

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
GAP Instrument Corporation) ASBCA No. 51658
)
Under Contract No. DCA200-94-H-0015)

APPEARANCE FOR THE APPELLANT: Peter M. Kilcullen, Esq.
Bell, Boyd & Lloyd PLLC
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Robert R. Goff, Jr., Esq.
Chief Legal Counsel
Joann W. Melesky, Esq.
Associate Legal Counsel
Defense Information Systems
Agency, Defense Information
Technology Contracting
Organization

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a contracting officer's decision denying appellant's \$93,606,515 claim for breach of contract. The underlying contract, which called for GAP Instrument Corporation (GAP) to furnish services as a Value Added Network (VAN) provider at no cost to the Government, was styled as a license agreement and was not typical of instruments used by the Government to acquire goods and services pursuant to the Federal Acquisition Regulation (FAR). The VAN license agreement at issue was part of a program intended to establish electronic commerce as a fixture in the Federal acquisition community. Only entitlement is before us. We sustain the appeal and find respondent in breach although our interpretation of the license agreement differs from appellant's.

FINDINGS OF FACT

Background

1. A draft license agreement for provision of electronic commerce services was sent by respondent to potential offerors on 30 November 1992. Addendum A to that agreement, "Electronic Operating Concept for Procurement," stated that electronic commerce would be used for purchases under \$25,000. It envisioned that such transactions would be exchanged through a Department of Defense (DoD) gateway computer at a DoD facility which was connected to a VAN used by DoD suppliers and vendors. (Ex. A-1)

2. By letter dated 1 June 1993 the Defense Information Systems Agency (DISA) informed potential participants of a presolicitation conference to be held on 22 June 1993. Enclosed with the letter, which was signed by contracting officer Constance Jackson, was a draft of a standard license agreement similar to that in finding 1 and a draft technical scope of work for implementing electronic commerce (EC) through use of electronic data interchange (EDI). The scope of work states, *inter alia*, that the Department of Defense (DoD) “has set aggressive goals to make electronic commerce a standard way of conducting business in the 1990s. By 1995, DoD plans to conduct 75 percent of all business transactions electronically.”¹ The forwarding letter provides in part:

The Defense Commercial Communications Office (DECCO) wishes to enter into a License Agreement for Electronic Data Interchange (EDI) Value Added network (VAN) services. This license agreement is to provide the framework for the exchange of business information between Government and the tens of thousands of firms interested in conducting business with the Government. This license agreement is built on the approach and experience of the EC pilot project at Wright Patterson AFB, Government Acquisition Through Electronics Commerce (GATEC).

(Ex. R-3)

3. After a 9 December 1993 presolicitation conference, DISA sent an information package to prospective offerors under a 10 December 1993 forwarding letter signed by Ms. Jackson. The letter enclosed answers to questions raised at the conference and afforded recipients until 15 December 1993 to submit additional questions. The information package included technical information and made reference to a process action team (PAT) report which was to be presented to the Secretary of Defense on 20 December 1993. The presentation included the statement that 65 percent of the 6,000,000 DoD small purchase actions “could be expected to be available for solicitation via EDI.” (Ex. R-4 at 000001, 000004-16, 000021, 000025-32)

4. According to the December 1993 Report of the Process Action Team on EC/EDI (“the PAT report”), DoD had been considering the use of EC/EDI to support its procurement processes since at least 1988. The PAT report references a January 1993 DoD report to Congress which recommended EC/EDI as a means of enhancing access to DoD procurement information for small businesses. It also references a September 1993 National Performance Review recommendation to expand use of electronic commerce for transactions “below a specified dollar threshold and for those acquisitions and orders that use simplified acquisition procedures.” (Ex. R-6 at 000011)

5. The PAT report defines electronic commerce as “the conduct of administration, finance, logistics, procurement, and transportation between the Government and private Industry [sic] using an integrated automated information environment to interchange business transactions.” It defined electronic data interchange as “the computer-to-computer electronic transfer of business transaction information in a public standard format between trading partners.” (Ex. R-6 at 000044) Current methods used by DoD for EC/EDI were described as follows:

2.8.1 CURRENT METHODS

Implementation of the distribution of EC/EDI transactions within the procurement community is currently very fragmented. The DoD systems currently using Electronic Commerce to distribute business data fall under one or more of three major categories. Some are in the development stage as is depicted in the diagram below. It should be noted that within the three major solutions there are many possibilities which are represented throughout the DoD. Under the Direct Connect falls any project which sends data from Government computer to commercial business, not a VAN, or receives data direct from a Trading Partner. Listed under Network Solutions are those systems which use a gateway to VAN or gateway to DP to VAN solution. Under the Electronic Bulletin Board are those systems which make a computer available for outside entities to log in for download and upload information. VANs sometimes provide this service and some projects have taken advantage of the service in addition to sending transactions to Trading Partners.

(Ex. R-6 at 000120)

6. The PAT report contained time-phased recommendations ranging from six months to two years for implementing electronic commerce within DoD. The plan considered a single point of registration to be a desirable feature of EC/EDI with benefits flowing to both DoD and industry. The Executive Summary of the PAT report concludes as follows:

Conclusion

The work of this DoD In Contracting PAT represents a best effort to provide accurate assessments of current EC DoD contracting capabilities and to set forth a comprehensive plan for implementing, within six months, an EC contracting

approach that provides a “single face to industry.” The EC in Contracting PAT realized from the beginning that this was a formidable task. The task is complex because of the number of variables that must be considered when developing an implementation plan for synchronized deployment to the Air Force, Army, Navy, Marines, and Defense Agencies. There is no question that the information provided to the EC in Contracting PAT by the services and agencies was the most current information available at the time. However, the EC/EDI environment is one of constant change. Therefore, the implementation schedules depicted in this report represent the intention of the components to make a good faith effort at achieving deployments in accordance with their submitted schedules.

On the basis of the research and analysis conducted by the DoD In Contracting PAT, it is evident that the time for instituting proactive measures that allow the DoD to reap the full benefits inherent in the EC/EDI process is here. It is the desire of the EC in Contracting PAT that the recommendations contained in this report will be acted upon swiftly since the EC/EDI environment provides an excellent opportunity for acquisition reform and realization of substantial benefits for DoD and Industry.

(Ex. R-6 at 000026-27, 000031-32)

7. The PAT report contained an implementation plan. It identified procurements of \$25,000 or less as “the best target for DoD’s EDI initiative in contracting.” It also called for “addition of certified Value Added Networks (VANs), operating under the DoD VAN agreement.” (Ex. R-6 at 000235-36) Appendix B of the plan was a sample license agreement. Addendum A, paragraph 2.1 provided as follows:

All contractors desiring to conduct business with participating DoD activities electronically must register as participating contractors and will be required to exchange all electronic transactions via a participating EDI VAN Provider. DoD activities participating in this approach will be phased into it in accordance with a DoD-wide implementation plan.

The license agreement called for DoD Distribution Points to provide DoD transactions offered under the agreement only to VANs which have signed such a license agreement.

(*Id.* at 00261-74) The plan was approved by the Deputy Secretary of Defense on 5 January 1994 (ex. R-10).

8. By letter of 11 January 1994 Ms. Jackson forwarded a revision to the proposed license agreement. The revision included the following:

2.1 Contractor Use of VAN Services

DoD will require all contractors desiring to electronically conduct business to only do so with a participating, fully tested EDI VAN Provider. Any contractor may also exchange transactions by other means (i.e., not electronic) in accordance with the FAR and other applicable regulations.

DoD will require registered vendors to exchange all electronic transactions via a participating EDI VAN Provider. DoD activities participating in this approach will be phased into it in accordance with a DoD-wide implementation plan.

(Ex. R-7)

9. By letter of 14 January 1994 Ms. Jackson forwarded additional answers to questions from the 9 December 1993 conference. The answers, *inter alia*, explained no EDI communication within DoD or between Government agencies would be exchanged through the VANs and identified the December 1993 PAT report (finding 4) as the plan referred to in the proposed license agreement. (Ex. R-8, Answers 2, 4, 10, 12, 21(c), 21(k)) We find the PAT report was the plan referred to in the license agreement (*id.*, tr. 65, 199-204, 234-36). GAP obtained a copy of the report, although the record does not disclose when (tr. 164).

10. On or about 8 March 1994 DISA assumed technical responsibility for establishing and maintaining hardware and telecommunications for EC/EDI (ex. R-9).

11. In a 28 April 1994 memorandum addressing the plan, the Deputy Secretary stated:

. . . Implementation of this plan over the next two-year period will enable DoD to enhance use of EC/EDI to support small purchases consistent with the existing \$25,000 threshold, and provide the capability to accommodate an increase to \$100,000. . . .

. . . .

Use of existing nonstandard EC/EDI capable small purchase systems shall be discontinued as soon as the standard DoD-wide EC/EDI system is fully operational at a particular activity. Furthermore, no funding will be expended to upgrade, further deploy, or expand existing nonstandard EC/EDI small purchase systems or implement new nonstandard EC/EDI small purchase systems [without high-level approval].

