ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
T&M Distributors, Inc.	)	ASBCA No. 51279
	)	
Under Contract No. DAKF06-93-C-0010	)	

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OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal involves a claim for improper diversion of requirements under a contract for the purchase of vehicle and equipment repair parts. Appellant contends that the amount of the diversions can be established by credit card receipts of purchases from vendors other than appellant and can be extrapolated from the available receipts. Appellant claims entitlement to breach of contract damages. The Government maintains that the purchases made from other vendors were not within the scope of appellant's contract or within an exception to the contract. The Government argues that a number of events contributed to a reduced need for repair parts and no extrapolation from the records of only one organization should be made. The Government also disputes appellant's claimed rate of profit. Both entitlement and quantum are before us for decision.

FINDINGS OF FACT

The Contract

1. On 5 May 1993, the Army awarded Contract No. DAKF06-93-C-0010 to appellant T&M Distributors, Inc. (T&M). The contract was a requirements contract for operation of a Contractor Operated Parts Store (COPARS) at Fort Carson, Colorado in an estimated base amount of $620,225. The contract consisted of a base period of performance from 1 June 1993 to 31 May 1994 and two one-year options. (Ex. J-1, ¶¶ 1, 20-21; R4, tab 3)

2. The contract required the contractor to supply parts and services under seven separate contract line items (CLINs). CLIN 0001 was parts that could only be obtained from the original equipment manufacturer (OEM).[1] CLIN 0002 was special purpose parts that could also only be obtained from the OEM. CLIN 0003 was remanufactured parts. CLIN 0004 was after market parts.[2] CLIN 0005 was a store operation fee. CLIN 0006 was a store-operating fee for instances in which the COPARS remained open during non duty hours. CLIN 0007 consisted of non-price listed (NPL) parts.[3] (R4, tab 3 at B-1 through B-14)

3. The contract specified the requirements to be fulfilled by the contractor in the Performance Work Statement as follows:

> The Contractor shall furnish all personnel, management, transportation, material, parts, supplies, and equipment, except as provided herein as Government furnished, to operate a Contractor Operated Parts Store (COPARS) for furnishing repair parts, tires and batteries for nontactical wheeled vehicles, commercial construction equipment and support equipment, material handling equipment, and tactical vehicles of commercial design at Fort Carson, Colorado.

(Ex. J-1, ¶ 3; R4, tab 3 at C.1-1) The contract defined the repair parts as follows:

> C.2.1.39 VEHICLE REPAIR PARTS. Any part, subassembly, assembly or component required for installation in the maintenance or repair of an end item, subassembly or component.

(R4, tab 3 at C.2-4)

4. The contract identified time limits within which COPARS was to deliver parts. The contractor was required to stock fast moving parts (FMP)[4] for immediate issue or, if out of stock, make them available within five working days from receipt of request from the customer. The contractor was required to make slow moving parts (SMP)[5] available to the Government within ten working days from receipt of request. (Ex. J-1, ¶ 4; R4, tab 3 at C.5-3, ¶¶ C.5.6, C.5.7) The contract provided that the Government reserved the right to cancel the request and purchase items from another source if the estimated delivery date was not met (ex. J-1, ¶ 5; R4, tab 3 at C.5-7, ¶ C.5.17.8) Section C.5.2 in the Performance Work Statement stated:

> All parts, both FMP and SMP, shall be made available to the Government within the time specified in para C.5.6 and C.5.7.

> If the Contractor cannot furnish the part(s) within the time specified, the customer shall be notified of the delay. If the reason for the delay is not acceptable, the Government reserves the right to cancel the request(s) and purchase the item(s) from other sources.

(Ex. J-1, ¶ 5; R4, tab 3 at C.5-2)

5. The contract incorporated standard clause FAR 52.216-21 REQUIREMENTS (APR 1984) which provides in pertinent part as follows:

> (c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

(Ex. J-1, ¶ 2; R4, tab 3 at I-7) The Schedule did not list the Government organizations using the COPARS. The parties have stipulated that they included, in addition to the Department of Logistics (DOL):

(a) DMMC
(b) 183rd Maintenance
(c) 52nd Engineers
(d) Department of Public Works
(e) Naval Support Unit Two
(f) DPTM
(g) 10th Special Forces
(h) FORSCOM
(i) PAE[6]

(Ex. J-1, ¶¶ 23, 40) The record does not reveal that all of these organizations had requirements that were within the scope of the contract.

6. The contract listed items excluded from the contract that were as follows:

> C.5.16.1 Parts under Maintenance Contract. The Government will not order, nor shall the Contractor provide, parts and material under separate contracts without the express approval of the KO [contracting officer].
>
> C.5.16.2 Operator Care and Preservation Supplies. The Government will not order and the Contractor shall not provide

> operators care and preservation supplies under the provisions of this contract.
>
> C.5.16.3 Items Onhand at the Reparable Exchange Activity. The Government will not order and the Contractor shall not provide items onhand at the Reparable Exchange Activity under the provisions of this contract.

(Ex. J-1, ¶ 6; R4, tab 3 at C.5-6, C.5-7) The contract included the following definition:

> C.1.22. OPERATORS CARE AND PRESERVATION SUPPLIES. Those items required in the day-to-day care of a vehicle, but not required to render it operational. This includes such items as polish, antifreeze, radiator flush and paint.

(R4, tab 3 at C.2-3) The contract also excluded services. The Bid Schedule stated in Part I, Section B:

> This contract does not provide for repair, rebuilding, or remanufacturing services.

(Ex. J-1, ¶ 7; R4, tab 3 at B-1)

7. The invitation for bids that was issued for the subject contract on 15 March 1993, included the Army's estimates for the base and option years, at retail price, for various categories of parts. They were described as follows:

> The Government estimates of parts consumption stated below are the annual anticipated requirements at retail value based on expenditures for the previous year for price-listed and actual price of non-price listed parts.

(Ex. J-1, ¶ 18; R4, tab 3 at 1, B-1) The Army's estimated sales were:

CLIN 0001	$162,000
CLIN 0002	518,705
CLIN 0003	64,000
CLIN 0004	74,000
CLIN 0007	518,605

(Ex. J-1, ¶¶ 17-18; R4, tab 3 at B-1, B-7) Bidders were required to propose discounts from the retail prices on published price lists (ex. J-1, ¶ 19). The total annual estimate of requirements was $818,205[7] for the base year and each of the option years, or average

monthly sales of $68,183.75. The total was $2,454,615 in the estimates of contract requirements.

8. The solicitation set forth sales under the preceding COPARS contract for calendar year 1992. Technical Exhibit 7 listed total monthly sales as follows:

January	$178,771.30
February	$ 69,683.77
March	$172,593.60
April	$175,980.00
May	$117,483.40
June	$110,583.80
July	$304,372.50
August	$136,610.80
September	$118,516.20
October	$136,402.70
November	$ 96,466.67
December	$142,195.20

The total of these sales was $1,759,659.94. The average monthly COPARS sales for the previous calendar year 1992 were $146,638.33, or more than twice the amount estimated in the solicitation. The amounts listed covered both price-listed (non-NPL) and NPL items. Technical Exhibit 7 contained the following disclaimer:

> *These monthly expenditures* represent needs derived from operating requirements arising during the relative time periods and *may not accurately reflect future demands*, as they will be dependent upon operational needs and other conditions affecting the Division and the installation.

(Ex. J-1, ¶¶ 14-16; R4, tab 3 at TE-7-1; emphasis added)

9. The contract attached Technical Exhibit 2, Density List, to include a projected list of equipment and number of requests. The list identified end items and model numbers for five of the using organizations (DOL, DMMC, 52nd Engineers, Naval Support Unit Two, and DPTM). (R4, tab 3 at TE-2-1 through TE-3-3) Technical Exhibit 2 included the following disclaimer:

> NOTE: THIS DENSITY LIST IS REPRESENTATIVE OF PARTS TO BE FURNISHED. This list reflects the type of equipment and the number of demands for each type of equipment. <u>This may not reflect what will occur in the future</u>.

