

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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GAP Instrument Corporation ) ASBCA No. 55041  
 )  
Under Contract No. DCA200-94-H-0015 )

APPEARANCE FOR THE APPELLANT: Cyrus E. Phillips, IV, Esq.  
Washington, DC

APPEARANCE FOR THE GOVERNMENT: Jo Ann W. Melesky, Esq.  
Deputy Legal Counsel  
Defense Information Systems  
Agency  
Scott Air Force Base, IL

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

This quantum appeal arises from our entitlement decision in *GAP Instrument Corp.*, ASBCA No. 51658, 01-1 BCA ¶ 31,358. That decision held that the government breached the captioned Value Added Network (VAN) license agreement (hereinafter “the VLA-1 contract”)<sup>1</sup> by failing to require all DoD contractors to use certified VANs for their mandatory electronic small purchase transactions with the government after 3 April 1996. *Id.* at 154,867. After several revisions, and two further Board decisions,<sup>2</sup> GAP’s final quantum statement is in the amount of \$20,019,000 for lost profits that allegedly would have been earned from third parties, but for the government breach (app. br. at 17-18). Familiarity with our prior decisions on the GAP claim is presumed. On the evidence presented in this quantum appeal, we find lost profits caused by the government breach unproven in any amount.

FINDINGS OF FACT

1. The relevant period for determining lost profits, if any, caused by the government’s breach of GAP’s VLA-1 contract is from the end of the “phase-in period”

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<sup>1</sup> GAP had a second VAN license agreement (“VLA-2”) after VLA-1 was terminated on 17 September 1997. VLA-2 is not at issue in this appeal.

<sup>2</sup> See *Gap Instrument Corp.*, ASBCA No. 55041, 06-2 BCA ¶ 33,375 and 07-1 BCA ¶ 33,567.

for the FACNET system<sup>3</sup> on 3 April 1996 through the termination of the VLA-1 contract on 17 September 1997. *GAP Instrument Corp.*, ASBCA No. 55041, 06-2 BCA ¶ 33,375 at 165,454, 165,460.

2. GAP contends that (i) after the phase-in period, the government allowed 64,274 contractors to conduct electronic small purchase transactions with the government without using the FACNET, (ii) if the government had required those contractors to use the FACNET, GAP would have had an 18 percent share of the new VAN customers, and (iii) 11,554 new VAN customers would have produced a net profit for GAP of \$20,019,000 on the VLA-1 contract (app. br. at 4, 17-18; ex. A-8 at 1, 6, 12).

3. GAP's estimate that 64,274 contractors were allowed by the government after the phase-in period to conduct electronic small purchase transactions with the government by means other than the FACNET is based on a finding in a DoD Inspector General's report dated 12 October 1997 that 98,884 contractors were registered in 12 "locally developed contractor databases" and not in the FACNET Central Contractor Registration (CCR). The estimate in GAP's claim is 65 percent of the number in the DoD IG's report "to allow for duplications." (App. supp. R4, tab 79 at 910; tr. 4/198, 201-02)

4. The estimate in GAP's claim assumes that the contractors registered in the locally developed computer databases and not in the FACNET CCR were not using the FACNET for their electronic small purchase transactions with the government. That assumption is not correct.<sup>4</sup> No later than September 1995, six months before the end of the phase-in period, all but one of the 12 locally developed contractor databases cited in the DoD IG's report were in FACNET compliant systems requiring a certified VAN for access. (Ex. G-15E at 2, 5-9; tr. 3/179-89)

5. A government witness testified that: "I think in 1996 [Ft. Bliss] came up [to FACNET compliance]" (tr. 3/189). In the absence of credible documentation as to when

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<sup>3</sup> The Federal Acquisition Computer Network (FACNET) is the name subsequently given to the centralized computer system for mandatory electronic small purchase transactions with the government. The certified VANs were the only means of contractor access to the FACNET (tr. 3/76-77, 181).

<sup>4</sup> Although 48 C.F.R § 4.503 (1995) required registration in the CCR "for a contractor to conduct electronic commerce with the Federal Government," the requirement was not enforced. As noted in the DoD IG report: "contractors are not in compliance with the Federal Acquisition Regulation requirements to register with the CCR before conducting electronic commerce over FACNET" (app. supp. R4, tab 79 at 893).

in 1996 the Ft. Bliss system became FACNET compliant, we find that for at least some time after the phase-in period, the contractors in the Ft. Bliss database were not using the FACNET for conducting mandatory electronic small purchase transactions with the government. Applying GAP's 65 percent factor to account for duplications, we find that the proven additional market for GAP's FACNET VAN services after the phase-in period and up to the termination of the VLA-1 contract on 17 September 1997 was no more than 4,426 contractors in the Ft. Bliss locally developed contractor database.<sup>5</sup>

6. In November 1996 there were 26 VANs competing with GAP for the contractors doing small purchase electronic commerce with the government over the FACNET (ex. G-13 at 3-14).<sup>6</sup> In August 1997, one month before the VLA-1 contract was terminated, there were 13,236 contractors registered in the FACNET CCR (app. supp. R4, tab 79 at 900). During the period from 4 April 1996 through 17 September 1997, GAP had a total of 35 paying customers for its FACNET VAN services (ex. G-23). This amounted to a .3 percent market share of the contractors registered in the FACNET CCR in August 1997.