(Ex. R-10)

The GAP License Agreement

12. James Edwardson, GAP's Chief Executive Officer (CEO), had no knowledge of the background to the EC/EDI program (findings 1-11) when he attended a Navy ICP EDI conference in Carlisle, Pennsylvania, on 18 May 1994, the purpose of which was to address the place of EDI in the Federal procurement process (ex. A-12; tr. 100-01). During the conference Navy representatives stated that DoD issues 50,000 requests for quotes each day and that 300,000² vendors return up to 500,000 quotes each day (ex. A-12; tr. 103). Mr. Edwardson considered the prices charged by the then-existing VANs to be high, and he became interested in the VAN concept and ascertained how GAP could become a VAN (tr. 106-07). He obtained a copy of a license agreement from Ms. Jackson and had it reviewed "six ways to Sunday . . . with very fine detail" by GAP contract personnel and counsel as well as reading it carefully himself. He believed that the Navy had understated the number of vendors, which GAP's research put at 760,000. (Tr. 107-09, 164) The DoD plan referred to in the agreement was unknown to him (tr. 180-83). He made no inquiries of the contracting officer, who called him twice - once because GAP was in Chapter 11 bankruptcy proceedings and a second time to inform him that GAP's status was acceptable (tr. 114, 164). He testified that at the time of execution:

My basic understanding of the agreement [was] that the government wanted us to provide a fairly expensive set of services free of charge. In return for those services, the government was creating a monopoly that was going to be limited to a group of VANs that signed this agreement and provided those services to the government.

(Tr. 109-10)

13. The agreement provides at paragraph N of the Technical Scope of Work that VAN providers will be notified of the schedule of activities in the electronic commerce program and that "DoD activities will be phased into this program in accordance with a DoD-wide plan." A DoD-wide implementation plan for phasing in small purchases is also

mentioned in Addendum A at 1. OVERVIEW. (R4, tab 1) With respect to the DoD-wide implementation plan, Mr. Edwardson testified:

A. The DOD plan was something, to me, that was promised, that should have been put forth as an attachment to this license amendment, which was never done.

Q. Did you have any idea what the plan was?

A. Not having a plan attached to the license and there being no plan attached to the license, there was no plan. What this was saying here is that the government was planning on having a plan, which they never attached to the license.

Q. Wouldn't it have been a good idea to ask the government for the plan?

A. We may have done that. I never did that personally, but I had a lot of contracting officers working on that. Someone may have done that.

Q. Did anyone from GAP ask for the plan?

A. I don't know.

(Tr. 181) We find from Mr. Edwardson's testimony that he recognized that the plan was significant to performance.

14. The agreement was executed by GAP on 9 June 1994 and by the contracting officer on 12 October 1994.³ It incorporated by reference FAR 52.233-1 DISPUTES (DEC 1991) ("the Disputes clause"), and, while not containing a "Changes" clause as such, it gave the Government the unilateral right to make revisions. The signed agreement was forwarded with the following letter from the Deputy Under Secretary of Defense (Acquisition Reform):

I would like to congratulate you on your foresight and perceptive judgment in electing to participate in the DoD standard EDI infrastructure. Your vision will help facilitate, throughout government and its supplier community, the realization of substantial benefits, including a "single face to industry."

This "single face to industry" can only be accomplished by using one data transmission technology. I also want to re-emphasize the importance of implementing this DoD-wide standard approach to EDI – again, in terms of benefits to both the government and its suppliers. With the cooperation and enthusiasm of organizations like yours, the DoD EC/EDI program will be an unqualified success. Again, thank you for

your participation and support. We are all part of an innovative and revolutionary team directed toward the realization of an exciting new electronic era in government. I look forward to continuing to work with you on this endeavor.

(R4, tab 1)

15. At the time of the agreement, the contracting officer's use of facsimile transmission involved printing on paper, her e-mail capability was limited to intra-agency communication, and she had no Internet access (tr. 210-12). To the contracting officer, insofar as the VAN agreement was concerned, the electronic conduct of business meant only the transaction sets, which we interpret to mean standardized formats for exchange of information on transactions involving the procurement of goods and services, passing through the hubs (tr. 201-02; Appendix 1 at C.3; app. ex. 7 at question and answer 16). IMPAC (Government purchase) cards did not exist in 1994 (tr. 218).

16. The license agreement (R4, tab 1) is reproduced in its entirety as Appendices 1 and 2 (revisions). Under the agreement, GAP became an EDI VAN provider that could charge DoD contractors a service fee for transmission of documents in an electronic format. Such transmissions were limited to those between contractors and DoD using the DoD hubs. The agreement paints a picture of an aggressive DoD program to convert its procurement (and ultimately other) functions to an electronic format using the hubs. Some relevant portions are summarized below:

- a) Phased approach to electronic commerce with DoD reserving the right to continue non-electronic transactions;
- b) Contractors conducting electronic commerce with DoD must register through a VAN provider;
- c) No guaranteed minimum number of transactions;
- d) No monetary charge to either party;
- e) Consideration limited to EDI VAN services from GAP and access to DoD data provided by DoD hubs from DoD;
- f) May be terminated in whole or in part on 30 days notice;
- g) EDI VAN provider defined as "a service that transmits, receives and stores EDI messages for EDI trading partners;"
- h) May be revised by the Government unilaterally;
- i) One year term with four one-year options;
- j) Electronic exchange of RFQ's, quotes, and awards through the hubs.

Performance Under the License Agreement

17. GAP built a VAN system, which was tested to handle up to 10,000 transactions per hour and certified as required by the agreement (tr. 118-19, 165). Its performance was satisfactory and “GAP was probably the least problematic of the VANs” (tr. 87-88).

18. Electronic bulletin boards are EC/EDI interchange systems consisting of a computer and modem through which Government procurement officials and vendors exchange information. They were considered nonstandard small purchase systems because they violated the “single face to industry” concept and did not use the DoD hubs. (Ex. A-16 at 3)

19. During the period of GAP’s agreement (1994-97) the Defense Logistics Agency (DLA) was exchanging procurement information using its own EDI, electronic bulletin boards, facsimile transmission (FAX) and, late in that period, using the Internet (tr. 92, 94). Some Army and Navy offices also used bulletin boards for exchange of procurement information at least as late as January 1996 (ex. A-6 at 4). We find, after implementation of the agreement pursuant to the DoD-wide plan, paperless, electronic transmission of RFQs, quotes, awards, orders against existing contracts, and award summaries violated the agreement.

20. GAP received FAXes from DLA which indicated that some DLA sites did not intend to use the VANs and Mr. Edwardson protested this to DISA (tr. 112-13).

21. A 2 December 1994 memorandum from the Deputy Under Secretary (Acquisition Reform) to various DOD offices provided as follows:

This office has received numerous queries recently concerning the status, use and further deployment of Electronic Bulletin Boards (EBB) in support of DoD procurement activities. Consistent with the implementation plan delineated in the DoD Electronic Commerce in Contracting Process Action Team (PAT) report, approved by the Deputy Secretary of Defense in January 5, 1994 and guidance issued in the Deputy Secretary of Defense memo dated April 28, 1994, “. . . no funding will be expended to upgrade, further deployment, [sic] or expand existing nonstandard EC/EDI small purchase systems unless specifically approved by the DUSD(AR). . .”.

This memorandum was not intended to require termination or restriction of the use of EBBs to support the dissemination and collection of information between DoD procurement activities and the private sector.

EBBs that are used to advertise purchase actions to the private sector, however are beyond the scope of information dissemination and collection. Consequently EBBs that advertise purchase actions must adhere to the policy outlined in the above referenced Deputy Secretary of Defense memo. In addition, although the memo references EC/EDI small purchase systems, it should be applied with respect to any nonstandard EC/EDI procurement system. If you have any questions regarding this memo, please contact me, or Ms. Delores “Dee” Smith at 703-681-0214.

(Ex. A-13)

22. A 24 May 1996 Inspector General report states that an alternative to VAN service for fees will be available by September 1996 (ex. A-17 at 12). By October 1996 DoD had set up a website and dial-up modem capability which allowed DoD vendors to register at no cost (ex. A-25 at 22). The growth of online catalogs, purchase cards and the Internet in 1996-97 was creating alternatives to the DoD hubs as the single method for electronic procurements (*id.* at 10-11; ex. A-28 at 11). We find that vendors were using services other than the VANs to, *inter alia*, submit quotes (ex. A-16).

23. During 1995 and 1996 appellant’s customer base rose to approximately 100 customers, whom appellant charged \$3,600 per year (tr. 159, 171). The customer base diminished thereafter (tr. 171).

24. The license agreement was terminated on 17 September 1997. A second license agreement was entered into by the parties. (Tr. 244-45)

25. On 16 March 1998 appellant filed a claim in the amount of \$93,606,515, which was denied in a contracting officer’s decision dated 26 May 1998 (R4, tabs 2, 3).