(*Id*. at TE-2-1; emphasis added)

10. Section C.6 in the Performance Work Statement made regulations and manuals applicable to the contract. Section C.6.2 stated:

> The Contractor is obligated to follow and adhere to those publications coded mandatory. Specific paragraphs will be referenced in instances where only a portion of the document is mandatory. Supplements or amendments to mandatory publications shall be considered to be in full force and effective upon receipt by the Contractor.

(R4, tab 3 at C.6-1) Section C.6.3 listed the Department of the Army publication AR 710-2, Supply Policy Below the Wholesale Level, as mandatory (*id*.). Paragraph ¶ 4-1(a)(6) of AR 710-2 states, "[s]tockage of COPARS parts in the using activities or in SSAs is not authorized" (ex. J-1, ¶ 8; supp. R4, tab 2A at 62).

11. The contract described the Government's quality assurance surveillance plan which included a procedure for the contracting officer's representative (COR) to process customer complaints. The plan specified that the COR would maintain a log of all complaints, investigate them, and complete a customer complaint record form for all validated complaints. The COR was to notify the contractor of all validated complaints and require appropriate corrective action. (Ex. J-1, ¶ 22; R4, tab 3, attach. 3)

Appellant's Bid

12. Appellant based its bid almost exclusively on sales figures of the prior contractor since the estimates in the solicitation are for bid purposes only and appellant, in its many years of experience with COPARS contracts, has found them to be "notoriously inaccurate" (tr. 36). Appellant was not concerned that the Government's estimates were less than the prior sales. We find no factual basis for appellant's belief that the vehicle list in the solicitation was the same for the prior contractor. Appellant expected its sales would be in line with the prior contractor's sales, *i.e.* within five to ten percent. (Tr. 36-37, 47-48, 54, 84-91, 512) Appellant projected its anticipated profit for different CLINs based on the discount it could obtain from its suppliers and the discount it offered to the Government. For CLIN 0001, OEM parts, and CLIN 0002, and CLIN 0007, special purpose parts, the anticipated profit was nil; for CLIN 0003, rebuilt parts, 25 percent; and for CLIN 0004, after market parts, an average of 40 percent. (Tr. 51-54)

13. Appellant submitted a bid at an evaluated price of $1,860,675 for the base period and the two option years. By letter dated 21 April 1993, the contracting officer asked appellant to verify its bid as it was below the Government's estimate. After verifying

its bid, the Government found appellant to be the lowest responsive and responsible bidder. (Ex. J-1, ¶ 20)

Contract Performance

14. The Government exercised contract options that extended the contract for a total of 42 months. The period of performance ended 30 November 1996. (Ex. J-1, ¶ 21)

15. Mr. Tim Kapler was appellant's store manager at Fort Carson. His management of the store was generally satisfactory with the exception of his difficulty identifying parts for ordering when no part number was provided on a requisition form. Appellant was unable to obtain parts and deliver what was ordered when the parts were not sufficiently identified on the requisition form. Mr. Kapler quit approximately five months before the end of the contract as extended. The operation of the COPARS was not significantly affected by his departure because his assistant was able to take over the operation. (Tr. 67, 327-28, 333-34, 511, 513-14, 572-73)

16. During the contract performance period the Government did not issue any deficiency reports, and there is no written record of customer complaints concerning appellant's performance of the contract. Appellant was not made aware of complaints about Mr. Kapler's performance although there were verbal complaints and Government discussions about untimely delivery of parts with Mr. Kapler. (Tr. 60-63, 143, 343-44, 514, 516-17)

17. Appellant's COPARS could sell items to the Government that were not contract requirements. The Government made purchases of repair parts and other items from the COPARS that were not within the scope of the contract. (Tr. 349, 352, 363-64, 528)

18. There were 2,027, or approximately 10 percent of the total, cancellations of requisitions during the period 1 June 1993 through 30 August 1996. An indeterminate amount was attributable to the unavailability of parts at the COPARS. The Government was unable to learn why orders were cancelled. Possible reasons for cancellation included the inability to supply the part within the time frames established by the contract, the inability to obtain the part if there was insufficient information to identify it, or a change in the need for the part. With few exceptions the record does not reveal which party cancelled requisitions or the reasons for the cancellation. The effect of the cancelled requisitions was to lower appellant's sales. (Supp. R4, tab 1; tr. 277-79, 323-34, 369)

19. In the first months of the contract, Mr. Thomas W. Daly, appellant's president noticed a "decline" in purchases that he called "dramatic" (tr. 67). He discussed the possible explanation with Mr. Billy Ward, appellant's general manager. Unidentified Army representatives told Mr. Kapler that all purchases were being made from COPARS and if an order was not placed after an inquiry into price and availability, that the parts were not

needed. In the third year of the contract, it seemed to be the normal course of business that inquiries about the availability of parts were not followed by purchases. Appellant then learned from its suppliers that the Army was purchasing directly from them rather than through COPARS. (Tr. 32-33, 38, 67-69, 514)

20. Appellant's actual sales under the contract were fairly consistent every month and averaged approximately $76,000 each month, which was more than the Government's estimate for the contract. The monthly sales of the prior contractor averaged approximately $146,000. (Ex. J-1, ¶ 16; R4, tab 3 at TE-7-1; ex. A-2; tr. 55-57) The difference between appellant's and the prior contractor's average monthly sales was approximately $70,000.

Other Events

21. Events that occurred prior to appellant's contract had an impact on purchases under the predecessor COPARS contract. Before and after Operation Desert Shield/Desert Storm, which took place between 7 August 1990 and 17 February 1991, vehicles and commercial construction equipment that were deployed had to be repaired to be brought up to standard. They were repaired again upon their return to Fort Carson. The poor condition of vehicles returned from Operation Desert Storm involved more than usual repairs. Units that deployed purchased spare parts for anticipated needs in the Persian Gulf. In 1992 the Government replaced older vehicles with 120 new tankers and trucks. Reduced operational needs would reduce the demand for repair parts. (Tr. 272, 318-20, 551)

22. The significant decrease in the annual estimates from the historical sales data in Technical Exhibit 7 indicates that the requiring activity considered the circumstances that led to changed requirements in preparing the solicitation. During the term of the contract the Government did not change the vehicle list contained in the contract (finding 9, *supra;* R4, tab 9; tr. 60, 243-44, 269-71).

23. There were changes in the quantity and age of vehicles at Fort Carson during the 42-month term of the contract. Fourth Infantry Division units in DMMC deactivated at Fort Carson. Some units relocated to Fort Hood, Texas during the time between August 1995 and March 1996, and took some vehicles with them. The Government disposed of 368 of their non-tactical vehicles and 985 of their commercially designed tactical vehicles by transferring them to a maintenance facility operated by Lear Siegler, Inc., a third party contractor, for upgrading before being reissued for use by Reserve or National Guard units. Before training exercises, the Government repaired all vehicles that were being readied to go on the training mission. There was a reduction in training missions that reduced the wear and tear on vehicles and resulted in decreased needs for repair parts. Deployment of units to Somalia from April 1993 to September 1993, and to Haiti in 1994 for six months removed vehicles from Fort Carson during the term of the contract. A heavy engineering company relocated to Fort Riley, Kansas and removed 42 vehicles from Fort Carson. New

vehicles issued in 1992 and 1993 to replace older tankers, trucks and tractors were under warranty during appellant's contract without need of repair parts from COPARS. (Ex. A-2; tr. 273-77, 317, 321-23, 525-34, 543, 546-52)

Appellant's Claim

24. Appellant filed a request, dated 4 February 1997, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for records of International Merchant Purchase Authorization Cards (IMPAC) card purchases for the period 1 January through 30 November 1996, by three individuals in the DOL at Fort Carson. Appellant named Bobby Gerald Browning, Ron L. Vaughn and approving official Joseph J. Massouda in its request. The use of credit cards for purchases from vendors other than appellant was known by appellant in the third year of appellant's contract when their use became more prevalent. If a purchasing official could not purchase a part directly because the price exceeded the $2,500 limit per day for use of the IMPAC credit card, COPARS might be requested to obtain the part. (Ex. J-1, ¶ 23; R4, tab 15; tr. 68, 166-67)

