive at profit of \$160,612.47 (\$533,779.09 less \$373,166.62 in estimated costs (finding 82)). This equates to a profit rate of 30.09% ($\$160,612.47/\$533,779.09$). Because we are persuaded that the diverted FOB contract work would have been somewhat more profitable for Mr. Phillips than his PCL/PHWS work on average (*see* findings 48, 85), we find that he has supported a profit award of \$160,612.47.

DISCUSSION

The Parties' Positions

Appellant contends that, due to the government's conceded breach of its requirements Contract No. 0015, it is entitled to recover anticipated gross profits of \$614,555.87. It calculates the profits by deducting its alleged estimated costs of \$158,833.74 from its alleged anticipated revenues of \$773,389.61, which it contends it has established with reasonable certainty. Appellant acknowledges that the profits it seeks are 79% of gross revenues. Appellant takes Mr. Freeman's profit into account in arriving at its gross profits figure on the alleged basis that he was Mr. Phillips' joint venturer or partner under the contract or that, if he was Mr. Phillips' subcontractor, Mr. Phillips' appeal includes a pass through claim on behalf of Mr. Freeman. (App. br. at 38, ¶¶ 200-01, 44, 48; app. reply br. at 2-11; app. supp. reply) Alternatively, appellant asserts that the Board should apply a jury verdict method of ascertaining its breach damages and it urges that its \$614,555.87 figure would still be a fair and reasonable approximation of those damages (app. br. at 46-48). In arriving at its profit figures, appellant includes the entire periods of the FOB contracts in its calculations and revenues from soap and paper towel requirements that it alleges were diverted.

The government asserts that:

[A]ppellant is owed the revenue he would have gained on the application of his rates to the work actually known to have been diverted less some reasonable estimation of the expenses he would have reasonably been expected to incur in undertaking the additional work balanced against the known historical levels of profit appellant has documented in his tax returns.

(Gov't br. at 1) The government contends that appellant, however, is seeking a windfall. The government alleges that appellant has overstated the amount of the diverted FOB work and anticipated revenues by including periods of time when no such work was required and soap and paper towel items that did not apply, while significantly understating the additional manpower, resources and other expenses that would have been required had he received the diverted work. The government alleges that appellant has also incorrectly included the anticipated profits of Mr. Freeman, a subcontractor with no privity of contract with the government and for whom appellant did not file a pass through claim, while incorrectly excluding the profit share to which Mr. Freeman would have been entitled and other subcontracting expenses from appellant's expenses. The government alleges that an appropriate profit range would be between \$215,737.53 (\$533,779.09 in government-calculated revenue less \$318,041.56 in government-estimated costs) and \$142,785.91 (applying appellant's average 26.75% profit margin rate for 2006-08 to revenue) (gov't br. at 1-2, as corrected at 47 (response to PFF 199)). The government proposes the latter calculation as the more appropriate, given the uncertainties of appellant's costs.

Standard of Recovery for Breach of Requirements Contract

The government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use it to satisfy the requirements. *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328, 1339 (Fed. Cir. 2003). The government has conceded that it breached appellant's requirements Contract No. 0015, although the extent of the breach, with respect to the time periods involved and soap and paper towel requirements, remains in dispute. In the case of a breach such as that at issue here, the contractor is entitled to recover damages in the form of lost profits provided that it proves by a preponderance of the evidence that the loss is the proximate result of the breach; the fact that there would have been a profit is definitely established; and there is some basis upon which a reasonable estimate of the amount of profit can be made. *Applied Companies*, 325 F.3d at 1336, 1339; *California Federal Bank v. United States*, 245 F.3d 1342, 1349 (Fed. Cir. 2001).

The method of assessing and computing appellant's damages for the government's breach of its requirements contract is within the Board's discretion, except that appellant is not entitled on any account to more than it would have received had the contract been fully performed and the amount awarded must not result in a windfall to it. *Applied Companies*, 325 F.3d at 1336; *Hi-Shear Technology Corp. v. United States*, 356 F.3d 1372, 1381-82 (Fed. Cir. 2004). *Hi-Shear* involved the government's breach of a requirements contract by its negligent estimate of requirements. Lost profits on unordered quantities were not available in such a case. The court of appeals validated the trial court's use of a jury verdict approach in determining damages.

A jury verdict method of awarding damages is an approximation based upon the entire record. While a jury verdict method may be used only when other, more exact, methods do not apply, the Board can use a jury verdict method if there is clear proof of injury, there is no more reliable method for computing damages, and the evidence is sufficient for us to make a fair and reasonable approximation of damages. *Grumman Aerospace Corp. v. Wynne*, 497 F.3d 1350, 1358 (Fed. Cir. 2007).

In assessing damages for the government's breach of a requirements contract when lost profits have been at issue, as here, we have relied upon a contractor's experienced profit rate and have applied its average profit rate to total revenues from sales that were diverted. *T&M Distributors, Inc.*, ASBCA No. 51279, 01-2 BCA ¶ 31,442 at 155,282. We have also used a jury verdict method when appellant's evidence was insufficient to determine its damages from the government's breach of its requirements contract and again have applied an historical average profit rate. *Henry Angelo & Company*, ASBCA No. 43669, 94-1 BCA ¶ 26,484 at 131,825.

Extent of Government's Breach

In order for the government to breach a requirements contract, as noted, it must have had requirements for the contract's items or services that it diverted away from the contractor. *Applied Companies*, 325 F.3d at 1339. Here, the government has established, and we have found, that diverted requirements were not in place for the full FOB contract periods and that Contract No. 0015 did not have any soap and paper towel CLINs or requirements at the time those requirements were included in the two applicable FOB contracts (findings 32-36).

For Purposes of Determining Damages from Government's Breach, There is No
Applicable Joint Venture, Partnership or Subcontract Pass-Through Claim

Appellant currently contends that lost profits due to the government's breach of Mr. Phillips' requirements contract should be computed from the perspective that Mr. Freeman was Mr. Phillips' joint venture partner and should include Mr. Freeman's lost profits. According to appellant, even if Mr. Freeman were Mr. Phillips' subcontractor, Mr. Freeman's lost profits should be included in appellant's recovery because Mr. Phillips is "contractually obligated" to pay to Mr. Freeman 50 percent of any profits Mr. Phillips recovers as damages in this appeal. (Supp. to app. reply br. at 3) The government contends, *inter alia*, that appellant's relationship with Mr. Freeman is one of sole proprietor contractor to sole proprietor subcontractor; appellant did not raise the prospect of a pass-through claim until post-hearing briefing; and appellant's subcontracting expenses must be taken into consideration (gov't br. at 61-63; gov't response to supp. to app. reply br.).

We found that Mr. Freeman is properly characterized under the circumstances of this appeal as Mr. Phillips' subcontractor under Contract No. 0015 (finding 6). Mr. Phillips' claim did not mention Mr. Freeman, any joint venture or partnership, or any "pass through" subcontractor claim. The complaint does not mention any joint venture, partnership, or subcontract with Mr. Freeman or name him at all. (Finding 37) Thus, for purposes of determining the damages owed by the government due to its breach of Mr. Phillips' contract, we find no applicable joint venture or partnership with Mr. Freeman and no subcontractor pass-through claim. We have taken into account Mr. Phillips' subcontract payments to Mr. Freeman in considering what Mr. Phillips' costs would have been to perform Contract No. 0015 and the diverted FOB contract work and the lost profits to which Mr. Phillips is entitled due to the government's breach (finding 77).

Profit Award

The parties stipulated to "reasonable quantum" (finding 1, ¶ 10). We apply a standard of reasonableness in any event. The amount of profit appellant seeks is not reasonable. Computed as a percentage of revenue, as the parties and we have done, the profit rate appellant seeks is 79.5%. Computed on a percentage of expense basis, it is 386.9%. (Finding 83) Moreover, appellant's proffered cost evidence was not compelling in the several respects identified in our findings. We found that the persuasive evidence of record does not support the extraordinarily high profit appellant seeks in connection with work it did not perform, which is nearly three times the average 26.75% profit rate Mr. Phillips enjoyed under Contract No. 0015 (finding 28 (a)).

In this appeal we conclude that a jury verdict method of computing damages is warranted based upon the entire record. The government has conceded injury but, in connection with determining damages, the parties' cost figures, in particular, are not exact. We have had to estimate costs in several cases because there is no more reliable method of computing them (*see* summary finding 82). The evidence is sufficient for us to make a fair and reasonable approximation of damages, however.

In the nature of a jury verdict, because we are persuaded that the diverted FOB contract work would have been more profitable for Mr. Phillips than his PCL/PHWS work on average, we found that he is entitled to a profit award of \$160,612.47, which equates to a profit rate of 30.09%, a higher rate than for any of the years 2006-08 (findings 26-28, 87).

DECISION

The appeal is sustained in the amount of \$160,612.47, plus CDA interest, calculated from the CO's deemed receipt of the claim on 26 February 2010 (finding 37) until payment, 41 U.S.C § 7109.

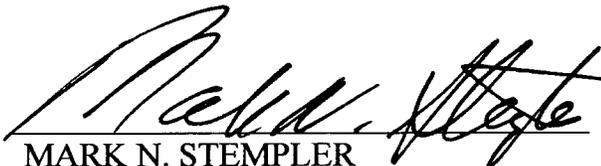
Dated: 19 March 2013



CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



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



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. 57280, Appeal of Joe Phillips, rendered in conformance with the Board's Charter.

Dated:

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