DECISION

Preliminary Matters

During the early post-briefing stages, the Board became concerned that Mr. Edwardson’s testimony that, notwithstanding the reference in the agreement to a DoD implementation plan, there was no such plan (finding 13), and the contracting officer’s testimony that the plan in the agreement was the PAT report (finding 9), created an issue as to whether there was a meeting of the minds sufficient for a contract to have been formed. The Board also expressed concern as to whether the agreement is a contract covered by the

Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The Board requested, and received, additional briefs on these points.

Had appellant been privy to the process through which the agreement was developed, the “meeting of the minds” issue probably would not have arisen, as we are persuaded here that there was mutuality of assent on offer, acceptance, and consideration sufficient to form a contract. However, if the provision on which mutual assent is missing goes to the heart of the contract, there may still be no contract formed. *Consumers Ice Company v. United States*, 475 F.2d 1161, 1165 (Ct. Cl. 1973). For this to happen, the issue to which there has been no mutual assent must be close to “the bounds of the entire consensual perimeter . . .” *WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 879 (Ct. Cl. 1963). Moreover, where there was no negotiation and the issue can be resolved by resort to application of “other devices for interpreting the agreement,” a finding that no contract was formed is improper. *Consumers Ice Company, id.* The agreement was a standard agreement, with terms that were identical to those of 30 other such agreements (finding 14; footnote 3). We conclude from this that the agreement was not subject to negotiation, thus giving rise to application of the *contra proferentem* rule. *Id.* Accordingly, we hold that the question of what constituted “the plan” referred to in the agreement is an issue to be resolved by the rules of contract interpretation. We further conclude that a contract was formed, notwithstanding the failure of mutual assent on “the plan.”

With respect to whether the agreement is a CDA contract, we first note that the contract incorporates by reference the Disputes clause. We would, therefore, have jurisdiction by virtue of that clause in any event. *G.E. Boggs & Associates, Inc.*, ASBCA Nos. 34841, *et al.*, 91-1 BCA ¶ 23,515 at 117,906. We also note that the CDA applies to contracts “entered into by an executive agency for- . . . (2) the procurement of services” 41 U.S.C. § 602(a). The agreement was held to provide for beneficial services to the Government, which enabled GAO to find jurisdiction under a similar provision in the Competition in Contracting Act (CICA), 31 U.S.C. § 551 *et seq.*, in *Total Procurement Services, Inc.*, B-255934.3, 94-2 CPD ¶ 74, a case involving an identical agreement.⁴ We concur with GAO that the agreement provides for services to the Government. As such, it falls within 41 U.S.C. § 602(a). Moreover, we have held the CDA applies to a contract which involved the procurement of services without a cash payment by the Government. *Enrique (Hank) Hernandez*, ASBCA No. 53011, 01-1 BCA ¶ 31,220. Accordingly, we hold that the CDA applies to the license agreement.

The Merits

Appellant argues that respondent breached the agreement, which it reads as not including the PAT report as the implementation plan referenced in the agreement, because it permitted EC/EDI transactions which did not go through the hubs and the VAN providers. Appellant would also have us find that electronic bulletin boards, e-mails, Internet transactions, FAXes and IMPAC card transactions violated the agreement. Respondent

argues *inter alia*, that the only reasonable interpretation of the agreement includes the PAT report as the implementation plan referenced in the agreement. Respondent also argues that it did not breach the agreement, and that appellant has not made the requisite showing of damages necessary to find entitlement.

The Significance of the PAT Report

The principal interpretation dispute is as to whether the agreement's reference to an implementation plan can only be read as a reference to the PAT report. Prior to execution of the agreement, during a period prior to appellant's entrance on the scene, the contracting officer informed potential VAN providers, and we have found (finding 9), that the PAT report was the plan referred to in the agreement. However, appellant was not party to the communication giving rise to our finding, and would not have known of the significance of the PAT report except through other means. In light of this appellant's peculiar circumstances, we must determine whether appellant's interpretation of the agreement was reasonable.

The agreement states in three places that implementation of the VAN services will be phased-in pursuant to a DoD-wide plan (*see* Appendix 1 at paragraphs N, 1, 2.1). The plan referred to was not attached to the license agreement sent to appellant and is not further identified in the agreement. While the agreement leaves no doubt that implementation would be pursuant to a DoD-wide plan, it is silent as to the particulars of the plan. As we understand Mr. Edwardson's testimony, he interpreted the agreement as not being subject to an implementation plan (finding 13). He personally reviewed the agreement carefully and had it reviewed in great detail by others, including counsel (finding 12). Moreover, appellant obtained a copy of the PAT report, although the record is silent as to when (finding 9). Mr. Edwardson also testified that someone representing appellant may have asked respondent for the plan (finding 13). While not explicitly stating it, the tenor of Mr. Edwardson's testimony was such that it is inescapable that he recognized that a DoD-wide implementation plan would be important to performance, and we have so found (*id.*). It is inexplicable then that he would simply have taken no action to find out what the plan contained. More than that, it is unreasonable to interpret an agreement so as to deny the existence of an implementation plan when the agreement mentions an implementation plan in three places. Indeed, an interpretation based on the belief that the implementation plan is not contained in the PAT report might be within the zone of reasonableness, but an interpretation that denies the existence of any plan is not. To prevail, a party must have relied on an interpretation that is reasonable. *Randolph Engineering Company v. United States*, 367 F.2d 425 (Ct. Cl. 1966).

In addition, the failure to provide, specifically identify, or synopsisize the terms of implementation in the DoD-wide plan, was a glaring omission in the agreement. It was, therefore, patent, and imposed upon appellant the duty to inquire. *Community Heating & Plumbing Company, Inc. v. United States*, 987 F.2d 1575 (Fed. Cir. 1993). Thus, appellant

proceeded at its own risk when it performed the contract in accordance with its own interpretation.

Given the unreasonableness of appellant's interpretation, we must determine what was meant by the references to the DoD-wide implementation plan. We have found, based on communications between respondent and potential licensees, that the DoD-wide implementation plan was contained in the PAT report (finding 9). It is reasonable in the circumstances to supply the implementation schedule in the PAT report as the DoD-wide implementation plan in the license agreement. *Sundstrand Corporation*, ASBCA No. 51572, 01-1 BCA ¶ 31,167. In summary, we interpret the agreement as implementing the VAN provider services in accordance with the schedule in the PAT report. We must also determine below the extent of the services to be provided.

The Government's Obligation

The TECHNICAL SCOPE OF WORK provides in paragraph A that procurement is the starting place for electronic commerce and “[t]he application of this technical approach to procurement is provided in Addendum A . . .” (*see* Appendix 1) Addendum A is titled DOD APPROACH TO ELECTRONIC COMMERCE FOR SMALL PURCHASES AND OTHER SIMPLIFIED PURCHASES and provides in 1. OVERVIEW for requests for quotations (RFQs), quotes, awards, summaries of awards, “some information [provided by DoD] regarding the DoD electronic commerce approach and contractor registration,” and priced orders against established contracts. The foregoing list is hereinafter referred to as the “mandatory items.” In addition, paragraph 2.2.3 provides that respondent can elect to send text messages “such items as notices of general interest; information concernig [sic] operational, environmental, or safety issues; statements of work to accompany a [sic] RFQ for services, etc.” using the VANs. (*Id.*) The items in paragraph 2.2.3 are hereinafter referred to as the “elective items.”

Read in its entirety, we interpret the license agreement as limited to small purchases and other simplified purchases as enumerated in Addendum A. The agreement, in Addendum A, ¶ 2.1, obligated respondent, in accordance with the DoD-wide implementation plan, to “require all contractors desiring to electronically conduct business to only do so with a participating, fully tested EDI/VAN Provider.” (Appendix 1) We conclude that, read in the context of Addendum A, respondent was required to use the VAN providers for electronic transmission⁵ of the mandatory items once the plan was phased-in at each DoD activity pursuant to the schedule in the PAT report. Respondent was not required to do the same for the elective items. The agreement also permits respondent to continue traditional “not-electronic” transactions. Purchase cards (“IMPAC cards”) did not exist at the time the agreement was executed (finding 15), were not within the contemplation of the parties, and their use did not violate the agreement.

Respondent argues that the agreement was “for **participating** DoD agencies” (Gov’ t post hearing br. at 38 (emphasis in original)). The word “participating” is used throughout the agreement to refer to VAN providers, while used only once to refer to DoD activities (Appendix 1, Addendum A, ¶ 2.1) and once to refer to contractors (*id.*, ¶ 2.3). Paragraph 2.1 states that DoD will require *all* contractors to register before doing business electronically, and that such contractors must use a participating VAN Provider. It then states “DoD activities participating in this approach will be phased into it in accordance with a DoD-wide implementation plan.” However, ¶ 1 of Addendum A provides “EDI-capable DoD activities will be phased into using [the approach described in Addendum A] based on a DoD-wide implementation plan.” Interpreted in the context of the overall agreement, we construe the single reference to “DoD activities participating in this approach” to mean DoD activities capable of electronic data interchange. The agreement’s references to DoD’s commitment to implementing EC, its aggressive goals, and particularly the statement in ¶ N that “[a]ll DoD-to-contractor transactions electronically exchanged as part of this EC program must be exchanged via a participating EDI VAN Provider” reinforce this interpretation. Thus, we believe that respondent’s argument, while accurately portraying the words in ¶ 2.1, does little to limit the extent of the Government’s obligations to appellant.