25. On 14 February 1997, appellant submitted a certified claim in the amount of $1,182,857.28 on the grounds of improper diversion of requirements from the contract. Appellant did not have the Government's response to its FOIA request, but stated that the large discrepancy between its average monthly sales and the average monthly sales under the prior COPARS contract ($70,408.17) for a vehicle fleet that had not changed materially was attributable to improper diversions made by Army personnel using IMPAC cards or otherwise violating appellant's requirements contract. Appellant did not have records to calculate the amount of its claim, which were necessarily in the possession of the Government, and estimated the amount of sales it should have received. Appellant estimated its expenditures to parts suppliers as 60 percent of the total sales improperly diverted to claim lost profits of 40 percent of diverted purchases as the measure of damages. (Ex. J-1, ¶ 24; R4, tab 16)

26. On 1 April 1997, the Government furnished documents in response to appellant's FOIA request. The documents consisted of monthly statements of the DOL master credit card account showing purchases by three card holders, Messrs. Browning and Vaughn and Ms. Kimberly J. Bohart, covering a period of approximately one year from 18 December 1995 to 23 December 1996. (Ex. J-1, ¶ 25; R4, tab 17)

27. The Government represented that it had no other IMPAC card records because records prior to December 1995 were destroyed in the ordinary course of business as prescribed by pertinent Army regulations (ex. J-1, ¶ 41). Mr. Browning testified that he retained all of his IMPAC credit card slips from the first time he used the IMPAC card (tr. 500-01). The IMPAC card records retained by Mr. Browning cover an additional 17-month period dating back to 13 July 1994 (supp. stip., ¶ 4).

28. By letter dated 10 April 1997, the contracting officer notified appellant that the documentation provided with appellant's claim was insufficient either to deny or affirm the claim (ex. J-1, ¶ 26; R4, tab 18).

29. By letter dated 29 July 1997, which was received on 30 July 1997, appellant submitted another certified claim with additional supporting documentation. Appellant estimated the amount of diversion from the IMPAC statements that showed three DOL employees made parts purchases in the total amount of $328,569.13. (Ex. J-1, ¶ 27; R4, tab 19) The average monthly purchases were $27,380.76. Appellant claimed that negligible quantities of auto tires and batteries were purchased through COPARS and found no auto tire or battery vendors identified in the IMPAC statements. Appellant, therefore, added the anticipated average monthly expenditures for the contract items Tires ($42,221.69) and Batteries ($3,653.66) to the average monthly purchases to calculate an amount of $73,256.11 as the estimated total average monthly diversion amount on which it calculated its revised claim for lost profits. (R4, tab 19) Appellant stated that "the best estimate of the value of its claim" was $1,230,702.65 (*id.* at 9).

30. On 17 November 1997, the contracting officer responded to appellant's claim stating that the claim could not be accepted. Based on the number of IMPAC card holders, he estimated a total amount of purchases from vendors other than appellant. He stated that a claim might be made for $14,800 in lost revenue. (R4, tab 21) The letter stated in pertinent part:

> d. I reviewed the IMPAC purchases you listed in Attachment 1 of your claim. Of the $328,569.13 total "Known" IMPAC charges, I found the following: approximately $24,000 in theory should have been purchased under the COPARS contract; approximately $92,000 were National Stock Number items that we had the option not to buy under COPARS; and the rest, approximately $212,000, were items that were not subject to purchase under the COPARS contract. Of the $24,000, an indeterminate amount is attributable to the unavailability of parts under COPARS.

(*Id.* at 2; emphasis in original)

31. Appellant elected to treat the contracting officer's letter, dated 17 November 1997, as a denial of its claim and filed this timely appeal (ex. J-1, ¶ 37; R4, tabs 22, 25).

Credit Card Purchases

32. The Government purchased, by using Government credit cards that had been issued to DOL, one of the using organizations, a quantity of parts and other items from

vendors other than appellant's COPARS. At issue in the appeal is the portion of those parts that should have been purchased from the COPARS as requirements within the scope of the contract. DOL IMPAC statements show that the Government purchased parts (and services) priced at $328,569.13 from vendors other than appellant[8] (ex. J-1, ¶ 27, J-2 at 19, A-4 at 17, ex. G-4).

33. DOL represented approximately 15 percent of the total sales made by the COPARS (ex. A-3; tr. 137). The DOL Maintenance Division performed repairs of vehicles in the Fort Carson fleet and also performed component repairs in the Integrated Sustainment Maintenance (ISM) program. Under the ISM program DOLs at various Army installations were assigned to overhaul or repair a specific line and number of components. The Repairable Exchange Activity (RXA) keeps in inventory as part of the Army's Wholesale Supply System various components for equipment, some of which are salvaged from vehicles no longer serviceable, so that parts for non-functioning equipment can be readily swapped. RXAs forward non-functioning components to the appropriate DOL for repair and, after repair, the components are returned to the RXA of origin. Approximately 75 percent of component repairs were components from other installations. The DOL at Fort Carson at the time of the hearing of the appeal was repairing transmissions for tactical vehicles designated M-1 and Heavy Equipment Mobile Material Transport and engines for armored personnel carriers. (Tr. 338-40, 358-62)

34. The parties have stipulated itemized amounts of the DOL IMPAC purchases on a 640-line spreadsheet. The number of line item purchases is less than 640 because lines are included for the names of vendors, totals, and spaces. (Ex. J-2) The parties have stipulated the amounts of DOL IMPAC purchases in four categories:

1.	"Admitted by Army"	$ 47,284.80
2.	"Contested by T&M"	109,453.20
3.	"No Documentation"	32,551.23
4.	"Not Contested by T&M"	139,279.90[9]

(Ex. J-2 at 19) The Government did not stipulate that diversions of requirements were improper.[10]

35. We find that some of the total items in category 1, "Admitted by Army," are purchases of parts that the Government requisitioned, but which appellant could not supply by the contract deadlines. The stipulated items are #362 for $230.26 and #476 for $117 and the portion of #220 that is for $100.50. Appellant failed to supply items in this category in the total amount of $447.76. (Ex. J-2; supp. R4, tab 5Z; tr. 142, 421-22, 462)

36. The Government has made the following classification of the items in category 2, "Contested by T&M" that we adopt for deciding the appeal: (a) repair parts for components, not end items, (b) repair parts for components maintained in RXA inventories, (c) repair parts for components that did not originate at Fort Carson, (d) repair parts for

components not identified with an end item within the scope of the contract, (e) repair parts for components of unknown origin, (f) repair parts for components identified with an end item not within the scope of the contract, (g) items other than repair parts (*e.g.*, operator care supplies, repair services), or (h) repair parts purchased for inventory.[11]

37. We find that some of the total items in category 2, "Contested by T&M," are purchases of parts that the Government requisitioned, but appellant could not supply them by the contract deadlines. The stipulated items are #47 for $1,235.40 and the portion of #220 that is for $69.78. Appellant failed to supply items in this category in the total amount of $1,305.18. (Ex. J-2; supp. R4, tab 5F; tr. 159-64, 386-87, 421-22)

38. Other items in category 2, "Contested by T & M," were the following types of repair parts:

a. The parties have agreed that some repair parts purchases relate to tactical vehicles (Gov' t br. at 40-51; app. reply br. at 12). In addition, line item 326 relates to a tactical vehicle (tr. 435-36). We find that all the repair parts purchases that relate to tactical vehicles relate to tactical vehicles that are not tactical vehicles of commercial design, *e.g.*, tanks and other tracked vehicles (ex. G-2; tr. 394-95, 398, 400-01, 415-16, 418-19, 431, 434-35, 454-55, 533-34). The parties did not consider the HUMVEE a tactical vehicle in this classification (Gov' t br. at 43; app. reply br. at 11-12). We find the total amount of items that relate to these tactical vehicles is $29,408.43.