7. GAP supports its claim for an 18 percent market share with an expert report and testimony, the substance of which is that GAP had a superior VAN service, that selling that service would be like "falling off a log," and that "if you get on the phone and make your calls, you're going to get 18 percent. You can't not."<sup>7</sup> (Ex. A-1 at 21; tr. 2/259-60, 267-68, 278-79) We find GAP's expert report and expert testimony unpersuasive in the face of GAP's actual market share of only .3 percent of the contractors registered in the FACNET CCR in August 1997.<sup>8</sup> We further find that, if the government had kept its promise to require all mandatory electronic small purchase transactions to be conducted through the FACNET after the phase-in period, the proven number of new customers for GAP's VAN services would have been .3 percent of the contractors in the Ft. Bliss database as adjusted by GAP to account for duplications, or no more than 14 new customers.<sup>9</sup>

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<sup>5</sup> 6,809 x .65 (app. supp. R4, tab 79 at 910).

<sup>6</sup> Two of the 29 companies in the 13 November 1996 list of DoD certified VANs were associated with GAP and offered the same services and prices to customers as GAP (ex. G-13 at 3, 6).

<sup>7</sup> When asked what basis he used for determining market share, GAP's expert testified: "I determined what kind of success a sales staff would have achieving customers" (tr. 2/365).

<sup>8</sup> When asked to explain the difference between his 18% estimate and GAP's actual market share, GAP's expert testified that when he visited GAP "[t]here was no sales effort that I saw taking place" (tr. 2/283-84).

<sup>9</sup> 4,426 x .003.



8. GAP's claim projects an average revenue of \$4,238 per projected VAN customer (11,554) for the period 1 January 1996 through 17 September 1997 (ex. A-8 at 1, 12).<sup>10</sup> GAP's statement of "Actual-Cash Basis" income, however, shows an average actual revenue of only \$1,211 per actual VAN customer (35) during the same period (R4, tab 6, attach. 1 at 1).<sup>11</sup> We find GAP's actual revenue per customer more credible than its projected revenue for the period in question. We conclude that for the period 4 April 1996 through 17 September 1997, 14 new customers would have produced additional gross revenue of no more than \$16,954.

9. GAP's claim projects cost of VAN sales for the period 1 January 1996 to 17 September 1997 at 10 percent of the sales revenue (ex. A-8 at 1). However, GAP's "actual-cash basis" statement for the same period shows cost of VAN sales at 256 percent of sales revenue (R4, tab 6, attach. 1 at 1). On the evidence submitted, we are unable to determine whether the items making up GAP's cost of sales were variable costs, fixed costs or a combination of the two. We, therefore, are unable to determine to what extent, if any, the additional revenue from 14 new customers would have exceeded the cost of those sales.

## DECISION

### A. The Government's Motions to Strike

The government moves under Board Rule 13(b)<sup>12</sup> to strike references in GAP's post-hearing briefs to documentary evidence of the profitability of other VAN/electronic data interchange (EDI) providers, and to documentary evidence of "government auditing standards." None of the cited documents at issue was offered in evidence at hearing. GAP argues that the Board may take judicial notice of the information in the documents and that they are otherwise admissible as public records. Since the profitability or not of other VAN/EDI providers and the content of government auditing standards make no material difference in our findings and decision on this appeal, the government's motion to strike is moot. *See Perini Corp.*, ASBCA Nos. 51160, 51573, 04-1 BCA ¶ 32,530 at 160,898.

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<sup>10</sup> Total projected VAN revenue for period (\$48,965,000) ÷ projected customers (11,554) (ex. A-8 at 1, 6, 12).

<sup>11</sup> Actual VAN revenue (\$42,380) for period ÷ actual paying customers (35) (R4, tab 6, attach. 1 at 1; ex. G-23).

<sup>12</sup> Board Rule 13(b) states in relevant part: "Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing...."

B. The Merits

In this quantum appeal, GAP has failed to prove that the government breach of the VLA-1 contract caused a loss of profit in the amount of \$20,019,000 or in any other amount. On the evidence presented, no more than 4,426 contractors were engaged in mandatory electronic small purchase transactions with the government through means other than the FACNET during the period of 4 April 1996 to 17 September 1997 (findings 4-5). On the evidence presented, GAP would have obtained no more than 14 new customers if the government had enforced its promise to require all electronic small purchase transactions to be conducted through the FACNET during that period (findings 6-7). On the evidence presented, we are unable to determine whether the additional revenue for 14 additional customers would have resulted in any profit, or diminution of loss, for GAP (findings 8-9). GAP requests a “jury verdict” on damages (app. br. at 18). We decline. As indicated in the findings above, the evidence is insufficient to make a fair and reasonable approximation of the damages. *See Grumman Aerospace Corp. v Wynne*, 497 F.3d 1350, 1358-59 (Fed Cir. 2007).

The appeal is denied.

Dated: 23 July 2008

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

I concur

I concur

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

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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. 55041, Appeal of GAP Instrument Corporation, rendered in conformance with the Board's Charter.

Dated:

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