The Breach

The parties have not presented arguments on the actual timing of the phase-in contained in the PAT report. We have not, therefore, attempted to analyze the timing except to determine its outward limits. We have found that the phase-in was to be completed in two years. We offer no opinion as to whether the PAT report schedule would require earlier phase-in for certain specific transactions. Under this criterion, after phase-in any failure to require contractors to conduct EC/EDI involving the mandatory items by using the VANs (finding 22) was a violation of the agreement after phase-in. Similarly, respondent violated the agreement when it failed to use the VANs for its part in transactions, such as issuing an RFQ, which involved the mandatory items (findings 19-21). In summary, respondent breached the agreement to the extent that respondent did not use, or failed to require affected contractors to use, the VAN providers in the period after the PAT report phase-in schedule, for electronic small purchase transactions involving the mandatory items.

We are aware that the agreement permitted unilateral revision by respondent (finding 14). However, the revisions made to the agreement (*see* Appendix 2) do not affect the issue before us. Moreover, if we equate the right to make unilateral revisions to the Government’s rights under the Changes clause, we still come to the conclusion that respondent breached the agreement. The failure to require all DoD agencies to use the VANs for small purchase procurements as addressed above was a drastic revision, going directly to the heart of the matter. It was, therefore, tantamount to a cardinal change under

the Changes clause, and a breach of the agreement. *Air-A-Plane Corp. v. United States*, 408 F.2d 1030 (Ct. Cl. 1969).

Establishment that Some Damage Occurred

Respondent further argues, in effect, that appellant is not entitled to relief because it has not made the requisite showing that some damage was suffered. In *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000) (hereinafter “*Barram*”), several court reporting contractors were listed on the Federal Supply Schedule (FSS).⁶ The contract’s Requirements clause required all such services to be ordered from the FSS “except as this contract otherwise provides.” The Government ordered services on an *ad hoc* basis from other contractors and the FSS contractors filed breach claims. The GSBCA rejected the claims, holding that the contractors were not guaranteed any business because the contracts were not requirements contracts. *Ace Federal Reporters*, GSBCA Nos. 13298, *et al.*, 99-1 BCA ¶ 30,139. The Court reversed. While not characterizing the contracts as requirements contracts, the Court observed “A contract is not unenforceable merely because it does not fit neatly into a recognized category,” *Barram* at 1332, and concluded that the contracts had sufficient content for a remedy to be fashioned. *Id.* at 1333. The Court also said:

the government promised that it would purchase only from the contractors on the schedule, with few exceptions. The government’s promise . . . has substantial business value because there were only between two and five authorized sources in each of the designated geographic regions.

Id. at 1332.

We find similarities between *Barram* and this appeal. Here, as there, the Government made a promise which it did not keep. Here, as there, the promise had business value, because appellant could charge fees to contractors which, had the Government kept its promise, would have had no choice but to use the services of the little coterie of VAN providers of which appellant was a member. Accordingly, we conclude appellant has shown that the issue of damages is not purely academic and that appellant has incurred some damage. *Applied Companies, Inc.*, ASBCA Nos. 50749, 50896, 51662 (26 February 2001).⁷

We sustain the appeal in accordance with the interpretation set out above.

Dated: 22 March 2001

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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

NOTES

- ¹ This was included in the license agreement at issue (R4, tab 1).
- ² The number of vendors is higher than 300,000 (tr. 267).
- ³ Ultimately, there were 31 such agreements between DoD and VAN providers (tr. 244).
- ⁴ The number of the license agreement in that case was the same as here, DCA200-94-H-0015.
- ⁵ FAX transmissions using paper (as opposed to computer-to-computer) are not within the agreement's definition of electronic transactions, which includes only "paperless" data interchange (Appendix 1 at B).
- ⁶ Although not clear from the Court's opinion that the FSS is involved, it is referenced in the GSA Board's opinion which the Court reviewed.

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We note that appellant has set out alternate damage theories in its complaint. In this regard, *see Glendale Federal Bank, FSB v. United States*, 239 F.3d 1374 (Fed. Cir. 2001).

APPENDIX 1

LICENSE AGREEMENT

DCA200-94-H-0015

This license agreement is effective as of the 12 day of October 1994, between the UNITED STATES OF AMERICA (hereinafter called the Government), and GAP Instrument Corp. (hereinafter called the EDI VAN Provider). WHEREAS, EDI VAN Provider warrants that he has the right to grant the within license and release, and the Government desires to procure the same, and

NOW THEREFORE, in consideration of the grant, release, and agreements hereinafter recited, the parties have agreed as follows:

ARTICLE 1. LICENSE GRANT - DECCO/RPPS (DEC 1993)

The EDI VAN Provider hereby provides the Government with the right to have access to the use of its EDI and Value-Added Network Services at no-cost to the Government for the purpose of exchanging business documents and information with individuals and organizations conducting business with the Government throughout the DOD Hub Gateway Computers. The network charges that would otherwise be applicable to the Government, for transmission of documents in an electronic format will be waived for the duration of the license agreement. In consideration for the EDI VAN Provider granting the Government this right, the Government agrees that it will not use, resell, or otherwise make available Contractor's services outside the scope of this agreement without the prior written permission of the EDI VAN Provider.

ARTICLE 2. LICENSE TERM - DECCO/RPPS (OCT 1992)

The license hereby granted may terminate in whole or in part, by giving the EDI VAN provider or Contracting Officer not less than thirty (30) calendar days notice in writing of the date such termination is to be effective.

The term of this agreement shall be for one year. The agreement may be extended for four one-year periods after the Government conducts an annual review of the agreement. At the time of each annual review, the Government will review any changes to the Technical Scope of Work as well as review all terms and conditions contained in the License Agreement including the no-cost provision. If it is determined to be in the Government's best interest, EDI VAN services required after Year One may be procured on a competitive basis in accordance with the Federal Acquisition Regulation.

Revisions to the License Agreement shall be made unilaterally by the Government. Any changes made to the Agreement, its Technical Scope of Work or Addendum A will apply to all signers of the Agreement, i.e., all participating EDI VAN Providers.

ARTICLE 3. PAYMENT - DECCO/RPPS, (OCT 1992)

In consideration for the Electronic Data Interchange (EDI) Value Added Network (VAN) provided by the EDI VAN provider and the access to the DOD Hubs located at up to two locations for operations and disaster recovery purposes, provided by the Government, as described in the Technical Scope of Work, there will be no monetary charge to either party. Sole consideration shall be the EDI VAN services provided by the EDI VAN provider and access to the DOD data provided by the DOD Hubs.

ARTICLE 4. COMPUTER SECURITY - DECCO/RPPS (OCT 1992)

Notwithstanding any other provision of this license agreement, the Government may unilaterally disconnect the EDI VAN Provider from the DOD Hubs (or stop acceptance of electronic mail from the EDI VAN provider), if the Government suspects any breach of computer security due to the connection with the EDI VAN provider (or acceptance of electronic mail from the contractor) which would compromise the integrity, normal operations, or privacy of the Government's computer system. The DOD/DISA Technical representative will notify the EDI VAN provider within two (2) hours, if the Government disconnects the EDI VAN provider (or stops accepting mail from the EDI VAN provider). Such notice will be verbal and optionally by electronic mail, but will be followed by a written notice within 24 hours of the reasons for the disconnect, the steps being taken to determine whether a breach indeed exists, and an estimated completion schedule for such steps. Upon notification of disconnect, the EDI VAN Provider shall promptly notify its subscribers. The Government will research and/or test to confirm any such breach of computer security. Upon satisfactory resolution of any apparent or real breach, the Government will reconnect the EDI VAN provider to the DOD Hubs. The EDI VAN provider shall indemnify the Government against all liability including costs, which may result from disconnecting the EDI VAN provider from the DOD Hubs.

ARTICLE 5. NEWS RELEASE - DECCO/RPPS (OCT 1992)

EDI VAN Providers shall not make news releases (i.e., publications, advertising, speeches, technical papers, and photographs) pertaining to this license agreement without the written approval of the Contracting Officer.

ARTICLE 6. NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT - FAR 52.227-2 (APR 1984)

(a) The EDI VAN Provider shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the EDI VAN Provider has knowledge.

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed under this contract, the EDI VAN Provider shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in possession of the EDI VAN Provider pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the EDI VAN Provider has agreed to indemnify the Government.