b. Repair parts for a test stand, an electric cart, and power testing machines are for support equipment or material handling equipment (tr. 380-81, 385-86, 426, 481-82, 563).

c. We find that items used in painting, *i.e.* tape, sand paper, sanding disks, and lubricant were similar to paint and reasonably warrant the same classification. The parties identified these paint-related items (app. br., app. A at 6; Gov' t br. at 52-54; tr. 457-58, 460-61, 464-65). We find they total $9,719.37.

d. Standard hardware items, *e.g.*, nuts and bolts, plugs, screws, tubing, and hose ends, and repair materials, *e.g.*, tire paste, are generally used in the repair of vehicles and not limited to maintaining vehicles for the purpose of rendering them operational.

e. We find two purchases from Clutch Service Wholesale (#50 for $460 and #53 for $685) that were contested (ex. J-2). Appellant did not contest 16 other purchases from the same vendor because labor charges were included on the invoices. Mr. Browning made these purchases in the total amount of $1,145 for services, not for overhauled clutches. (Tr. 164, 387-88)

f. Parts purchased for inventory include the items that are referred to as bench stock. Mechanics use these parts on a day-to-day recurring basis, and purchases are made in quantity. Examples of parts purchased for stock rather than repair of a designated vehicle are automotive belts, filters, fuel pumps, gasket sets, and switches. (Tr. 154, 179, 181, 186, 196-97)

39. The parties have stipulated that the IMPAC records do not identify the repair parts or other items that were line item purchases from several different vendors in category 3, "No Documentation" (ex. J-2 at 1, 4-5, 8-9, 13-19). No other purchases were made from some of the several vendors (ex. J-2, lines 3, 25, 269) Appellant contested some, but not all the other purchases made from other vendors for which there are undocumented purchases (ex. J-2, lines 119, 282, 425, 554, 631). For these purchases we can estimate the amount that can be attributed to improper diversions of contract requirements according to the percentage of purchases contested. We find the estimated amount according to the percentage of purchases appellant has established were improper diversions in the category "Contested by T&M." These calculations are appropriate for the vendors on lines 119, 282, 425, 554, and 631 (ex. J-2). We find the amount of undocumented purchases that can reasonably be attributed to improper diversions of contract requirements is $3,940.01.

40. There is no evidence of credit card purchases by other organizations using the COPARS. The record does not establish when purchases were made by the different using organizations from the COPARS during the term of the contract. Appellant's computer-generated report of total COPARS sales by account code of the using organizations shows the period of time in which orders were placed (ex. A-3; tr. 132). Activities of PAE, DMMC, 183rd Maintenance, and the 52nd Engineers, which were other large users of the COPARS, are shown to continue through November 1996 (ex. A-3 at 1, 2, 9; tr. 138). There is more than one account for a using organization, however, and many accounts for which no orders were placed as of a date substantially earlier than the end date of the contract. Appellant's report fails to establish that there was no change in the number and age of vehicles at Fort Carson during the term of the contract.

Appellant's Profit

41. The contract did not provide for profit on the NPL items (CLIN 0007). For items which have published price lists, *i.e.*, CLINs 0001 and 0002, appellant had no markup where the price for which appellant obtained the part was also the selling price. Other items within CLINs 0003 and 0004 were obtainable in the after market as rebuilt items and could be profitable. (2d Stip.; tr. 39-44, 46, 71)

42. Appellant has presented its profit as the difference between its cost of sales and price to the Government on the basis of known discounts obtained from suppliers and offered to the Government for examples of after market parts (CLIN 0003, CLIN 0004).

They were highly profitable items in the COPARS with a wide range of profit margin. Appellant elicited the following testimony from Mr. Ward:

> Q And the profit on these highly profitable parts, they could easily be 30 percent, couldn' t they?
>
> A They could be more than that.
>
> Q Would you think it could be 40 percent, easily?
>
> A I' ve seen them as high as 60-70 percent.

(Tr. 513) According to appellant, it experienced under the contract an average profit margin of 40 percent on the after market parts within CLIN 0004 and approximately 25 percent on parts within CLIN 0003. Approximately 75 percent of the diverted parts were CLIN 0004 items.[12] Appellant considers the profit margin of 40 percent "very reasonable" (tr. 75). Appellant made an analysis of profit margins that it experienced on CLINs 0003 and 0004 that was submitted in evidence, but did not calculate 40 percent on the basis of this tabulation. Appellant arrived at 40 percent as "an educated guess" (tr. 109). Appellant' s profits were "hurt by the government diverting sales away from the COPARS" (tr. 514).

43. During the contract Mr. Donald Powers, chief of the technical support branch, log management division in the DOL, understood from a conversation with Mr. Kapler that appellant's overall profit margin from the COPARS at Fort Carson was between nine and 16 percent. Mr. Powers did not know how the percentage was calculated. (Tr. 516, 518-19) At the hearing the Government challenged Mr. Ward's testimony that he could not recall appellant's profit margin. At his deposition Mr. Ward remembered that the general profit margin at the Fort Carson COPARS was 13, 14, or 15 percent. (Tr. 509-10)

44. Appellant's actual profit rates experienced under the contract varied on a monthly basis. Appellant's tabulation shows that the profit margin on sales of all parts, including CLINs 0001, 0002 and 0007 (items on which appellant made little or no profit), was in the range of 13 to 24 percent. The average monthly profit rate for all parts was 20 percent. Profit on sales of CLINs 0003 and 0004 parts ranged from 23 to 48 percent. The average monthly profit rate for these parts was 33 percent. Appellant's analysis of the profit it experienced shows gross profit. Appellant compared the invoice price paid with the sales price to calculate its monthly profit rate. Appellant did not factor any business expenses, including local office and home office overhead, into the profit calculations. We find that appellant would not have needed additional staff to fill the diverted orders. (Ex. A-6; 2d stip.; tr. 70-77, 112-16)

45. The Government revised appellant's analysis to recalculate appellant's asserted profit rates to account for its store operating costs. Appellant required $7,000 per month

to operate the COPARS including home office expenses and received only $2,000 in fixed fee under the contract under CLIN 0005, leaving a difference of $5,000. Appellant would have incurred some additional administrative costs for the quantity of parts purchases that were diverted. These costs would not likely have been for personnel since appellant retained the same number of people, two, who had been working in the COPARS for the prior contractor. The Government's analysis shows an average monthly profit rate of 23 percent on sales of CLINs 0003 and 0004 after the adjustment is made for operating costs. The Government calculated that the profit margin on appellant's NPL and non-NPL parts was 13 percent. We find the Government's calculations the most reliable evidence on profit. (Ex. A-6; 2d Stip.; tr. 69-71, 96-97, 111; Gov' t br. at 34-35)

DOL IMPAC Records

46. Mr. Browning, chief of production control and shop supply, maintenance division in the DOL, purchased repair parts for end items and for components from appellant's COPARS and from vendors other than appellant using his IMPAC credit card. He did not believe he was required to purchase parts for components from COPARS, but did so if they could not be obtained through the Army's Wholesale Supply System or if the amount of the purchase exceeded the limit on his credit card. The Government prepared requisition form 1348-6 to purchase from COPARS. When COPARS did not timely supply parts, Mr. Browning used his IMPAC credit card to make the purchase from another vendor. Mr. Browning's IMPAC statements and related documents do not show that a requisition to COPARS was cancelled before an order from another vendor was placed. Mr. Browning asserted that he did not have the forms when the IMPAC request was prepared, and it was not convenient to attach them to the credit card receipts. (Supp. stip., ¶ 1; tr. 357, 363-64, 366, 371-72, 374) In the absence of any supporting canceled requisition forms, the DOL IMPAC statements alone are not persuasive that parts were first requisitioned and appellant failed to supply the parts within the time limits specified in the contract.

47. The parties have stipulated that the existing records of Mr. Browning which predate 18 December 1995, and which were not produced in discovery, are of the same general character and nature as those which were produced. The parties further stipulated that it would be appropriate to extrapolate the records which were not produced from those which were. (Supp. stip., ¶ 5)

PRELIMINARY MATTERS

The Board did not close the record at the conclusion of the hearing in order to give the parties an opportunity to revise certain specific documents about which witnesses testified at the hearing. The parties filed a Joint Stipulation of Fact, identified as exhibit J-2, which is another version of appellant's exhibit A-4. The parties made revisions to reflect changes in their positions resulting from testimony at the hearing. In addition, appellant filed exhibit A-6, which is a corrected and updated last page of appellant's exhibit

A-5 that summarizes appellant's sales and profit margins under the contract between February 1994 and November 1996.[13] The Government submitted a Second Supplemental Joint Stipulation of Fact to clarify the nature of exhibit A-6.

Appellant filed its reply brief with evidentiary attachments. The Government filed a motion to strike the attachments and appellant's argument based thereon from the record on the grounds that appellant was attempting to present new evidence after the record has closed in violation of Board Rule 13. Appellant responded that the attachments are pages printed from the internet revealing the fact that military units moved to Fort Carson. Appellant argued that the Board should take judicial notice pursuant to Federal Rule of Evidence 201(b) of information on publicly-available websites which is contrary to the Government's "biased presentation" that military units left Fort Carson during the term of the contract (app. resp. at 1). Appellant submitted that the Government failed to make timely and full replies to appellant's discovery requests and discuss numbers of vehicles at Fort Carson. Appellant argued that the Board should accord less weight to the Government's evidence because of the Government's "misconduct" (app. reply br. at 19). The Government's position is that appellant was aware from the contracting officer's final decision and the pleadings that the Government alleged that appellant's sales were reduced because of the transfer of vehicles from Fort Carson. The Government explained that it had not provided earlier responses in discovery because the information did not fall within the scope of appellant's discovery requests. (Tr. 16)

Once the evidentiary record has been closed, it should be opened for the receipt of additional evidence only for compelling reasons and under circumstances fair to both parties. We are not persuaded to take judicial notice of facts concerning the arrival of military units at Fort Carson. The attachments are somewhat confusing narrative excerpts copied from unidentified websites. Appellant's submission after the hearing does not represent newly discovered evidence. Appellant was on notice and had opportunity to develop contradictory or mitigating evidence. We are not persuaded that the evidence now offered could not have been earlier obtained by the exercise of due diligence. We have reviewed the exchange of discovery and find that the Government reasonably fulfilled its discovery obligations. Appellant did not file a motion to compel the Government to provide additional information during discovery, but raised its objection by *motion in limine* to exclude the Government's evidence the day before the hearing. The Board heard argument from the Government and denied the motion (tr. 12-17, 19-21). The documents do not qualify as evidence which warrants reopening the record under the Board's standards for Rule 13. *See BMY, Division of Harsco Corporation*, ASBCA No. 36805, 94-2 BCA ¶ 26,725 at 132,950.

DECISION

Extent of Diversions

Where the Government's methods of fulfilling requirements change, while the requirements do not, the Government does not have an arbitrary right under a requirements contract to develop and use its potential capabilities at the expense of a contractor. The Government is not liable if its requirements are actually different from those anticipated when the agreement was made. *Pacific Technical Enterprises, Ltd.,* ASBCA No. 17087, 74-2 BCA ¶ 10,679; *Henry Angelo & Sons, Inc.*, ASBCA No. 15082, 72-1 BCA ¶ 9356, *motion for reconsid. denied*, 72-2 BCA ¶ 9493; *Alamo Automotive Services, Inc.*, ASBCA No. 9713, 1964 BCA ¶ 4354.

Appellant asserts that there is no real dispute that diversion occurred. With respect to the category of purchases "Admitted by Army," in the amount of $47,284.80, the Government has conceded that the items were requirements within the scope of the contract, but argues that an exception in the contract applies. The Government maintains that it placed requisitions with the COPARS for the underlying parts (Gov' t br. at 37). The Government argues that most of the items are within the exception to the contract that allowed the Government to purchase from other sources if the contractor's reason for delay in furnishing parts contractually required to be furnished within five or ten working days was unacceptable.[14]

We have found that the Government established the amount of repair parts in this category that appellant could not supply within the contractually required time as three line items in the total amount of $447.76 (finding 35). We have found that the IMPAC records alone do not support the assertion that appellant was unable to provide or unable to provide within the time limits all the other parts. There are few requisition forms in the record of IMPAC purchases to show that the parts were first ordered from the COPARS. There is no other evidence of notice from appellant to the Government that COPARS could not furnish a requested repair part. The Government relies on an alleged practice of Mr. Browning to fail to attach a cancelled requisitioning document from the COPARS when he did not have it available at the time he prepared the IMPAC purchase request. The absence of cancelled requisition documents from the record renders Mr. Browning's testimony that COPARS failed to supply all the items in the category "Admitted by Army" less than credible.

Appellant has the burden of showing the extent of diversion which it has done with IMPAC records of purchases of repair parts from auto parts vendors and the Government's admission in the stipulation of facts here that the parts are within the scope of the contract. The Government has failed to show that an exception in the contract allowed it to make all these purchases. We conclude that appellant is entitled to recovery for purchases in the category "Admitted by Army" less the three items shown to be within the exception to the contract.

With respect to the purchases in the amount of $109,453.20 that are stipulated as "Contested by T&M," appellant also maintains that they were improper diversions of contract requirements. Appellant argues that proof of the types of parts ordinarily sold by the COPARS is evidence that the same types of parts purchased by IMPAC cards were diversions from the contract requirements (app. reply br. at 9). The Government's dispute is based on the grounds that the items were not within the scope of the contract. It is the Government's position that every purchase that cannot be linked to a particular end item within the scope of the contract is a failure of proof by appellant (Gov' t br. at 63). The Government further maintains that, with respect to components, only repair parts for components destined for identified vehicles located at Fort Carson and within the scope of the contract were contract requirements (Gov' t reply br. at 9). The Government asserts that the items in the "Contested by T&M" category were (a) repair parts for components, not end items, (b) repair parts for components maintained in RXA inventories, (c) repair parts for components that did not originate at Fort Carson, (d) repair parts for components not identified with an end item within the scope of the contract, (e) repair parts for components of unknown origin, (f) repair parts for components identified with an end item not within the scope of the contract, (g) items other than repair parts (*e.g.*, operator care supplies, repair services), or (h) repair parts purchased for inventory. According to the Government, none of these items were contract requirements.

Contract interpretation begins with the plain language of the agreement and must be aimed at construing the agreement in a manner that effectuates its spirit and purpose. The contract is to be read as a whole. An interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it meaningless. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Metric Constructors, Inc.*, ASBCA No. 49343, 97-2 BCA ¶ 29,076. The purpose of the contract was to provide parts to be used in repair and maintenance activities. Appellant's COPARS was to furnish repair parts, tires and batteries. The parts were intended for nontactical wheeled vehicles, certain construction and other support equipment, and tactical vehicles of commercial design. (Finding 3) There is no exclusion in the contract for items used to repair components. The contract specifically defined vehicle repair parts as "[a]ny part, subassembly, assembly or *component* required for installation in the maintenance or repair of an end item, subassembly *or component*" (*id.*). It is reasonable to understand for a vehicle within the scope of the contract that all its constituent parts and assemblies are also within the scope of the contract.