(c) The EDI VAN Provider agrees to include, and require inclusion of, this clause in all subcontracts at any tier for supplies or services (including construction and architect-engineering subcontracts and those form material, supplies, models, samples, or design or testing services) expected to exceed the dollar amount set forth in 13.000 of the Federal Acquisition Regulation (FAR).

ARTICLE 7. EXCLUSIVITY - DECCO/RPPS (OCT 1992)

This license agreement provides for EDI VAN Provider access to the EC data provided as described in the Technical Scope of Work. The DOD Hubs will provide DOD transactions offered under this agreement only to VANs signing this agreement. DOD will not provide these transactions to VANs under other agreements. This license agreement shall be used exclusively for obtaining access to the EC Data provided by the DOD Hubs computer during the term of this agreement.

ARTICLE 8. EXTEND TERM OF AGREEMENT - DECCO/RPPS (OCT 1992)

This agreement shall be effective the date Government signs the agreement and shall continue unless sooner terminated in accordance with the provisions of this agreement. The total duration of this License Agreement shall not exceed 60 months (one basic year with four one-year periods).

ARTICLE 9. MINIMUM GUARANTEE - DECCO/RPPS (OCT 1992)

The magnitude of DOD transactions depends on Congressional appropriations. Therefore, DOD cannot guarantee any minimal level transactions activity at any of its facilities.

ARTICLE 10. LIABILITY EXCLUSIVE - DECCO/RPPS (OCT 1992)

The Government is not responsible for errors or omissions of the EDI VAN Providers in providing information to the other commercial entities. The Government is not liable for non-performance of the EDI VAN Providers.

ARTICLE 11. USE OF LICENSE AGREEMENT - DECCO/RPPS (SEP 1993)

The License Agreement is for use by both DOD and non-DOD Agencies.

ARTICLE 12. CLAUSES INCORPORATED BY REFERENCE - DECCO/RPPS (OCT 1992)

This agreement incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available.

FAR REF	CLAUSE TITLE	DATE
52.203-1	Official Not to Benefit	APR 1984
52.203-3	Gratuities	APR 1984
52.203-5	Covenant Against Contingent Fees	APR 1984
52.232-23	Assignment of Claims (JAN 1986) - ALTI	APR 1984
52.233-1	Disputes	DEC 1991

ARTICLE 13. LIMITATIONS OF LIABILITY - DECCO/RPPS (DEC 1993)

The EDI VAN Provider is not expected to assume liability for incidental, special or consequential damages, or third party claims against the EDI VAN Provider or the Government, under or related to the agreement with the VAN Provider's total liability under or relating to the Agreement will not exceed, in the aggregate, one hundred thousand dollars (\$100,000).

ARTICLE 14. TECHNICAL ENHANCEMENTS - DECCO (APR 1990)

After implementation of the License Agreement, the Government may solicit, and the EDI VAN Provider is encouraged to propose independently, improvements to the services, features, or other requirements of the license agreement. These improvements may be proposed to save money, to improve performance, or for any other purpose which presents a service advantage to the Government.

IN WITNESS WHEREOF, the parties hereto have executed this license agreement. Both parties agree that by signing this license agreement they do so within the scope of their authority. If any party exceeds the scope of their authority they do so at their own risk.

THE UNITED STATES OF AMERICA

BY: (signed Constance E. Jackson)

TITLE: Contracting Officer

DATE: 12 Oct 94

EDI VAN PROVIDER

BY (signature)
James Edwardson

TITLE: CEO

DATE: June 9, 1994

TECHNICAL SCOPE OF WORK

A. OBJECTIVE

The objective of this attachment to the EDI VAN Provider license agreement is to describe the DoD technical approach to electronic commerce using multi-VAN DoD Hubs to exchange transactions with EDI VAN Providers participating in the agreement. It defines technical requirements and procedures for participating EDI VAN Providers. Most functional areas within DoD including procurement, finance, transportation, supply, and administration are ultimately expected to use the technical approach described in this attachment. Procurement is the first functional area to use it. The application of this technical approach to procurement is provided in Addendum A to this agreement. Addendum A is consistent with and uses the technical approach described below.

B. OVERVIEW

The Department of Defense (DoD) is committed to implementing electronic commerce (EC) using electronic data interchange (EDI). In a May 1988 policy memorandum, the Deputy Secretary of Defense directed the Department of Defense (DoD) components to make “maximum use of electronic data interchange (EDI) for the paperless processing of all business-related transactions.” Defense Management Report Decision 941, issued in November 1990, commits DoD to replace existing documents with EDI. The benefits of exchanging this information electronically include fewer data entry errors, elimination of mailing costs, decreased paper handling, reduced inventories, better cash management, and shortened order times.

DoD has set aggressive goals to make electronic commerce a standard way of conducting business in the 1990s. By 1995, DoD plans to conduct 75 percent of its most frequently used business transactions electronically. DoD believes a “common approach for all Military Services and Defense agencies with a single face to industry” is the most expedient and efficient manner to implement EDI and EC within DoD.

To achieve these goals, DoD will use multi-VAN Hubs to exchange transactions between DoD and the EDI VAN Providers used by DoD’s commercial trading partners. These commercial trading partners can choose to use any of the EDI VAN Providers participating in this agreement. A commercial trading partner will send and receive information to and from DoD via its EDI VAN Provider. A firm meeting the terms and conditions of this agreement, can operate as an EDI VAN Provider on its own behalf under this agreement, even if the firm does not intend to act as an EDI VAN Provider for other DoD trading partners. DoD activities will transmit data to the Hubs which will forward the data to the appropriate EDI VAN Providers used by the DoD activities’ trading partners. DoD will send any one-to-all (i.e., available to the public) transactions sent by DoD activities to each of the participating VAN Providers via the Hubs. The participating EDI VAN Providers are

required to make these public transactions available to all interested subscribers. DoD will also exchange one-to-one transactions, i.e., transactions addressed to specifically to [sic] one or more contractors, via the multi-VAN Hubs.

DoD will develop and distribute to all participating EDI VAN Providers a document detailing the policies and procedures that will be followed to establish and maintain connectivity with the multi-VAN DoD Hubs. Each EDI VAN Provider will establish redundant connectivity with the Hubs in accordance with the agreement.

DoD will use a phased approach for implementing EDI with its various functional areas and across DoD activities. Procurement and payment transactions have been identified as priority targets for DoDs EC program but all business areas will move to an EC environment when it makes good business sense to do so. DoD has designed a standard framework and technical solution for all business areas.

C. EDI VAN PROVIDER SERVICES

C.1 DEFINITION OF AN EDI VAN PROVIDER

An EDI VAN Provider shall be defined as a service that transmits, receives, and stores EDI messages for EDI trading partners. The EDI VAN Provider also provides access to these EDI messages by the parties to which the messages are addressed. A firm meeting the terms and conditions of this agreement can operate as an EDI VAN Provider on its own behalf under this agreement, even if the firm does not intend to act as an EDI VAN Provider for other DoD trading partners. Trading partners need not directly receive nor send documents in standard formats defined below, but DoD will send all documents to the EDI VAN Provider using these formats and all transactions must be in these formats when they are received by DoD from the EDI VAN Provider.

C.2 EC Program Mailbox

The EDI VAN Provider must provide DoD with at least one EDI mailbox which DoD will use to monitor compliance with the terms and conditions of this agreement and for troubleshooting and testing. DoD may store data in this mailbox for up to five business days. The EDI VAN Provider must provide DoD with the use of any software needed to use this mailbox. This software and mailbox shall only be used for the above purposes by the DoD Technical Representative, not by individual DoD activities.

C.3 Standards and Conventions for Standards Usage

C.3.1 Transaction Set Standards

The EDI VAN Provider must be able to exchange all transactions with the multi-VAN DoD Hubs using the American National Standards Institute (ANSI) Accredited Standards Committee, Commerce, and Transport (EDIFACT) standards when the EDI VAN Providers are informed by the DoD Technical Representative that DoD will begin to use EDIFACT standards. DoD will notify EDI VAN Providers at least 90 days before any EDIFACT messages are used by DoD via the Hubs. The EDI VAN Provider must have the ability to read and interpret ASC X12 header and/or trailer records (i.e., ISA, GS, GE, IEA segments) and the equivalent parts of EDIFACT messages.

The EDI VAN Provider must support the exchange of ASC X12 transaction standards and draft standards for trial use (DSTU's) in the current version and release (Version 3, Release 4, referred to as "3030") as well as two prior releases (3010 and 3020). New versions and releases of the ANSI ASC X12 standards must be supportable by the EDI VAN Provider within 90 days' notice from the Technical Representative. Until December 1995, the EDI VAN Provider must also support ASC X12 Version 2, Release 3 (referred to as "2003"). When DoD begins using EDIFACT messages, the DoD Technical Representative will inform the EDI Van Providers of which EDIFACT messages and statuses must be supported. Prior to the commencement of testing, the DoD Technical Representative will provide participating VANs a list of transactions to be used initially.

Consistent with the Federal Information Process Standard (FIPS) Publication 161-1, DoD activities may also use industry-specific standards, if no equivalent X12 or EDIFACT standards have been approved and issued by September 30, 1995 and the DoD activity was using such industry-specific standards on September 30, 1991. DoD will inform the participating EDI VAN Providers of any such usage of standards and identify the source of such standards at least 90 days before such standard are used by DoD via the Hubs.

The ANSI ASC X12 standards and supporting documents may be obtained from the Data Interchange Standards Association, 1800 Diagonal Road, Suite 355, Alexandria, Virginia 22314-2840, phone (703) 548-7005.

C.3.2 Implementing Conventions for Use of ASC X12 Standards

As a matter of common practice, ASC X12 standards and DSTU's (as well as EDIFACT messages) are seldom used in their entirety. For this reason, the DoD (in a manner similar to many private sector industry groups) has written a series of implementation conventions, which are sub-sets of the ASC X12 standards and DSTU's. These conventions describe the precise manner in which the DoD intends to use the ASC X12 standards and DSTU's with its trading partners.

The EDI VAN Providers must (directly or indirectly via affiliated services) enable interested businesses to receive and send ASC X12 transaction sets following the DoD implementations conventions for the ASC X12 standards. (Conventions will be provided for EDIFACT messages when DoD begins using them.). The EDI VAN Provider must use the most current version of these conventions for each ASC X12 version and release. The DoD Technical Representative will provide the EDI VAN Provider with the DoD conventions and all updates for any ANSI ASC X12, EDIFACT or other EDI messages DoD uses in accordance with Section C.3.1, above. The EDI VAN Provider must comply with the conventions and any changes to them within 90 calendar days of receipt from the Technical Representative.

Currently DoD conventions are available for ASC X12 Version 2, Release 3 and in draft form for transaction sets in ASC X12 Version 3, Release 1 (many transaction sets) and Version 3, Release 2 (one transaction set only, the ANSI X12 838). DoD will issue new or updates to the conventions no more frequently than every six months, unless an emergency change to the conventions becomes required.

C.3.3 CALS Data Within ASC X12 Transaction Set 841

DoD plans to include CALS (Continuous Acquisition and Life Cycle Support) data (both binary and ASCII, as specified in MIL-STD-1840A and in companion suite of military specifications) with some of its electronic Requests for Quotation (RFQ) transaction sets. The EDI VAN Provider may provide services to enable interested subscribers to exchange such data with a DoD activity and translate it into usable forms. All binary data will be exchanged in ASC X12 841 transaction sets.

C.3.4 Transaction Exchange Methods

The EDI VAN Provider may exchange ASC X12 (and eventually EDIFACT) transactions with the multi-VAN DoD Hubs using one of the following methods or another method, if found mutually acceptable by DoD and the EDI VAN Provider. In determining acceptability of a method proposed by an EDI VAN Provider but not listed below, DoD will consider among other factors the DoD resources required to test and support the alternative method. If an alternative method is found acceptable to DoD and one EDI VAN Provider, that same method will be made available to all other participating EDI VAN Providers. Consistent with the term of the License Agreement, DoD may modify the transaction exchange methods available annually.

C.3.4.1 FTP (file transfer protocol) or UUCP over TCP/IP

The following four methods are subject to DoD availability. EDI VAN Providers will be informed as DoD achieves these capabilities.

C.3.4.2 FTAM (File Transfer Access Management) over OSI

C.3.4.3 CCT (Consultative Committee for International Telegraph and Telephone) X.400 (Version 1988). This standard is compliant with the Government Open Systems Interconnect Profile (GOSIP) via X.435 (the version of X.400 designed for exchange of EDI transactions) is preferred by DoD and will likely be required in future (e.g., 1994) versions of this license agreement.

C.3.4.4 ANSI ASC X12.56 Interconnect Mailbag Control Structure. This ANSI X12 standard is designed to control the exchange of groups of ANSI X12 transaction sets between two interconnecting entities. The entities in this agreement will be the EDI VAN Provider and the multi-VAN DoD Hubs.

C.3.4.5 Simple Mail Transfer Protocol (SMTP) (Internet RFC [Request for Comment] 822) based on DoD Military Standard (MIL-STD) 1781. Each EDI transaction set (in the case of ANSI X12, beginning with an ISA segment) will be in a separate SMTP envelope.

C.4 Interface between Multi-VAN DoD Hubs and EDI VAN Providers

All EDI transactions exchanged between commercial trading partners and DoD activities will be exchanged via the DoD Hubs. Connectivity between the DoD Hubs and the EDI VAN Providers will be established through one of three alternative connectivity methods using asynchronous, binary synchronous (BSC), or CCITT X.25 access protocols:

C.4.1 Toll free phone call by DoD whereby DoD can dial a phone number to exchange transactions with the EDI VAN Provider. Minimum speed is 9600 bps.

C.4.2 Dedicated circuit (leased line) to DoD Hubs at EDI VAN Provider expense. The EDI VAN Provider is responsible for all needed cables and peripheral equipment to receive the data beyond the port at the multi-VAN DoD Hubs. Minimum line speed is 19,200 bps.

C.4.3 Internet (as defined in the DDN (Department of Defense Data Network) Protocol Handbook, NIC 50004-500006).

C.4.4 Providers shall [sic] support interface connections including but not limited to RS-232, RS-449, X.21, Z.35, MIL-STD-118.

The EDI VAN Provider may exchange the transaction exchange method or interface to the multi-VAN Hubs providing 10 days' advance notice to the DoD Technical Representative. Any change will be subject to the same testing requirements in Section K (Testing and

Initiation of Services). The actual implementation date will be coordinated with the DoD Technical Representative.

D. DATA RESPONSIBILITY

The DoD assumes responsibility of all data until it is delivered to each EDI VAN Provider's connection on the DoD Hubs, at which point it becomes the EDI VAN Provider's responsibility. The DoD will make every effort to ensure the communications session is properly completed and all data is transmitted to the EDI VAN Provider.

E. EDI VAN PROVIDER HOURS OF OPERATION AND AVAILABILITY

The EDI VAN Provider must be accessible to exchange transactions to and from the DoD Hubs 24 hours a day, 7 days a week except for eight hours weekly for regularly scheduled routine maintenance. The EDI VAN Provider must report any scheduled and unscheduled break in services under this agreement to the DoD Technical Representative in a timely manner.

F. DATA BACK-UP AND RECOVERY

The EDI VAN Provider must back up all data processed by its host computer(s) related to this agreement such that full data recovery is possible. That data in the DoD mailbox must be retained by the EDI VAN Provider a minimum of 10 days after the mailbox has been emptied (received) by DoD and may be retained in off line storage. The data exchanged with DoD on behalf of subscribers must be retained for 5 days. The EDI VAN Provider must provide DoD with the capability to restore these retained EDI transactions. Either the entire contents of the mailbox or specific sets of transactions identified by the X12 interchange control number will be requested for restoration.

An audit trail for transaction exchanged via the DoD mailbox must be available for at least 90 days. As a minimum, that audit trail should include the date and time a message has been received or delivered, the interchange control number, and the sender ID.

Each EDI VAN Provider will establish redundant connectivity with the Hubs for disaster recovery purposes.

G. QUALITY CONTROL

The EDI VAN Provider must have an internal quality monitoring program that assures that reliable communication lines are maintained to enable the DoD Hubs computer(s) to exchange electronic transactions using the provided mailbox. The system availability must be at least 97 percent during normal service hours excluding regularly scheduled routine maintenance (see E, EDI VAN Provider Hours of Operation and Availability).

H. DATA PROTECTION

Adequate protection must be provided for DoD's data traffic. EDI VAN Providers are expected to provide administrative, technical, and physical safeguards against threats and hazards to the security and confidentiality of data. The EDI VAN Provider must be able to secure system access, database access, and EDI mailbox from unauthorized personnel. The EDI VAN Provider must use reasonable care to prevent loss, alteration or disclosure of information or data generated by or addressed to the DoD. The EDI VAN Provider will not knowingly disclose information or data belonging to the DoD without written consent of DoD.

Only one-to-all transactions addressed directly to the EDI VAN Provider by DoD and identified as such shall be considered public and do not require DoD's written consent for disclosure to others.

I. USER DOCUMENTATION

The EDI VAN Provider must provide to the DoD Technical Representative all user documentation concerning the EDI VAN Provider services provided to other basic electronic mailbox subscribers conducting electronic commerce with the DoD via this agreement. The EDI VAN Provider must provide timely updates of such documentation when modified. All such materials will be returned by DoD to the EDI VAN Provider upon the expiration or termination of this agreement.

J. ENCRYPTED DATA TRANSMISSION

Upon selection of a data encryption standard by DoD, some EDI transactions may be encrypted. The EDI VAN Provider must be capable of handling such encrypted transactions exchanged between DoD and contractors. The DoD selection of a standard will be made public and available to participating EDI VAN Providers. Neither the address segments of the EDI transaction sets (e.g., the ISA and IEA segments of ANSI ASC X12 transaction sets) nor any electronic envelope described in Section C.3.4 will be encrypted. However, there is no DoD requirement for the EDI VAN Provider to encrypt or decrypt data.