Consistent with the purpose of the contract, the repair and maintenance activities are to take place at Fort Carson where the contractor is to operate a COPARS. There is no reason to limit the furnishing of repair parts to vehicles or components that have a known origin at Fort Carson. The practical interpretation of a contract, as shown by the words or conduct of the parties before the controversy is given "great, if not controlling weight," in interpreting the contract. *Max Drill, Inc. v. United States*, 192 Ct. Cl. 608, 620, 427 F.2d

1233, 1240 (1970); *Coastal Dry Dock & Repair Corp.*, ASBCA No. 31894, 87-1 BCA ¶ 19,618 at 99,237. This interpretation of the scope of the contract is consistent with the parties' performance of the contract. The Government issued no instructions to make distinctions that would qualify the Government's purchasing of repair parts for vehicles as the Government now asserts the requirements were limited. Accordingly, we interpret the scope of the contract to include repair parts for components without distinctions made for the origin of the vehicles or the components. We have found that optional purchases were made from the COPARS and do not accept, therefore, appellant's theory that repair parts ordinarily sold by the COPARS constitute contract requirements.

With respect to the Government's classification, we have read the contract in this manner to determine whether repair parts purchases appellant contested are within the scope of the contract or outside the scope of the contract as the Government asserts. We have concluded that repair parts for the vehicles identified as the end items in the contract are within the scope of the contract, whether they are incorporated directly into the vehicle, or indirectly used in repairing a subassembly or component destined for ultimate installation in the vehicle. The fact that some components after repair are maintained in RXA inventories does not place the repair parts purchased for those components beyond the scope of the contract. Some components originated from installations other than Fort Carson, were sent to Fort Carson for overhaul, and once repaired, returned to RXAs of origin. We conclude that activities at Fort Carson, which required repair parts for components or end items within the scope of the contract, required the Government to make its purchases from the COPARS. The installation of origin for components is without significance as it is for end items.

With respect to components whose end item cannot be determined from the Government IMPAC records, appellant has taken the approach that all components are within the scope of the contract without regard to the ultimate vehicle repair. The Government argues that appellant has the burden of proof and needs to show that the repair parts were for an identified vehicle within the scope of the contract. The Government's approach is that all components are beyond the scope of the contract unless they are linked to a particular end item vehicle within the scope of the contract. The Government maintains that there is no basis, given the facts of this case, for the Board to presume that these purchases fall within the scope of the contract (Gov't br. at 63). We do not agree. We will presume that the components would be used in repair of an end item vehicle within the scope of the contract unless there is indication to the contrary. Where credit card receipts do not include sufficient information to identify the items purchased, it can be impractical to establish the actual Government purchases that violated the contract due to the nature of the Government records. The Government could have prepared more detailed records, but failed to do so and cannot claim the benefit of its omissions here to avoid responsibility for diversions of requirements from appellant's COPARS contract. We conclude that repair parts for components that are not linked to particular vehicles are within the scope of the contract.

Some DOL IMPAC purchases of repair parts were identified with end items (or components thereof). The Government's evidence distinguished two types of tactical vehicles. Only some tactical vehicles were within the scope of the contract, *i.e.* tactical vehicles of commercial design. Appellant has argued that if parts were available commercially, the tactical vehicles were of commercial design. This position is only a bare allegation that is not evidence. *Cascade General, Inc.*, ASBCA No. 47754, 00-2 BCA ¶ 31,093 at 153,531. Some of the IMPAC statements indicate that purchase was for a tactical vehicle (or component thereof) not defined as of commercial design (finding 38). For other items in this Government classification, there was testimony that confirmed the type of tactical vehicle. The purchase of repair parts for these tactical vehicles did not constitute improper diversions of contract requirements.

The purchases of items that were not repair parts, tires or batteries are also not within the scope of the contract. The contract provides an exception for operator care and preservation supplies, which were defined as supplies used for the day-to-day care of a vehicle but not required to render it operational (finding 6). The Government maintains that items were not repair parts because they were used in maintenance rather than repair. Appellant has argued that the items in question here are repair parts because they are materials used in the repair process. We find it plain that identified repair material and standard hardware items, such as nuts and bolts and screws, were used in the repair of end item vehicles. The contract includes a specific exclusion of paint (*id*.). The similar items used in painting, *e.g.* tape and sandpaper, warrant the same exclusion (finding 38.c.). We conclude that painting supplies were excluded from the contract requirements and other items in this classification were repair parts within the scope of the contract. The contract provides an exclusion for repair services (finding 6). Two items are disputed as either clutch repair services constituting services or the purchase of overhauled clutches (finding 38.e.). Based on other charges by the same vendor and Mr. Browning's testimony of what he purchased, we conclude the items were services that are not within the scope of the contract. The purchase of items that were painting supplies and the purchase of repair services were excluded from the contract requirements by the terms of the contract, and those purchases in the amount of $10,864.37 did not constitute improper diversions of contract requirements.

The Government maintains that repair parts purchased for inventory (*i.e.* bench stock) are beyond the scope of the contract. The Government argues that parts for stock were not earmarked for particular vehicles and, therefore, are not within the scope of the contract. We have rejected that argument above. The Government also relies on an interpretation of Army Regulation 710-2, which states that stockage of COPARS parts is not authorized. The Government argues that this regulation prohibits purchasing items from COPARS for stock. Appellant interprets the same language as a prohibition against stocking COPARS parts. COPARS was available to the Government to provide the items it was purchasing for inventory. It is unreasonable to require the Government to purchase

elsewhere the items it wanted to have in stock. We understand that the Government was not to purchase repair parts for stock because doing so would duplicate inventory maintained in the COPARS. In lieu of making those purchases, the Government was to meet its requirements as needed through COPARS under the contract. Appellant's interpretation is the only reasonable meaning of the contract provision. We conclude that repair parts for inventory were within the scope of the contract.

From the items stipulated in the category "Contested by T&M," we conclude appellant's entitlement to all of the items with the exception of certain purchases in the Government's classifications (f) repair parts for components identified with an end item not within the scope of the contract and, (g) items other than repair parts. Appellant is not entitled to recovery on the basis of the amount of $41,577.98 of contested purchases. We deduct this amount from the total amount of purchases stipulated in the category "Contested by T&M" to determine that the total amount of improper diversions established by the DOL IMPAC records in this category is $67,875.22 ($109,453.20 - $41,577.98 = $67,875.22).

With respect to purchases in the amount of $32,551.23 that are stipulated in the category, "No Documentation," appellant argues that they should all be deemed improper diversions of requirements because they are purchases from sources that sold or appeared to have sold vehicle parts. In the alternative, appellant requests that the proportion of admitted and contested purchases the Board finds to have been improper diversions be applied to the total undocumented purchases to find the amount of improper diversions in this category (app. br. at 17). The Government argues that appellant has failed to meet its burden of proof that the purchases were for repair parts. The Government also argues that there is nothing in the record that links these purchases to end item vehicles within the scope of the contract.

Our evaluation of the line items in the category "No Documentation" indicates that some purchases were made from vendors from which there were no other purchases. Other purchases were from vendors from which there were other purchases all of which appellant did not contest. We have no basis to assume in these two situations that the purchases stipulated in the "No Documentation" category were for repair parts within the scope of the contract. Other purchases were from five vendors from which the Board has found that there were some other purchases that were improper diversions. We will assume that, on the average, the undocumented purchases from these vendors represent diversions in the same proportion as we have found other purchases from the vendor constitute diversions. We have estimated the amount in this category to be $3,940.01 (finding 39). Appellant presented its *prima facie* case with respect to these purchases and in the absence of evidence sufficient to controvert it, appellant's case stands controlling. Additionally, there is a fundamental rule of evidence that where certain facts are peculiarly within the knowledge of one of the parties, the possessor of this knowledge may be required to come forward with evidence concerning these facts, and a failure to do so raises an inference that

the facts are unfavorable to the possessor's case. *Frequency Electronics, Inc.,* ASBCA Nos. 17917, 18619, 74-2 BCA ¶ 10,792 at 51,328. The Government was peculiarly able to document the repair parts it purchased with IMPAC credit cards and had access to the facts concerning the nature of the purchases made at the time the cards were used. From the items stipulated in the category "No Documentation," we conclude appellant's entitlement to an estimated amount of $3,940.01 for the items stipulated from vendors from whom other purchases constituting improper diversions were made.

The total amount of improper diversions is determined as follows:

Category 1	"Admitted by Army"	$ 46,837.04
Category 2	"Contested by T&M"	$ 67,875.22
Category 3	"No Documentation"	$ 3,940.01
	Total	$118,652.27

Appellant maintains that the documented purchases are only part of the DOL diversion of the contract requirements. The DOL IMPAC card statements are for three DOL employees for a twelve-month period from December 1995 to December 1996. Appellant requests that the Board extrapolate the total DOL diversion on the basis of the parties' stipulation that other IMPAC card records are of the same general character and nature as those which were produced and it would be appropriate to extrapolate the records which were not produced from those which were (app. br. at 17). Extrapolation involves an expansion of known data into an area unknown to arrive at knowledge of the unknown by inferences based on an assumed correspondence between that area and what is known. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 807 (1986). The Board extrapolates rates for use in calculating quantum on the basis of undisputed evidence from a contractor's books and records. *See, e.g., Campbell Industries,* ASBCA No. 40436, 94-2 BCA ¶ 26,760. The Government failed to disclose Mr. Browning's IMPAC card records for the period July 1994 to December 1995 and has stipulated that it would be appropriate for the Board to extrapolate to calculate the total DOL diversion. This extrapolation is made by obtaining the average monthly diversion and determining the amount of diversion to add for the 17-month period July 1994 to December 1995.

We have determined from evidence of the documented IMPAC credit card purchases that the Government improperly diverted requirements from appellant's contract in the amount of $118,652.27. We extrapolate from the improper diversions stipulated in the IMPAC documents in the record to determine the amount of diversion to add for the period that similar IMPAC documents of DOL purchases were in existence, but not disclosed by the Government as follows: we obtain the average monthly diversion that we have concluded was improper ($118,652.27 ÷ 12, or $9,887.69) and determine the amount of diversion to add for the 17-month period July 1994 to December 1995 ($9,887.69 × 17, or $168,090.72) to calculate the total DOL diversion of $286,742.99 ($118,652.27 + $168,090.72).

Appellant submits that the factors which make it necessary and appropriate to extrapolate the total diversion by DOL from the partial records that are available also apply to alleged diversion by other organizations at Fort Carson. Appellant's proposed methodology for extrapolation of the total diversion at Fort Carson is to calculate the amount of diversion based on the percentage of COPARS purchases made by DOL, which was 15 percent. This methodology assumes that other organizations subject to the contract requirements had IMPAC card users in numbers that correspond to DOL and that they used cards during the contract period for contract and non-contract purchases in a corresponding ratio. Appellant presented no evidence in support of such assumptions.

Alternatively, appellant proposes that the extrapolation be made by a comparison of average monthly revenues during the contract with average monthly revenues during the predecessor contract. Appellant argues that the vehicle listing was the same as in the predecessor contract, it expected its sales would be in line with the prior contractor's sales, and its sales were much lower due to the diversion of requirements, primarily through IMPAC card purchases. Appellant submits that the difference of $70,000 per month in sales can to applied to the 42-month period of the contract to estimate the total diversion of requirements from appellant's contract as $2,940,000 (app. br. at 21). The Government disputes the reasonableness of this extrapolation with evidence that appellant's decrease in COPARS sales was not caused by diversions through IMPAC card purchases, but by unrelated events.

We have found different reasons for the change in the quantity of vehicles at Fort Carson that decreased the need for repair parts (findings 21, 23). Accordingly, to extrapolate the amount of improper diversions attributable to organizations other than DOL based on the amount of diversions we have found or the difference in sales between the COPARS and the prior contractor would be inappropriate. Appellant's reliance on *Jay Automotive Specialties, Inc.*, ASBCA No. 50036, 99-1 BCA ¶ 30,186, is misplaced. In that case we determined that it would have been impractical to ascertain the actual Government purchases diverted from the COPARS by interviewing one or two hundred IMPAC card users. The nature of the Government records precluded establishing the actual Government purchases that violated the contract. In order to find the amount of diversion in a seven-month period at the end of the contract, the Board extrapolated the amount by comparing average monthly store revenue during the period with average monthly store revenue during the preceding 26-month period of the contract that was a normal period without diversion. The difference multiplied by seven was the total amount of revenues diverted from appellant due to the improper IMPAC card purchases. The contractor's approach of comparing the two periods of time was considered reasonable. The Board found that the methodology produced a reasonable and sufficiently accurate estimate of the Government purchases. It was specifically noted by the Board that the fact that the quantity of vehicles had not changed provided adequate assurance that the comparison of average monthly revenues did not overstate the reduction in revenues. As indicated above, in order

for the Board to extrapolate, it is essential that assumptions of continuity, correspondence, and parallelism between what is known and the unknown provide a basis for considering the projection sufficiently accurate. Unlike the circumstances in the *Jay Automotive* appeal, where a comparison could reasonably be made, the quantity of vehicles at Fort Carson requiring repair changed during the course of the contract, and the Board will not make an estimate that would not be reasonably accurate.

We have concluded that the total amount of diversion was $286,742.99.

Measure of Recovery

By not ordering all its requirements for repair parts from appellant in violation of the terms of appellant's requirements contract, the Government breached its contractual obligations. *Viktoria Transport GmbH & Co., KG,* ASBCA No. 30371, 88-3 BCA ¶ 20,921 at 105,735. We do not accept the Government's effort to limit appellant's recovery to costs incurred plus reasonable profit by retroactive application of the theory of a constructive termination for convenience (Gov't br. at 94-97). The diversion is not remediable under the termination for convenience clause in a contract after the contract has been performed. In *Ace-Federal Reporters, Inc. v. Barram,* 226 F.3d 1329, 1333-34 (Fed. Cir. 2000), where there was breach of a requirements contract for reporting services, the Court recently stated:

> "No decision has upheld retroactive application of a termination for convenience clause to a contract that had been fully performed in accordance with its terms." *Maxima Corp. v. United States,* 847 F.2d 1549, 1557 (Fed. Cir. 1988). We see no reason in law or logic to impose a retroactive constructive termination for convenience here. The concept is a fiction to begin with, but there has to be some limit to its elasticity. The contractors stood ready to perform throughout, did perform those orders placed, and the contract ended.

The Government seeks to distinguish *Ace-Federal Reporters* by presenting the facts there as evidence of an abuse of discretion. The Court did not address bad faith or abuse of discretion and did not state that either was a prerequisite for its conclusion that settlement under the termination for convenience clause was not the proper remedy for diversion of requirements under requirements contracts. We have previously held that allegations of bad faith, abuse of discretion, or arbitrary or capricious action are not essential for a claim for lost profits for improper diversions under a requirements contract. *Carroll Automotive,* ASBCA No. 50993, 98-2 BCA ¶ 29,864. *See Jay Automotive Specialties, Inc., supra*. In accordance with the recent decision of the Federal Circuit and Board precedent in *Carroll Automotive*, we conclude that appellant's remedy for the Government's breach of its requirements contract is for damages.[15]

The appropriate measure of breach of contract damages is an award of damages sufficient to place the injured party in as good a position as he or she would have been had the breaching party fully performed. *San Carlos Irrigation and Drainage District v. United States,* 111 F.3d 1557, 1562-63 (Fed. Cir. 1997); *Northern Helex Company v. United States,* 207 Ct. Cl. 862, 888-89, 524 F.2d 707, 713 (1975), *cert. denied*, 429 U.S. 866 (1976); *International Gunnery Range Services, Inc.*, ASBCA No. 34152, 96-2 BCA ¶ 28,497; *A-1 Garbage Disposal and Trash Service, Inc.*, ASBCA No. 43006, 93-1 BCA ¶ 25,465. Appellant relies on the statement of the measure of damages in the Restatement of Contracts, which provides that the injured party in an action for breach of contract is entitled to recover for "the loss in the value to him of the other party's performance caused by its failure or deficiency." RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981)*; see PAE International,* ASBCA No. 45314, 98-1 BCA ¶ 29,347. This measure would include the profit that appellant would have earned. *Tamp Corporation,* ASBCA No. 25692, 84-2 BCA ¶ 17,460.

Appellant is entitled to profit it would have earned if COPARS had made additional sales in the total amount of the diversions. We have concluded that this amount is $286,742.99.

Appellant maintains that its profits on the diverted items would have been 40 percent of sales revenues and that there were no additional costs associated with the parts sales that were diverted. Appellant projected the rate based on certain high-profit parts, CLIN 0004, which were most of the diverted purchases. The rate, however, was only a guess. (Finding 42) Appellant objects to finding a profit rate based on the profit margin realized on the sales it actually made arguing that it would be duplicative to include overhead and operating costs which have been paid in calculating the profit rate. The Government has projected appellant's profit rate on all parts at 13 percent of revenues based on net profits rather than appellant's demand for gross profits. The Government proposed to take into account all allocable expenses, *i.e.* appellant's cost of doing business, as a deduction from gross revenues to calculate the profit appellant would have earned. Accordingly, the Government has analyzed appellant's tabulation of the profit rates it experienced and stated that appellant's profit was no more than 13 percent on all parts and no more than 23 percent on CLINs 0003 and 0004.

We have found that the Government's calculations based on appellant' s experienced profit rate are the most reliable evidence of profit and accordingly, we use them for purposes of damages (finding 45). Approximately three-fourths of the diverted purchases for which the IMPAC records included description of the parts purchased were CLIN 0004 items (finding 42). These items were the most profitable parts. Appellant would have, therefore, earned profit at a rate higher than an appropriate profit rate for the diversions of all parts. The Government's analysis of the higher profit CLINs, CLINs 0003 and 0004, found an average monthly rate of 23 percent (finding 45). We consider that

three-fourths of the purchases would have received a profit of approximately 23 percent, and one-fourth would have received little or no profit. We conclude that a fair and reasonable average rate of profit to use in determining appellant's damages is a composite rate of 17.25 percent. This rate is applied to the total revenues from sales that were diverted (.1725 x $286,742.99 = $49,463.17).

Summary Calculation of Quantum

1.	Admitted by Army	$ 47,284.80		(finding 34)
	failed to supply	- 447.76		(finding 35)
	Subtotal		$ 46,837.04	
2.	Contested by T&M	$109,453.20		(finding 34)
	failed to supply	- 1,305.18		(finding 37)
	tactical vehicles	- 29,408.43		(finding 38.a.)
	painting supplies	- 9,719.37		(finding 38.c.)
	repair services	- 1,145.00		(finding 38.e.)
	Subtotal		$ 67,875.22	
3.	No Documentation		$ 3,940.01	(finding 39)
Total diversions from DOL records			$118,652.27	
Additional diversions by DOL by extrapolation				
	$118,652.27 ÷ 12 = 9,887.69 average per month			(finding 26)
	$9,887.69 × 17 months			(finding 27)
			$168,090.72	
	Total		$286,742.99	
Lost profits @ 17.25 %				(finding 45)
	$ 286,742.99 × .1725		$ 49,463.17	

CONCLUSION

The appeal is sustained in part and otherwise denied. Appellant is entitled to recovery in the amount of $49,463.17, plus interest from 30 July 1997, in accordance with the Contract Disputes Act, 41 U.S.C. § 611.

Dated: 5 June 2001

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

NOTES

[1] The contract defined an OEM part as "[a] part manufactured only by the original end item equipment manufacturer and distributed through its dealership" (R4, tab 3 at C.2-3). An OEM was defined as "[a] manufacturer of the complete production vehicle, either commercial or military, whether assembled from parts of its own manufacturer, other manufacturers or a combination of both" (*id.*).

[2] After market parts include filters, spark plug wires, spark plugs, water pumps, alternators, starters, batteries, tires, nuts and bolts, and other types of normal maintenance items (tr. 52, 513).

[3] The contract defined NPL parts as "[p]arts not identified on a commercial published price list" (R4, tab 3 at C.2-3).

[4] The contract defined fast-moving parts as "[t]hose parts, both price listed and non-price listed, for which the inventory turnover rate is sufficient to warrant continuous "on-the-shelf" availability (parts with three demands in a 90-day period)" (*id.* at C.2-2).

[5] Slow-moving parts were defined as "[t]hose parts that do not meet the criteria for stockage as Fast-Moving Parts" (*id.* at C.2-4).

[6] PAE refers to Pacific Architects and Engineers, a commercial contractor that was not obligated to purchase parts through the COPARS (tr. 252, 289).

[7] The Government has stated and appellant has not disputed that the amount of $818,205 was the annual Government estimate (Gov' t br. at 5, 7). The total of estimated sales

for CLIN 0002 and CLIN 0007 are not found in the contract. The parties apparently considered CLIN 0002 and CLIN 0007 the same because of the bidder's option to designate CLIN 0002 items "NPL" instead of proposing a discount and provide them under CLIN 0007. (R4, tab 3 at B-2; Gov' t br. at 7; tr. 45-46).

[8] Appellant presented a summary of the IMPAC statements that is in the record as Exhibit A-4 on the basis of statements found in the record in the supplemental Rule 4 file, tabs 5 through 5L (tr. 149).

[9] The purchases in category 4 are not in issue.

[10] At the hearing appellant presented different amounts for categories 1, 2 and 4 (ex. A-4 at 17). The Government introduced an exhibit showing amounts in three categories that were comparable to categories 2, 3, and 4 combined: termed "Outside Scope of Contract," "Within Scope of COPARS", and "Could not meet Requirement Delivery Date." The Government's third category was in the amount of $1,235.40. The parties revised the pre-hearing stipulation in exhibit J-1 based on testimony at the hearing and then agreed to the amounts for the categories of DOL IMPAC purchases. Category 2 was stipulated as $110,870.85. (Ex. J-2 at 19) Exhibit J-2 shows a discrepancy of $1,417.65 between the stipulated DOL IMPAC purchases of $328,569.13 and the total of the categories, which is $329,986.78 (*id*.) Appellant found an error in the amount of $110,870.85 resulting from including the amount of $1,417.65 on line 423 (the total of lines 421 and 422 appearing in the "Admitted by Army" category) in the "Contested by T&M" category. Appellant corrected its error by deducting this amount from $110,870.85 and calculating $109,453.32. (App. br. at 13, n.5) We find the correct amount of the category "Contested by T&M" is $109,453.20.

[11] Appellant's classification of the same items was (a) items for repair of a component rather than an end item, (b) stock items, (c) painting and repair accessories, and (d) miscellaneous items (app. br. at 12-16, app. A). We find in evaluation of the items in category 2, "Contested by T&M," that appellant's position on the line items corresponds to the Government's classification.

[12] Appellant classified the IMPAC purchases to the extent information was available in the DOL records by CLIN and calculated that purchases in the amount of $112,292, which is approximately 75 percent of the total, were CLIN 0004 (app. br. at 24-25, app. B, C). The Government did not question the accuracy of appellant's summary of the record evidence (Gov' t reply br. at 21).

[13] Appellant made an error in including six percent profit on NPL items on the basis that COPARS contracts usually include this amount of profit. Appellant's contract at Fort Carson did not include this profit provision. (Tr. 74-75, 109, 115)

[14] The Government argues that two stipulated items in this category involved parts that were purchased for stock and thus beyond the scope of the contract (Gov' t br. at 38, 44). The Government position is contrary to its stipulation of fact and rejected in accordance with appellant's request (app. reply br. at 14).

[15] The prior rule was that damages are awarded in breach of requirements contract circumstances only where there is bad faith or abuse of discretion on the part of the Government. *Viktoria Transport GmbH & Co., KG, supra,* at 105,737.

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. 51279, Appeal of T&M Distributors, Inc., rendered in conformance with the Board's Charter.

Dated:

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