The EDI VAN Provider may optionally offer encryption and decryption services for EDI transactions between the EDI VAN Provider and its subscribers.

K. TESTING AND INITIATION OF SERVICES

Services as specified in the addendum(s) may begin after successful testing of the following: (1) connectivity between the EDI VAN Provider and the Hubs' Computers; (2) compliance with the relevant enveloping and transaction standards; and (3) other

requirements in this agreement. Testing will commence after the DoD Technical Representative has informed the EDI VAN Provider that DoD is ready and the EDI VAN Provider responds that is [sic] ready. The detailed, written test plan will be provided to the EDI VAN Provider by the DoD Technical Representative.

The test will include a procedure to determine that the steps of the registration process satisfactorily function in accordance with Addendum A to this agreement.

The test must be successfully completed within 20 calendar days of the test start date, unless DoD and the EDI VAN Provider agree to extend the test period.

After completion of successful testing, the DoD Technical Representative will inform the EDI VAN Provider in writing of the date to establish actual services (the exchange of production transactions).

If DoD concludes that the EDI VAN Provider has failed to test, it will inform the EDI VAN Provider in writing of the reasons for failure. The EDI VAN Provider can request a second test within 10 days of notice of failure. A re-test may only be carried out in accordance with mutually acceptable conditions between DoD and the EDI VAN Provider. DoD shall not be required to agree to subsequent tests.

L. DISASTER RECOVERY SERVICES

In the event of an unplanned interruption or inaccessibility to EDI VAN Provider services relevant to this agreement, DoD shall have access to and use of “back up capabilities” as defined below after delivery of a “disaster notification” to the EDI VAN Provider or its designee by DoD or by the EDI VAN Provider to DoD. The initial disaster notification be oral or written [sic]. However, oral notifications must be followed by a written disaster notification within 24 hours of the initial notification.

“Back up capabilities” are defined as the computer and telecommunications equipment located at the EDI VAN Provider designated computer recovery center which operates in lieu of the EDI VAN Provider regular services when services are curtailed.

DoD shall continue to have the right to access to and use of the backup capabilities until the EDI VAN Provider’s regular services are restored. The backup facilities must pass the same tests as used during initiation of services.

M. ACCESS TO ONE-TO-ALL (PUBLIC) TRANSACTIONS

All transactions sets sent by DoD that are intended for any interested party to see, will be sent to all participating EDI VAN Providers as “one-to-all” (public) transactions. These transactions will be addressed to a “public” mailbox controlled by the EDI VAN Provider

itself and identified to DoD by the EDI VAN Provider. DoD will provide all public transactions to each EDI VAN Provider using the transaction exchange and interface methods selected by the EDI VAN Provider for exchanging all transactions as part of this agreement.

The EDI VAN Providers must make these one-to-all transactions (e.g., public RFQs and award summaries [ANSI ASC X12 836 transaction set]) accessible to all interested subscribers to its services within the time limits specified for each transaction set. Time limits are defined in addenda to this agreement by functional area. Each EDI VAN Provider will receive all public transactions; no EDI VAN Provider may request to receive only a sub-set of them. DoD encourages the EDI VAN Providers to make these public transaction sets available to the widest number of interested subscribers.

N. OTHER CONSIDERATIONS

All DoD-to-contractor transactions electronically exchanged as part of this EC program must be exchanged via a participating EDI VAN Provider. EDI VAN Providers participating in this agreement will be notified of the schedule of implementation of DoD activities in this EC program. DoD activities will be phased into this program in accordance with a DoD-wide plan. Electronic exchanges between DoD activities will not be conducted under this Agreement.

ADDENDUM A: DOD APPROACH TO ELECTRONIC COMMERCE FOR SMALL PURCHASES AND OTHER SIMPLIFIED PURCHASES

1. OVERVIEW

This addendum defines how DoD will use the technical approach described in the Technical Scope of Work of this agreement in order to implement a DoD-wide approach to electronic commerce for small purchases and other simplified purchases consistent with the Federal Acquisition Regulation (FAR) and other applicable statutes and regulations.

EDI-capable DoD activities will be phased into using this approach based on a DoD-wide implementation plan.

Requests for quotations (RFQs) will be issued by DoD activities, quotes will be sent by interested contractors to these activities, and the activities will make awards. All electronic transactions will be exchanged via the multi-VAN DoD Hubs. All contractors will send and receive transactions via one of the participating EDI VAN Providers.

Before conducting electronic commerce with DoD, all contractors must register using a simple electronic registration transaction sent to DoD via a participating EDI VAN Provider.

DoD activities may issue public RFQs and award summaries as defined in the Technical Scope of Work. Award summaries provide basic award information about prior public RFQs against which awards have been issued, e.g., winning contractor, unit price, quantity. This addendum does not prescribe how EDI VAN Providers must provide subscribers access to public RFQs and award summaries nor does it prescribe the format of the information to be provided. A participating EDI VAN Provider may sort these transactions and provide them to interested subscribers as deemed appropriate. For example, an EDI VAN Provider may choose to make RFQs and award summaries available to interested subscribers via electronic bulletin board type services allowing subscribers to browse through an RFQ bulletin board to select to which RFQs to respond. Other EDI VAN Providers may choose to select RFQs or award summaries of particular interest to their subscribers based on subscriber profiles and provide only these transactions to subscribers in a pre-selected, convenient format. This electronic access to public procurement information is intended to:

- Provide the means for conducting fast-paced procurements and payments
- Increase competition for DoD's procurement awards
- Reduce operating costs for both DoD agencies and contractors
- Make it easier for small businesses to learn of business opportunities with DoD.

DoD will electronically transmit to the participating EDI VAN Providers some information regarding the DoD electronic commerce approach and contractor registration. EDI VAN Providers must make this information accessible to their subscribers. (This information and the registration process are described in Section 4.)

DoD activities will also be able to issue priced orders against established contracts using this approach. These orders will be sent electronically by DoD activities to relevant contractors in accordance with the terms and conditions of the established contracts.

2. TRANSACTIONS TO BE EXCHANGED

All transactions exchanged between DoD and contractors will be in compliance with the transaction set standards and relevant DoD conventions for their use as prescribed in the Technical Scope of Work. DoD activities will issue “one to all” as well as “one to one” transactions. DoD activities will receive one-to-one transactions from registered contractors. These transactions are described in Sections 2.2 and 2.3. Participating EDI VAN Providers will be provided with a list of specific transaction sets to be used at the outset of this agreement. This list will be updated in accordance with the Technical Scope of Work.

2.1 Contractor Use of VAN Services

DoD will require all contractors desiring to electronically conduct business to only do so with a participating, fully tested EDI VAN Provider. Any contractor may also exchange transactions by other means (i.e., not electronic) in accordance with the FAR and other applicable regulations. DoD will require registered vendors to exchange all electronic transactions via a participating EDI VAN Provider. DoD activities participating in this approach will be phased into it in accordance with a DoD-wide implementation plan.

2.2 Public (One-to-All) Transactions

Under this Addendum, DoD activities may issue two types of public transactions: public RFQs and public award summaries. These will be issued electronically to all participating EDI VAN Providers via the multi-VAN Hubs in compliance with the Technical Scope of Work (section on “Access to One-to-All (Public) Transactions”).

The EDI VAN Provider must provide DoD read-only access to one-to-all transactions in the same way it provides such access to its subscribers. DoD will use this capability to monitor compliance with this agreement. The capability will not be provided to contractors directly by DoD except as chosen by the EDI VAN Provider in Section 2.4.

DoD encourages the EDI VAN Provider to make the one-to-all transactions accessible to the widest number of interested contractors to strengthen competition and improve DoD access to the U.S. industrial base.

2.2.1 Public (One-to-All) RFQs

DoD activities can elect to send an individual RFQ as a one-to-one transaction to one or more specific contractors concurrent with, or in place of, a one-to-all (public) transaction.

DoD will use the ANSI ASC X12 840 transaction set for the public RFQ in accordance with the DoD conventions for that transaction set. Consistent with these conventions, the RFQ will_ [sic] contain the location (e.g., zip code) to which an item must be shipped and the Federal Supply Class (FSC) of each item to be purchased. The FSC will be in a separate data element (field) in the RFQ transaction set to enable more convenient searches of RFQs by or on behalf of interested subscribers. Some RFQs will contain more specific classifications, such as National Stock Numbers.

The EDI VAN Provider must make available to all of its interested subscribers any changes to or cancellations of public RFQs within the time frames specified in Section 3. This may require action by the interested subscriber.

2.2.2 Public (One-to-All) Award Summaries

If a public RFQ is awarded, a public award summary will be issued.

DoD will use the ANSI ASC X12 transaction set 836 for the award summary in accordance with DoD conventions for the use of that transaction set. An award summary provides basic information about an award made in connection with the issuance of a public RFQ. The award summary refers to the relevant RFQ by RFQ number, provides the identity of the winning contractor, and basic award information.

2.2.3 Public (One to All) Text Messages

DoD activities can elect to send text messages using the ANSI ASC X12 transaction set 864 to all contractors as a public message.

DoD's use of the test message format may include such items as notices of general interest; information concernig [sic] operational, environmental, or safety issues; statements of work to accompany a [sic] RFQ for services, etc.

2.3 DoD activities will exchange all electronic transactions with individual contractors/vendors via the multi-VAN DoD Hubs and the appropriate participating EDI VAN Provider using the approach described in the Technical Scope of Work. These

transactions are referred to as “one-to-one” transactions, because they are addressed to individual contractors/vendors. Electronic transactions following EDI standards can only be addressed electronically to one addressee (one recipient) at a time; there is no capacity within the EDI transaction set standards to send one transaction to more than one address simultaneously, i.e., no “carbon copy” can be sent. If a sender wants to send one transaction, e.g., one RFQ or one text message, to multiple parties, the sender duplicates the transaction set and sends it “one-to-one” to each party. The term “one-to-one” is used to differentiate these transactions from “public” transactions which are addressed by the Government to the participating EDI VAN Providers themselves. It does not mean the business transaction is not sent to more than one party.

Consequently, the term, “one-to-one transactions” applies to all procurement and contracting actions conducted on the EDI VAN. For example, one-to-one transactions will be used by the DoD to issue delivery orders against contracts (e.g., indefinite delivery, indefinite quantity requirements contract, etc.), competitively solicit quotations from two or more vendors, or to solicit a quotation from only one vendor (per FAR 13.106(a) and (b)). These transactions are all referred to as “one-to-one transactions” because they are addressed to individual contractors/vendors.

DoD activities will exchange all of their one-to-one transactions with individual contractors and vendors via the multi-VAN DoD Hubs and the appropriate participating EDI VAN Provider using the approach described in the Technical Scope of Work.

All one-to-one RFQs will be in compliance with the DoD conventions for the RFQ. Consistent with these conventions, the RFQ will contain the location (e.g., zip code) to which an item must be shipped and the Federal Supply Class (FSC) of each item to be purchased. The FSC will be in a separate data element (field) in the RFQ transaction set to enable more convenient searches of RFQs. Some RFQs will contain more specific classifications, such as National Stock Numbers.

All of the transactions are subject to modification or cancellation. If a DoD-originated RFQ, award, or other transaction set is changed or canceled, the EDI VAN must provide access to the transaction to all interested or pertinent subscribers in a timely manner. This may require action by the interested subscriber.

The EDI VAN Provider must provide DoD access to one-to-one transactions as a test subscriber in the same way the EDI VAN Provider provides such access to its subscribers. DoD will use this capability to monitor compliance with this agreement. The capability will not be provided to contractors directly by DoD except as chosen by the EDI VAN Provider in Section 2.4.

The EDI VAN Provider must make the one-to-one transactions accessible to only the identified addressee(s) within the time frames specified in Section 3.

DoD will exchange text messages with participating contractors using the ASC X12 864 transaction set.

2.4 Optional Marketing Opportunities at Sites

In conjunction with the DoD activities using the DoD-wide approach to electronic commerce, DoD may provide limited marketing opportunities for the EDI VAN Providers at each DoD activity as electronic commerce is introduced to interested contractors. This will be handled in accordance with DoD Policy.

These marketing opportunities will vary by DoD activity and are not an endorsement of any contractors or a particular product.

If the EDI VAN Provider has executed this agreement after such opportunities have already been conducted at some activities, DoD and the activities are under no obligation to repeat an opportunity for the EDI VAN Provider. Sites may restrict such marketing opportunities to participating EDI VAN Providers that have successfully passed testing required by the agreement.

Some examples of opportunities that may be provided are (1) participation in contractor conferences or meetings as speakers or exhibitors (this is not a determination of agency interest under 5 CFR 2635.204, nor a determination that such appearance or attendance is a necessary expense for the agency); (2) provision of written EDI VAN Provider material at the DoD activity for interested contractors; or (3) distribution of lists of interested contractors from an activity.

3. MINIMUM TRANSACTION ACCESSIBILITY REQUIREMENTS

Because many of the procurement-related transactions will be time-sensitive, participating EDI VAN Providers must make the transactions accessible to subscribers within certain time limits. Accessibility is defined as the time elapsed from the time the transaction leaves the multi-VAN DoD Hubs to when it is accessible to a subscriber. In the case of one-to-all transactions, “access to a subscriber” means when it is accessible to any interested subscriber. For one-to-one transactions, “access to a subscriber” means when it is accessible to the addressee. A transaction may be accessible to a subscriber before the subscriber actually sees or read it. For example, a transaction is accessible to a subscriber if it is on a bulletin board that the subscriber can access freely or it is in the subscriber’s electronic mailbox.

The following accessibility requirements apply:

- One-to-all transactions: Two Hours
- One-to-one transactions: One Hour

In the future, accessibility requirements may vary by the priority of the transaction when this priority information can be carried with the transaction in a way to be accessible to the EDI VAN Provider, e.g., in a CCITT X.435 compliant envelope.

4. VENDOR REGISTRATION INFORMATION AND CAPABILITIES

All contractors must register with DoD to conduct business with DoD activities using the DoD-wide approach to electronic commerce described in this Addendum.

The EDI VAN Provider must be able to provide any interested subscriber (1) basic information about the DoD approach to electronic commerce for procurement and how to register as a contractor; and (2) the capability to register. The information described in 4.1, 4.2, and 4.3, will be provided to the EDI VAN Provider by the DoD Technical Representative in electronic form. From time to time, the Technical Representative will provide the EDI VAN Provider with modifications to these files. In the aggregate, these text files will be no more than the equivalent of 80 to 100 single spaced, typed pages. These requirements can may [sic] be met in various ways by the EDI VAN Provider.

4.1 Access to Basic Information on the DoD Approach

A contractor interested in exchanging a transaction for the first time with a DoD [sic] must be given access by the EDI VAN Provider to basic information on the DoD-wide approach to electronic commerce and how contractors can participate.

4.2 Notification of Requirement to Read EC Procedures, Terms and Conditions File(s)

The EDI VAN Provider must provide any interested subscriber access to a notification which explains that to participate in electronic commerce with DoD, the subscriber must first read and agree to the EC Procedures, Terms and Conditions file and submit a completed contractor registration transaction set.

4.3 Access to EC Procedures, Terms and Conditions File(s)

The EDI VAN Provider must provide any interested subscriber access to up to five text files of EC Procedures, Terms and Conditions applicable to conducting business electronically with DoD. The EDI VAN Provider must provide the subscriber with the capability to determine which text files apply to the type of business the subscriber intends to conduct with DoD. The DoD Technical Representative will provide the EDI VAN Provider with rules subscribers can use to determine which files apply under what conditions.

4.4 Registration Transaction

The EDI VAN Provider must directly or indirectly provide any interested subscriber the capability to complete the registration transaction set. The transaction set will be the ASC X12 838 transaction set following the DoD implementation conventions. The DoD expects the EDI VAN Provider to enable subscribers to conduct these four steps easily, preferably using electronic mail or similar electronic means.

APPENDIX 2

[on DEFENSE INFORMATION SYSTEMS AGENCY letterhead]

3 June 1994

To All Prospective Offerors:

The Government is making the following unilateral changes to the EDI VAN License (DCA200-94-H-0015) Technical Scope of Work.

(1) Change Para C.4.2 to read "Minimum speed is 9.6 Kbps." In lieu of "Minimum speed of 19,200 bps."

(2) Change Para C.4.4 to read ". . . limited to RS-232/CCITT, RS-449, RS-530, V.24, V.35 and MIL STD-188." In lieu of ". . . limited to RS-232, RS-449, X.21, Z.35, MIL-STD-118."

All other terms and conditions remain unchanged.

If there are any further questions please contact the undersigned at (618) 256-9696.

Sincerely,

/s/
CONSTANCE E. JACKSON
Contracting Officer

Encl a/s

APPENDIX 2

[on DEFENSE INFORMATION SYSTEMS AGENCY letterhead]

5 October 1994

To All Prospective Offerors:

The Government is making the following unilateral changes to the EDI VAN License (DCA200-94-H-0015) Technical Scope of Work.

Change Para C.3.1. second paragraph, first sentence to read “. . . in the current version and release (Version 3, Release 4, referred to as “3030” and “3040”) . . .”

All other terms and conditions remain unchanged.

If there are any further questions please contact the undersigned at (618) 256-9696.

Sincerely,

/s/
CONSTANCE E. JACKSON
Contracting Officer

Encl a/s

EFFECTIVE 31 AUGUST 1994 THE DEFENSE COMMERCIAL
COMMUNICATIONS OFFICE WAS REDESIGNATED
DEFENSE INFORMATION TECHNOLOGY CONTRACTING OFFICE

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. 51658, Appeal of GAP Instrument Corporation, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals