ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
CACI International, Inc.	)	ASBCA Nos. 53058, 54110
	)	
Under Contract No. DCA200-94-H-0015	)	

APPEARANCES FOR THE APPELLANT: Peter M. Kilcullen, Esq.
Kilcullen Law L.L.C.
Alexandria, VA

Cyrus E. Phillips, IV, Esq.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Joann W. Melesky, Esq.
Stephanie A. Kreis, Esq.
Deputy Legal Counsel
Defense Information Systems Agency
Scott Air Force Base, IL

OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals are taken from contracting officers' decisions denying claims of $73,208,256 in ASBCA No. 53058 and $91,051,195 in ASBCA No. 54110. The claims arose from the alleged breach of a no-cost license agreement. CACI International, Inc. (hereinafter sometimes CACI or appellant) seeks anticipatory profits as recompense. In *Gap Instrument Corp.*, ASBCA No. 51658, 01-1 BCA ¶ 31,358 (hereinafter "*Gap*"), we held that we have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613, as amended (CDA), in disputes developing under such license agreements.

FINDINGS OF FACT

Background

1. For purposes of this dispute, a value added network (VAN) provider is defined as:

> C.1 DEFINITION OF AN EDI [Electronic Data Interchange] 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.

(R4, tab 1/Bates 000011)[1]

2. CACI is a company whose reputation at the time relevant to this dispute was largely limited to government circles. It did not enjoy widespread recognition in the supplier community. (R4, tab 19 at 15; tr. 4/145)

3. In 1986 CACI entered into a contract with the Army for a Standard Army Automated Contracting System ("SAACONS"), which was for software enhancements to be utilized in automating the Army's contracting system (tr. 1/27-30). Between 1986 and 1992 SAACONS was installed at 256 Army procurement sites for use by the Army (tr. 1/31, 177).

4. Beginning in 1991 CACI also developed the Standard Automated Contracting System – Federal ("SACONS-Federal") software for use by other government agencies (tr. 1/31-32). CACI similarly developed Standard Automated Contracting System – Commerce Business Daily ("SACONS-CBD") and Standard Automated Contracting System – Electronic Data Interchange ("SACONS-EDI") which, respectively, assisted procuring agencies in the sending of procurement notices to the Commerce Business Daily and locations such as electronic billboards (tr. 1/36-40).

5. Thereafter CACI began development of software to be used by vendors in conjunction with automated government procurement. This resulted in QuickBid, which was intended for vendors' use and could process an EDI transaction according to ANSI X12 standards.[2] (Tr. 1/40-42)

---

[1] A VAN provider might also offer additional functions, such as translation software, but such additional functions were not required (tr. 6/88).

[2] ANSI X12 is an acronym for American National Standards Institute X12 standards, which is a commonly accepted industry standard format for business transaction flows in electronic data interchange (R4, tab 27/Bates 000002; tr. 1/34-36).

6. On or about 29 April 1992 CACI entered into a Memorandum of Understanding with General Electric Information Services, Inc. (GEIS) (ex. A-2). Under the two-phased agreement, they were to provide "compatible products and services to the Government and Government related marketplaces to provide electronic procurement capabilities if the results from the Phase 1 efforts lead them to mutually conclude that such provisioning would be a worthwhile undertaking" (*id*. at 1). Under Article 2, Phase 2 was to be a five-year effort. Article 3 provided for distribution of revenue. CACI was to receive 60 percent of initiation fees with a minimum of $40 per subscriber. GEIS was to receive 80 percent of all monthly service charges. CACI was also assessed a posting fee by GEIS, starting at a rate of $.80 per document. (*Id*. at 4, 5, 6) The agreement described the relationship of CACI and GEIS as follows in Article 6:

> Nothing herein is intended to create a joint venture, or partnership, or otherwise authorize either party to make any offer or proposal that would bind the other. Nothing herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the parties.
>
> Sharing of revenue is specifically addressed in Article 3. Sharing of expenses [is] solely limited to sharing of conference expenses . . . . No other expenses will be shared by the parties.

(*Id*. at 9) The Memorandum of Understanding was amended five times, with the last executed 21 April 1995. The amendments adjusted revenue distribution, among other things, including the addition of a payment to CACI by GEIS for QuickBid software. (*Id*., amendments 1-5)

<u>Electronic Commerce (EC) and the Pat Report</u>

7. A report was prepared for DoD by the Lawrence Livermore National Laboratory titled "Electronic Commerce for the Department of Defense: FY 92 End-of-Year Report of the Lead Engineering and Development Activities in the LLNL EC/EDI Project." The report, dated 28 October 1992, numbered the DoD vendor base at over 300,000 and over 350,000 vendors. (Ex. A-4, ¶¶ 1.1, 3.3 (300,000), ¶¶ 3.8, 5.4.1 (350,000))

8. CACI became aware of the DoD EC initiative in 1993 and in October of that year contacted DoD contracting officer Constance E. Jackson of Defense Commercial Communications Office (DECCO), Defense Information Systems Agency (DISA).

CACI learned that DoD planned to eventually conduct all EDI/EC through DoD hubs[3] only to VANs that had signed a VAN License Agreement (VLA). (Ex. A-13/Bates 000007; tr. 2/76-77)

9. On 9 December 1993 a pre-solicitation conference was held. Approximately 30 prospective contractors attended (R4, tab 32). CACI did not attend. (Tr. 2/79) Attendees were told that 65 percent of 6,000,000 small purchase actions would be conducted through EDI. They were told that 85 percent of those actions were handled by 238 sites. This was included in the PAT report. (R4, tab 27/Bates 000290, tab 30) One of the participants asked as Question 4 whether intra-government services would be provided by VANs. That and other questions were answered in a 14 January 1994 response from the contracting officer, Constance E. Jackson, who responded that "DoD does not plan to use commercial value-added networks to exchange EDI transactions within DoD." Question 21 (K) asked about the implementation schedule. Answer 21 (K) identified the implementation schedule as part of the PAT report. (Exs. A-6, A-7 at 2, 12) CACI contemporaneously received and reviewed a copy of the 14 January 1994 questions and answers (tr. 2/79).

10. In 1993 the DoD Electronic Commerce in Contracting Process Action Team (hereinafter PAT) was formed to "develop a comprehensive plan for implementing an [electronic commerce] approach for procurement functions consistent with the [ANSI X12] standards, to develop a planning estimate for the resources and schedule required, and to identify relevant policy issues" (R4, tab 27/Bates 000002).

11. On 20 December 1993 the PAT report was issued (*id.*). The PAT report stated "[o]ver 300,000 vendors are interested in conducting business with DoD today" (*id.*/Bates 000177).

12. According to the PAT report, DoD has 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." (R4, tab 27/Bates 000002)

---

[3] A hub, sometimes referred to as a network entry point (NEP) or distribution point, was the point at which data from the VANs, formatted in ANSI X12, would be distributed. The DoD hubs were in Columbus, Ohio, and Ogden, Utah. (Tr. 6/83-85)

13. 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." (*Id.*/Bates 000053) 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 of information. VANs sometimes provide this service and some projects have taken advantage of the service in addition to sending transactions to Trading Partners.

(R4, tab 27/Bates 000158)

14. 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.

(*Id.*/Bates 000023-24)

15. 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." (R4, tab 27/Bates 000289-91) Appendix B of the plan was a sample license agreement. Addendum A, section 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.

(*Id.*/Bates 000265, -277)

16. The VAN called for DoD Distribution Points to provide DoD transactions offered under the agreement only to VANs which have signed such a license agreement (R4, tab 27/Bates 000265-80).

17. The PAT report stated "[a] strategic goal of DoD is to present a 'single face to industry'" (*id.*/Bates 000004). It was considered a baseline functional requirement. The PAT report defined that term as follows:

> **2.2.3 SINGLE FACE TO INDUSTRY**
>
> A "single face to industry" is defined as performance of EC by the Government using EDI in accordance with federal information processing standards and a common set of business practices and operational principles. Federal implementation of EDI is depicted in Federal Information Process Standards Publication (FIPS PUB) 161 and DoD Implementation Conventions. FIPS PUB 161 specifies the use of ANSI X12 and/or EDI for Administration, Commerce, and Transport (EDIFACT) for EDI conducted by the Federal Government. The "single face to industry" must be a solution which allows the vendor to be able to process the transaction to and/or from any DoD activity, minimally subscribe to one VAN to do business with all DoD, and register only once to become a DoD supplier (rather than with each DoD component/activity).

(R4, tab 27/Bates 000053)

18. At paragraph 2.1.3 "ASSUMPTIONS" it included the following:

> - The EC in Contracting PAT will sponsor deployments of procurement EDI inititiatives for activities that process greater than 10,000 transactions of $25,000 or less annually.

(*Id.*/Bates 000049-50)

19. Major components of the EC/EDI integration process were described as follows, in pertinent part:

> GOVERNMENT DISTRIBUTION POINTS (GDPs) – This philosophy allows for the orderly collection from multiple gateways of electronic transactions for distribution to other

> Government activities or VANs for issue to the Government's intended trading partner(s). DoD will need to distribute transactions in an electronic state to all organizations, external and internal to DoD, that have need for the information. Therefore, DISA will establish multiple GDPs with this mission. The GDPs that connect to VANs will be called Distribution Hubs to differentiate them. There will need to be more than one Distribution Hub for redundancy and continuity of operations (backup contingency) for the vital mission of distributing DoD's daily business.
>
> VALUE ADDED NETWORKS – VANs are in the business of providing distribution of electronic transactions to a customer base spread internationally. Including VANs in the DoD integration process will ensure that the distribution process is designed and implemented consistent with existing commercial VAN support capabilities. This will assist our trading partners, desiring to do electronic business with DoD, in performing our needed electronic distribution of transactions.
>
> TRADING PARTNER CORPORATE PROCESSES – The EC/EDI integration process depicts our trading partners and their corporate automated processes notionally, but does not advocate setting mandated hardware or software solutions as long as the transactions to/from these trading partners are compatible with DoD.

(R4, tab 27/Bates 000052)

20. Volume 2 of the Implementation Plan notes at paragraph 1.1.3 that 238 DoD sites perform 85 percent of transactions of $25,000 or less, and that the EDI capability of the sites "is the critical factor in near term success for Electronic Commerce (EC)." However, the schedule only covered 208 of the sites. The Implementation Plan also provided:

> **1.5 DEPLOYMENT SCHEDULE AND LOCATIONS**
>
> The deployment schedule for component locations and the actions necessary to build the DoD EC/EDI infrastructure are set forth in section 11.0 of this volume and in Volume I, Chapter 2.0. Components retain the flexibility to deploy their

EDI capability to their priority locations in variance of the schedule.

(*Id.*/Bates 000290, -294, -296 to -98)

21. Section 3.0, "TECHNICAL MILESTONES AND REQUIRED RESOURCES," contained several tables showing various systems and their implementation schedules as part of a 24-month, 3-phase deployment, as summarized below:

Department	System	0-6 months	7-12 months	13-24 months	Total
Navy	ITIMP	0	3	0	3
Navy	APADE	18	7	0	25
Air Force	MADES	5	0	0	5
Air Force	MADES II	16	48	29	93
Army	SAACONS	69	8	0	77
DLA	SPEDE	5	0	0	5
TOTAL		113[4]	66	29	208

(R4, tab 27/Bates 000296-98)

22. Section 11.0, "MILESTONES," included a series of GANTT charts showing execution schedules for technical deployments and other actions commencing as early as 29 January 1994 and completing as late as 28 February 1996 (*id.*/Bates 000309-22). The schedules are described at section 11.0 as setting forth various milestones:

> . . . [R]epresent[ing] the best estimates from all participating organizations at the time of submission. There may be deviations to these scheduled milestones during the implementations. The assigned implementation coordinators, functional and technical, will continuously evaluate and update all milestones, when appropriate.

(R4, tab 27/Bates 000308)

[4] The PAT report shows the DLA sites as "already begun and will carry over into FY94" (R4, tab 27/Bates 000298).

23. The PAT report also included a set of assumptions that included the following:

- EDI capabilities must provide a single face to industry.
  - DoD will use ANSI X12 and EDIFACT standards.
  - DoD EC/EDI initiatives will adhere to DoD implementation conventions.
  - One point of entry will be available for contractor connectivity.
  - A Master Contractor Repository will be established to provide a single point of registration.
  - A centralized standard TPA will be established at an activity identified to perform this task.
  - A standard VAN agreement will be used.[5]

(*Id.*/Bates 000292-93)

24. The data flow of the plan set forth in the PAT report is represented by a diagram showing two-way communications with the flow of information from left to right as follows: government applications (identified as SPEDE, MADES 1, MADES II, APADE, SAACONS, MOCAS, BCAS, FEDERAL), through a bar titled "APPLICATION FORMAT," to government gateways (Service, Columbus, Agency, Ogden, Federal), with the notation "X12" to flow arrows after the gateways, to network entry points (DISA hubs at Columbus and Ogden), to the VANs, through a bar marked "X12 COMPLIANT," to vendors. Arrows representing the flow from right to left (vendors to government applications) were part of the diagram. (Ex. G-42; tr. 6/76-88) Thus, the plan intended the VANs to play the role of storing data from the hub or the vendor and forwarding it to either the vendor or the hub. The data was to be transmitted in ANSI X12 by the VANs. Although not required, the VANs could provide translation services to and from vendors. (Tr. 6/88-89)

---

[5] The standard VAN Licensing Agreement appears in its entirety as an appendix to *GAP, supra*, 01-1 BCA at 154,867-79.

25. The standard VAN agreement in the PAT report (R4, tab 27/Bates 000265-80), anticipated creation of an infrastructure by the government based on the proposed deployment schedule of the individual services. Respondent's obligations included creating the DoD hubs and implementation of the VLA. (Tr. 6/101-07)

26. Implementation of the plan in the PAT report was approved on 5 January 1994 (ex. A-10). The PAT report at paragraph 1.2.2.2 provided 60-90 days lead time from approval to the beginning of execution of the plan and at paragraph 1.3.2 made implementation contingent on funding (R4, tab 27/Bates 000291-92). A DoD policy memorandum dated 28 April 1994 announced that DoD policy was that existing EC/EDI methods (*e.g.*, bulletin boards) would be discontinued once the VAN system was fully operational (R4, tab 32, enclosure 2).

The VAN Licensing Agreement

27. On 1 March 1994 Ms. Jackson forwarded to "All Prospective Offerors" a copy of the proposed no-cost VLA. The cover letter stated: "The Defense Commercial Communications Office wishes to enter into a License Agreement for Electronic Data Interchange (EDI) Value Added Network (VAN) services." (Ex. A-8; R4, tab 1/Bates 000006) CACI received a copy of the letter and VLA on or about 1 March 1994 (tr. 1/94-96). Addendum A to the VLA stated "EDI-capable DoD activities will be phased into using [the approach in the Technical Scope of Work] based on a DoD-wide implementation plan" (ex. A-16/Bates 03857). We find the "DoD-wide implementation plan" referred to in the VLA was that contained in the PAT report (finding 9; ex. A-7 at 12; tr. 1/87-88).

28. The VLA contained, among other things, the following provisions:

> **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 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 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.

. . . .

TECHNICAL SCOPE OF WORK

. . . .

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.

(R4, tab 1/Bates 000006-07, -10, -17)

29. In the Overview section, the VLA states: "DoD has set aggressive goals to make electronic commerce a standard way of conducting business . . . . [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." (*Id.*/Bates 000010)

30. The VLA required the VAN provider to successfully complete testing:

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 the 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.

(R4, tab 1/Bates 000015-16)

31. There is no evidence the VLA was ever amended to extend phase-in periods or to add DoD sites. There is nothing in the VLA about prices (R4, tab 1 *passim*).

32. The VLA incorporated by reference FAR 52.233-1, DISPUTES (DEC 1991) (R4, tab 1/Bates 000009). It did not incorporate a provision such as the Changes clause providing for an equitable adjustment to the contractor when the VLA was unilaterally revised by the government pursuant to Article 2 (finding 28).

33. GEIS was tested, certified and entered into a VAN Licensing Agreement with DoD on 28 July 1994 (ex. G-34; tr. 7/160-61).

<u>The CACI VLA</u>

34. The DoD EC/EDI program and, particularly, the plan to enter into multiple VLAs, was believed by CACI to have at least two effects on its business. First, CACI was providing EDI service to the Army, and it realized it would lose that direct relationship. The second effect was to afford CACI the opportunity to pick up additional DoD business from other services such as the Air Force and DLA. (Tr. 2/80) CACI planned to become a VAN provider (ex. A-13/Bates 000002).

35. CACI created a New Business Opportunity Capture Plan in early June 1994. The plan proposed to provide EDI VAN services at no cost to DoD. VLAs between DoD and multiple VAN providers were predicted, as was CACI's need to become a VAN provider in order to protect existing business. Revenue was projected to be derived from subscriptions to EDI trading partners at $788. A goal of 15,000 customers (5 percent of 300,000 DoD vendors),[6] annual revenue of $11,800,000, annual costs of $7,800,000 and annual gross profit of $4,000,000 was set forth. Attainment of the goal was projected via annual revenue growth to $800,000 by June 1995, $2,400,000 by June 1996, $4,300,000 by June 1997, $7,200,000 by June 1998, and $10,300,000 from July 1998 to March 1999. The plan observed there was no date set for execution of the VLA, although it was desirable that the CACI VLA be signed before the government began renewing VLAs in March 1995, and there was no date set for testing. According to CACI's interpretation of the VLA program, CACI could choose when to sign and when to test. (Ex. A-13/Bates 000001-04)

36. At the time of the Business Capture Plan, the Internet was still a relatively new communications vehicle and its use in the VAN program was seen by CACI as providing CACI with a means to make use of public communications infrastructure in lieu of the GEIS infrastructure (tr. 1/111). The Plan listed James Madaj as Proposal Manager (ex. A-13/Bates 000006). He was responsible for making arrangements for testing, which the Plan projected to be completed by 15 July 1994 (*id.*/Bates 000008; tr. 1/115).

37. CACI submitted a signed VLA to DECCO on 24 June 1994 (ex. A-14). The VLA was executed by Ms. Jackson on 2 September 1994 (ex. A-16/Bates 03848). According to Mr. Madaj, he contacted DECCO, the relevant government agency, soon thereafter more than once by phone to arrange for testing, but they never called him back (tr. 1/115). He testified that he did not recall to whom he spoke (tr. 1/226). However, we find his testimony unpersuasive, as documents in the record indicate that CACI did not endeavor to be tested in the first year of the agreement (R4, tabs 7, 16, 24 ("BACKGROUND")).

---

[6] According to CACI's sales manager Andrew Gorman, this was "worst case," and CACI management wanted 10 percent (tr. 2/87). Mr. Gorman based the 300,000 vendors on the number of checks sent by the Treasury Department each month to all government contractors (tr. 2/86).

38. In 1995 DITCO initiated a procedure for contacting VAN licensees who had not been successfully tested (R4, tab 42). By March 1995 at least 15 VANs were operational (R4, tab 94/Bates 000052). By letter of 7 July 1995 Ms. Jackson contacted CACI and informed it that certain information was required if CACI still intended to be a VAN (R4, tab 5). CACI responded by letter of 15 September 1995 providing the information and asserting it was preparing for testing in the near future (ex. A-28). Certification testing was suspended on or about 20 November 1995 and revised. The testing became more complex after January 1996. (R4, tab 17; tr. 6/262)

39. CACI was a value added service (VAS) provider and completed testing as a VAS in January 1995 (ex. A-37/Bates 001275). However, the VLA clearly covered only VANs (R4, tab 1 *passim*) and set forth certain requirements for testing to become a VAN (R4, tab 1/Bates 000015-16). Successful testing as a VAS did not qualify CACI as a VAN (tr. 6/157-58). CACI understood that it also had to undergo VAN certification testing (*e.g.,* R4, tabs 21, 44/Bates 000007). CACI did not complete VAN certification testing and become certified until 10 July 1996 (R4, tab 23; tr. 5/90). Thereafter, the new contracting officer, Debra Santoro, sent a copy of the VLA to CACI. The VLA was identical to the one executed in 1994 except that Ms. Jackson's signature was "whited out" and Ms. Santoro signed as contracting officer. (*Cf.* R4, tab 1/Bates 000009; ex. A-16/Bates 03848; tr. 7/204-05) The date under her signature was changed to 10 July 1996. She had done so at the behest of Colonel George Bettis and Will Griffith of DISA, who apparently believed the agreement should be re-executed once certification testing was successfully completed. (R4, tabs 1, 22, 23, 60; tr. 7/202-05) There is no evidence that the VLA was ever re-executed by CACI.

The CACI Gateway

40. The PAT report proposed switching SACONS-EDI to ABC EDI translation software and moving the gateway from CACI to Fort Lee in October 1993 (R4, tab 27/Bates 000092). Thus, CACI understood or should have understood that the EDI procurement system it operated for the Army was to become part of the system described in the PAT report (tr. 1/88-89). The deployment of SACONS-EDI to 77 Army sites, with an additional gateway in Phase III, was to take place over 24 months (R4, tab 27/Bates 000093-95). As the VAN program required that transmissions be ANSI X12 and DoD compliant, the SACONS-EDI translation software had to conform. The SACONS-EDI software, which was proprietary to CACI, did not conform. (Tr. 6/206-07, 7/75-76)

41. The DISA hubs, to which the procuring agency gateways were to be connected, became operational in February 1994 (tr. 6/270). On 8 March 1994 the Assistant Secretary of Defense directed transfer of the gateways to the DISA hubs. Operational control of the hubs and existing gateways was to be assumed by DISA within 60 days thereafter with formal transfer from the component (*e.g.,* Army) to DISA within

120 days. (Ex. G-7) Because of the non-conforming software, the SACONS-EDI gateway could not be transferred to DISA in March 1994 and was not transferred within 60 days thereafter (tr. 6/205-09).

42. CACI was unwilling to release certain proprietary information regarding its software associated with the SACONS-EDI gateway (ex. G-22/Bates 000006; tr. 6/205-06, 7/75-83). The situation was such that DISA could neither take information from SAACONS and do the translation without CACI or transfer the gateway as it existed (tr. 6/205-09).

43. To allow gateway and SACONS-EDI operations to continue while Navy and Army SAACONS sites were in transition, DISA issued Delivery Order (DO) No. 50 to CACI for a price of $289,136. DO No. 50 was dated 5 December 1994 and had a 180-day period of performance. (R4, tab 49/Bates 000037-38, 000042) The period of performance was extended to 12 July 1995 and the price to $485,123 (*id.*/Bates 000023; tr. 7/88). The SACONS-EDI gateway became a functioning part of the DISA system on 10 January 1995 (R4, tab 92 at 5). Subsequently, additional support from CACI for operation of the SACONS-EDI gateway from 1 October 1995 to 5 December 1995 was purchased for $324,708 through DO No. 72. The period of performance of that DO was extended to 22 March 1996. Funding of $566,930 was authorized. (R4, tab 50/Bates 000001-02, -029, -033)

44. The Army built a new version of SAACONS, which it called SAACONS 2.6, that it would own and share with DISA. Once SAACONS was ANSI X12 compliant, DISA was able to build the capability into its translation gateways and assume full responsibility for operation of the SACONS-EDI gateway. (Tr. 6/205-09) The record does not disclose the point at which SAACONS 2.6 was completed and implemented, although SAACONS 2.6 was scheduled for testing through March 1995 with all Army sites deployed by August 1996 (R4, tab 94/Bates 000006-08).

<u>The Successor VLAs</u>

45. By letter of 17 September 1996 Ms. Santoro informed the VANs that they had until 9 October 1996 to execute a new VLA under threat of termination of the existing VLA (R4, tab 7). The new VLA, DCA200-97-Z-0031, was returned by CACI with a signature dated 7 October 1996. Under Article 8 of the new VLA government liability was capped at $100,000. (R4, tab 8 at 5-6, 8) Ms. Santoro did not execute the new VLA because CACI had not successfully completed certification testing under the new agreement (tr. 7/209).

46. A revision of the new VLA was executed by CACI on 28 April 1997 (R4, tab 10 at 9). CACI successfully completed testing on or about 20 April 1998 and Ms. Santoro executed the new agreement on 22 April 1998 (*id.*, R4, tab 83). The original

VLA, No. DCA200-94-H-0015, was terminated upon execution of the revised VLA, No. CA200-97-Z-0031 (tr. 7/227; app. br. at 29; gov't br. at 112). The revised VLA was terminated on 15 February 1999 (R4, tab 86; tr. 7/219).

Implementation of the PAT Report

47. In February 1994 the system was completed to the point where a physical connection between gateways and network entry points could have been made (tr. 6/271-72). Shortly after implementation of the PAT report was begun DISA began to move toward making the DoD sites compliant with the Federal Acquisition Network (FACNET), which required that the DOD sites use the gateways, network entry points and VANs to electronically exchange transactions with business partners (tr. 6/227). The sites that were compliant were deemed "FACNET certified" (tr. 6/228). The schedule set forth in the GANTT charts of the PAT report showed completion of the implementation plan in approximately two years (finding 14). That plan was revised in May 1994. The VANs were provided copies of the revised plan and the plan was regularly discussed during monthly VAN meetings. (Tr. 6/169-70, 7/57-58) As CACI was the Army's SAACONS contractor and it was providing services at a gateway (findings 40-44), it is a reasonable implication that CACI knew of the revised schedule (tr. 7/58). However, the record does not reveal the specifics of the revision or revisions that were disclosed to VANs or CACI.

48. Throughout implementation progress reports were provided internally to DoD management (R4, tab 94). The progress reports showed some Phase I deployments completed in January 1995 (*id.*/Bates 000006). The reports referred to the "DISA TWO YEAR PLAN" (*id.*/Bates 000021-23). The two-year plan is consistent with the PAT report (R4, tab 27 *passim*).

49. Through July 1996 DoD sites were FACNET certified, as follows:

	1/15/96	2/15/96	5/21/96	7/11/96
Army –	121	144	170	173
Navy –	25	25	25	25
Air Force -	79	79	85	85
DoD misc. -	2	2	2	2
DLA -	0	0	1	1
TOTAL	227	250	283	286

(R4, tab 94/Bates 000223, -233, -249) There is no evidence the other four projected DLA sites (*cf.* finding 21) were ever certified.

50. It was CACI's understanding that there were 238 DoD offices which did most of the acquisitions for DoD (ex. A-31 at 2). It understood these offices to constitute the sites identified in the PAT report for implementation of EC within two years. Based on a

report by Mr. Gorman, CACI believed the implementation to be behind schedule at the beginning of 1996, as follows:

Department	System	Planned Number	FACNET Certified	Shortfall from Planned
Navy	ITIMP	3	1	2
Navy	APADE	25	7	18
Air Force	MADES	5	6	0
Air Force	MADES II	93	75	18
Army	SAACONS	77	159	0
DLA	SPEDE	5	0	5
Unidentified	Unidentified	30	Unknown	Unknown
TOTAL		238	248[7]	43

(*Id.* at 7; tr. 2/115, 118-19) Mr. Gorman interpreted the PAT report as calling for certification of 77 high volume Army sites. He did not know whether those 77 sites were included in the 159 FACNET certified Army sites. He also considered the absence of DLA sites to be significant, as DLA issued numerous delivery and purchase orders. (Tr. 2/125-26)

51. Mr. Gorman estimated that only 20,000 EDI purchase transactions per month were being generated as of late 1995-early 1996 (R4, tab 31 at 6; tr. 2/120). However, in the last quarter of calendar year 1995 DISA reported, and we find, 276,952 transactions (RFQs, quotes and purchase orders) were passing through FACNET. From April to June of 1996 DISA reported, and we find, there were 584,859 such transactions. (R4, tab 94/Bates 000250)

52. In a January 1996 report of an audit conducted from April to October 1995 the DoD Inspector General noted that 27 electronic bulletin boards were in use, of which 19 were used for small purchases (ex. A-32 at 2). Six of the 19 were reviewed (*id.*). DoD guidance at the time allowed for use of bulletin boards until full implementation of FACNET. The bulletin boards in question were interim measures. DLA reportedly intended to transition to FACNET at two sites in May and June 1996. The two DLA sites were not FACNET certified as of 31 August 1995 and only one of the five planned DLA sites was certified as of 11 July 1996. (*Id.* at 6; finding 49)

Effect of Changes from the PAT Report's Proposed Schedule on CACI

53. In January 1996 no DLA sites were certified (finding 49). Mr. Gorman believed that DLA's absence was significant because it accounted for "[a] large amount

[7] Mr. Gorman's report did not total all of the FACNET certified sites.

of the eligible transactions" (tr. 2/125-26). Also missing was a certified site for the Air Force's Wright-Patterson Air Force Base, which Mr. Gorman believed to be a high volume site (tr. 2/127-28).

54. According to CACI the low number of transactions affected its decision to "start its own VAN business" (app. br. at 26). We find no credible evidence of this. The evidence is to the contrary (*e.g.,* ex. A-25).

55. After it became a certified VAN, CACI expected "explosive growth" (tr. 3/21). However, by 1997 the VAN had been identified as a financial challenge (tr. 3/11-12). In August 1997 CACI had only 1,169 customers for its VAN (tr. 3/17-18). CACI promoted William Curry to head the group responsible for operation of the VAN on 1 November 1997 (tr. 3/19). He made internal changes to become more disciplined in the organization's approach to the business (tr. 3/22). Mr. Curry began to feel CACI was being "led astray" (tr. 3/24). The transactions that were supposed to come through FACNET "just weren't happening" (tr. 3/23). He believed the number of FACNET transactions was decreasing (tr. 3/24). At a meeting with DoD's Joint Electronic Commerce Project Office (JECPO) a new DoD electronic commerce architecture was revealed, after which he was convinced that the VAN program was being treated as a stepchild (tr. 3/25).

56. In a DoD Audit Report dated 4 March 1997, titled "SUMMARY REPORT ON THE DOD IMPLEMENTATION OF ELECTRONIC COMMERCE/ELECTRONIC DATA INTERCHANGE IN CONTRACTING FOR SMALL PURCHASES AND THE FEDERAL ACQUISITION COMPUTER NETWORK," it was reported that "alternative vehicles to FACNET for electronic commerce are increasingly being explored" (ex. A-53 at 11). Listed alternatives were use of electronic bulletin boards, electronic catalogs and expansion of the Internet (*id.*). It was also reported that government buying organizations are reluctant to post acquisition items through FACNET, and that vendors were reluctant to pay for VAN services (*id.*). We find that DoD was not making the effort necessary to create a system allowing vendors "to process the transaction[s] to and/or from any DoD activity, [and] minimally subscribe to one VAN to do business with all DoD, and register only once to become a DoD supplier" (R4, tab 27/Bates 000004).

CACI's Claims

The Original Claim

57. Mr. Curry prepared the original claim (tr. 3/26). The claim, in the amount of $73,208,256,[8] was submitted on 24 May 2000 and certified on 19 November 2003 (R4,

---

[8] The table titled "Numerical Results of the Model" shows lost profit of $73,208,257 (R4, tab 2/Bates 000211) and appears to have a $300,000 error.

tab 2; ex. A-61). The claim seeks unearned but anticipated profits as damages (*id.*). The amount is derived from estimated revenues of $107,130,948 and projected costs of $31,369,972 minus actual revenues of $2,252,719 (*id.* at Bates 000211). Throughout the proceedings the parties, and especially CACI, have referred to claim models as from a "but-for-world" (*e.g.*, tr. 3/52). We interpret this as referring to CACI's financial position "but-for" the government's alleged breach.

58. Mr. Curry did not include actual costs. He made certain assumptions in preparing the claim. He assumed a beginning date for damages of 1 October 1994 and an ending date of 1 April 1998 (R4, tab 2/Bates 000211, 000215-18; tr. 4/25). He estimated a base of 600,000 potential customers as of 1 April 1998. He estimated CACI's market share as 10 percent with a three-month "ramp-up" of the 300,000 customers predicted to be available at the outset, with 100,000 entering the system and 10,000 becoming CACI customers in each of September, October and November 1994. He projected the remaining vendors as entering the system on a straight-line basis, with CACI gaining 750 customers per month. The claim assumes an 8 percent "churn"[9] rate. CACI's damages increase because of churn even though the customer base is static, because each new customer is projected as paying a set-up fee which the departing customer would not have paid (R4, tab 2, ex. VII; tr. 4/97, 117). In revenue projections he used rates actually charged in CACI's arrangement with GEIS for the period prior to CACI's "stand alone" status, and CACI's actual rates thereafter. (R4, tab 2/Bates 000007-08, 000215-18) He estimated costs by taking costs actually experienced and extrapolating them out to accommodate a larger operation (*id.*; tr. 3/94-99). To those costs he applied provisional overhead (56.2 percent), G&A (8.3 percent) and fringe rates (30.2 percent, representing personnel costs such as sick leave) (R4, tab 2/Bates 000215; tr. 3/97-98).

59. Mr. Curry did not know what CACI's investment in infrastructure was at the time of the claim (tr. 4/109). He had no documentation for and was unable to measure churn (tr. 4/116-17). In estimating market share, he used a figure of 3,200 for CACI's existing QuickBid customer base in 1994. He did not verify that number. (Tr. 4/113-14) He could not recall where he obtained the GEIS prices for the period 1 October 1994 through 30 September 1996 (tr. 4/120). When asked whether the start date for revenues for operation of a CACI stand-alone VAN was consistent with what actually occurred, he conceded that it was not (tr. 4/118). His model shows revenues for QuickBid Net (QBN) prior to August 1996, when it came into existence (tr. 4/158). He testified that he showed "a more refined reading of the PAT report in my subsequent models" with respect to the "ramp-up" period of three months and acknowledged that the PAT report calls for a 24-month implementation (tr. 4/121). The overhead, G&A, and fringe rates used were from CACI's fiscal year 2000 (tr. 4/127). He did not consider that GEIS was a

[9] Customers entering CACI's business base from another VAN and leaving CACI's business base for another VAN each month (tr. 3/50).

VAN which had customers that did not use Quick Bid in projecting that all GEIS customers would transfer to CACI in October 1995 (tr. 4/122-24).

60. The damages sought in CACI's claim consist solely of anticipatory profits. The profits allegedly lost arise from the projection of revenues CACI argues it would have earned from contracts with parties other than DoD and not from the VLA. (R4, tab 2 *passim*)

61. The contracting officer denied the claim in a final decision dated 25 August 2000. CACI appealed on 27 September 2000 and the appeal was docketed as ASBCA No. 53058. (R4, tabs 3, 4)

The Expert Report and Testimony

62. After the Board's decision in *Gap*, CACI engaged Dr. Stephen Kalos of Charles River Associates, Inc. (CRA), an expert in economic damages, to provide testimony and an expert report on damages (tr. 3/115-16, 5/6-8). The report is dated 5 October 2001 and calculates damages at $55,800,000 (ex. A-57 at 27). The report was supplemented on 7 November 2002 and damages reduced to $51,340,326 (ex. A-58 at 4; tr. 5/8-9). The damages sought are expectation damages and consist solely of anticipatory profits. The profits allegedly lost arise from the projection of revenues CACI argues it would have earned from contracts with parties other than DoD and not from the VLA. (Exs. A-57, -58 *passim*)

63. Dr. Kalos' model uses a customer base of 300,000 (tr. 5/12-13). It is based on his interpretation of the PAT report and projects a total of 209 DoD sites accounting for 190,765 customers being deployed in the first 16 months of the program, with the remaining 109,235 customers coming online at the end of the 24th month, as follows:

Month	Number of Customers
1.	59,000
2.	23,500
3.	13,800
4.	17,700
5.	16,200
6.	11,700
7.	9,700
8.	14,765
9.	3,200
10.	3,200
11.	3,200
12.	3,200
13.	3,200
14.	3,200
15.	3,200
16.	2,000
. . . .	
24.	109,235
TOTAL	300,000

The first month's total includes 13,000 from the Air Force's GATEC system. (Ex. A-57 at 9, 11) GATEC, however, is not listed in the PAT report's three-phase deployment schedule (R4, tab 27/Bates 000296-98, 000309-22). Moreover, Dr. Kalos could not correlate the 109,235 vendors to any site in the PAT report (tr. 5/93). There is no evidence of a deployment schedule for vendors other than those identified in the VLA as supplemented by the PAT report (R4, tab 1 *passim*, tab 27 *passim*).

64. Dr. Kalos attempted to take information in the PAT report and extrapolate it to derive the vendor number for each system. For example, for APADE he projected the 2,000 vendors listed in the PAT report for Charleston FISC at paragraph 2.4.3.1.6 as "an average sized center" over the projected 25 APADE sites to reach the total of 50,000 (25 x 2,000). For ITIMP, the PAT report shows 65 vendors and Dr. Kalos projects 65 vendors. For SPEDE (50,000) the vendor population is supportable. (R4, tab 27/Bates 000069, 000079, 000099; ex. A-57 at 11) With other projections from the PAT report, however, the numbers do not hold up as well. For SACONS, Dr. Kalos projects 38,500 total vendors based on dividing a 17,000 vendor population by the number of sites referenced (34) and multiplying the resulting 500 per site vendor number by the 77 sites in the deployment schedule (R4, tab 27/Bates 000298; ex. A-57 at 11). However, PAT report paragraph 2.4.3.5.6, which he cites for support, states "There are over 17,000

vendors in the database which includes all 34 sites, and there is duplication across sites." Read in context, we find the total vendor number projected in the PAT report is 17,000, not 38,500. For the 98 MADES sites no PAT report section is cited. (R4, tab 27/Bates 000091; ex. A-57 at 11) The 39,200 vendor population is an assumption (tr. 5/104). Dr. Kalos based his estimate on SACONS minus 100 vendors per site (*id.*). As we have found SACONS to have a vendor population of 17,000, Dr. Kalos' projection methodology would result in 17,000 minus 9,800, or 7,200.

65. We find the number of vendors to be serviced as the result of the deployment set forth in the PAT report is not 300,000, but 124,265, as follows: APADE – 50,000; ITEMP – 65; MADES – 7,200; SAACONS – 17,000; SPEDE – 50,000. We find no support for GATEC as part of the deployment and we find no basis to include 109,325 vendors not associated with the site deployments. (R4, tab 27/Bates 000296-98)

66. The period for the damage model extends from February 1994 to July 1998 and assumes that 5 January 1994 was the start date for the first phase of the PAT report deployment (ex. A-57, attach. C at C1-C3). It thus assumes that all of the projected 300,000 vendors will be employing VANs for electronic commerce by the end of the PAT report's final phase-in period. Dr. Kalos used the CACI-GEIS relationship as the basis for damages between February 1994 and July 1996 (tr. 5/42).

67. Dr. Kalos assigned a market share of 27.6 percent for Phases I and II and 10 percent for customers at the end of Phase III, with an overall market share of 21.2 percent (ex. A-57 at 16). He projected that CACI-GEIS would have a total of 63,527 vendor-customers out of the projected 300,000 vendor total population by January 1996 (ex. A-57, attach C at C2; tr. 5/25). This remains constant until August 1996 when CACI became a stand-alone VAN. At that point, Dr. Kalos assigned to CACI one-half of the CACI-GEIS customers, or 31,763. CACI customers remain constant thereafter. (Tr. 5/26) However, he saw no documents which demonstrated that CACI actually carried over one-half of the CACI-GEIS customers (tr. 5/122).

68. Dr. Kalos used a churn rate of 4 percent (ex. A-57 at 18). No empirical data was presented to support this. Churn increases CACI's alleged damages (tr. 4/97, 117).

69. Dr. Kalos based the prices for CACI's services prior to becoming a stand-alone VAN on prices set forth in the CACI-GEIS agreement, specifically $16 per month subscription fee and $150 set-up fee (ex. A-58, revised ex. C). The $150 set-up fee was used throughout the damages period (*id.*). During the stand-alone period after August 1996, the annual fee utilized is $650 until October 1997 when the annual fee is reduced to $600 (*id.*; tr. 5/30). Dr. Kalos used empirical data for the pricing (ex. A-57 at 18-19). Total revenues for the model are $82,399,792 (ex. A-58, revised ex. C).

70. Dr. Kalos estimated total costs for the model at $32,279,151 (tr. 5/57). Cost elements include labor related costs: development and management, sales, help and operations, to which fringes, overhead and G&A are applied; and commissions (new, renew and bonus). Other cost elements are equipment, royalties, leased lines, other fixed costs, and telephone, to which G&A is applied. (Ex. A-58, revised ex. C) The costs are tied to the size of the operation (ex. A-57 at 20-25). Although the period of "but-for" revenues ends in April 1998, Dr. Kalos continued costs through August 1998 on the theory that obligations for services would have continued for some customers (*id.* at 20). He testified "[t]he costs that I estimate CACI would have incurred in the but-for-world are calculated in much the same way as Mr. Curry calculated them" (tr. 5/48). We find the costs in his model were not actual costs (*cf.* finding 73, *infra*).

71. Dr. Kalos estimated profits allegedly lost from the end of July 1996 as "roughly $30 million" (tr. 5/71). He also testified, however, that the customer pool would be smaller at that point (tr. 5/66-67). He later revised his estimate to $45 million if the stand-alone period was modified to begin in January 1996 (tr. 9/54-55).

72. The profit rate in Dr. Kalos' model is more than 60 percent (tr. 5/58, 8/45). He testified that is reasonable in a venture such as the stand-alone VAN (tr. 5/62). However, CACI's overall profit margin in the period was 6 percent (tr. 8/45). We find the 60 percent profit rate unreasonable.

73. We find Dr. Kalos used a vendor base which is not supported by the record. We further find unsupported his assumption that the entire vendor base of 300,000 would, pursuant to the PAT report schedule, use VANs. We find his start date for damages not only unsupported but directly contradicted by the terms of the VLA and CACI's certification date of 10 July 1996. Similarly unsupported is his assumption of the number of GEIS customers CACI would inherit when it became a VAN. Moreover, Dr. Kalos did no calculations on reliance or restitution damages (tr. 5/87).

The Revised Claim

74. After Dr. Kalos prepared his model Mr. Curry revised CACI's claim, which was transmitted to the government on 30 December 2002. That revision was certified on 6 January 2003 and sought damages in the amount of $91,051,195. (R4, tab 11/Bates 000002, 000040) The damages sought are expectation damages and consist solely of anticipatory profits. The profits allegedly lost arise from the projection of revenues (through April 1998) CACI argues it would have earned from contracts with parties other than DoD and not from the VLA. (R4, tab 11 *passim*) As the revision, among other things, significantly reduced the customer base while significantly increasing damages, the revision was treated as a new claim (tele. conf. memo. dtd. 2 Jan. 2003; consolidation request dtd. 26 Feb. 2003). A contracting officer's decision denying the claim was issued

on 12 February 2003 (R4, tab 12). The appeal was docketed as ASBCA No. 54110. The amount of the claim was subsequently reduced to $89,210,638 (ex. A-59).

75. The claim assumes a vendor population of 300,000 (tr. 3/122). Mr. Curry used 42 "parameters" in the claim, as follows:

> The following table highlights the differences between the original damages model (May, 2000) and this revised damages model (December, 2002)

Comparisons of Model Inputs

Para-Meter	Topic	New Model Value	Original Model Value
1	CACI-GEIS damages start date (SAACONS)	Apr-94	Oct-94
2	CACI-GEIS damages start date (Other than SAACONS)	Apr-94	Oct-94
3	CACI start up own network date	Jan-95	Oct-95
4	Complete transition from GEIS-CACI	Jan-96	Oct-95
5	CACI revenue from GEIS-CACI customers (initiation/license fee)	$150	$150
6	CACI revenue from GEIS-CACI customers (monthly subscription fee)	$16	$16
7	CACI QBN fees for the periods prior August96 (initiation/license fee)	$200	$200 through Sep-96
8	CACI QBN fees for the periods prior August96 (annual subscription fee)	$788	$800 through Sep-96
9	CACI QBN fees for the period August96 through September97 (initiation/license fee)	$150	$175 Oct-96 through Apr-98
10	CACI QBN fees for the period August96 through September97 (annual subscription fee)	$650	$650 Oct-96 through Sep-97
11	CACI QBN fees for the period October97 through April98 (initiation/license fee)	$175	$175
12	CACI QBN fees for the period Octber97 [sic] through April98 (annual subscription fee)	$600	$600
13	*"Volume discounts" for multiple subscriptions by the same company*:		
14	-- Single unit price multiple	1	1
15	-- 2-6 unit price multiple	3.66	N/A
16	-- 7-16 unit price multiple	7.43	N/A
17	-- 17-32 unit price multiple	13.40	N/A
18	-- 33-48 unit price multiple	19.74	N/A
19	*Percentage of multiple subscriptions by the same company:*		
20	-- 1 unit	94.0%	100.0%
21	-- 2-6 unit level	4.0%	0.0%
22	-- 7-16 unit level	1.0%	0.0%
23	-- 17-32 unit level	0.5%	0.0%
24	-- 33-48 unit level	0.5%	0.0%
	Calculate CACI trailing costs of subscriptions beyond the		

25	damages period, for servicing of commitments made during the damages period?	Yes	Yes
26	Churn	3.2%	8.0%
27	Trailing ("frictional") overlap	5.4%	0.0%
28	Intentional overlap	0.0%	0.0%
29	Total number of trading partners (vendors)	300,000	600,000
30	CACI share rate of customers from GEIS-CACI pool	53.1%	50.0%
31	CACI acquires percentage of GEIS-CACI customers over what period of months?	12	1
32	Number of DECA vendors	6,500	N/A
33	CACI share rate of subscribers from DECA vendors	100%	N/A
34	Period that DECA vendors enter into the pool	Jan-95	N/A
35	Number of vendors not specifically timelined in the PAT report, except DECA vendors	102,735	N/A
36	CACI share rate of other customers not from GEIS-CACI or DECA pools	5.00%	10.00%
37	GEIS share rate of other customers not from GEIS-CACI or DECA pools	4.69%	10.00%
38	Vendor adoption rates	Apply PAT report adoption	3-month transition from Oct-94 through Dec-94
39	EBSI-Sensoft royalty rates	Apply CRA logic	$125 per new customer
40	Sales Commission rates	Apply CRA Logic	Not applied at all
41	Actual loss findings	DCAA estimates	Reflected only actual revenues
42	CACI indirect rates	Use actual rates	Used provisional or estimated rates

III. KNOWN ERRORS

There are no known errors in this revenue model. CACI has attempted to reflect a conservative realism in its model and to incorporate the latest information. Moreover, the current model applies many of the conclusions and techniques from CRA's analysis, in all circumstances where CACI believes that the CRA analysis is superior to CACI's analysis. Some of these factors increase the calculated damage estimate, and some decrease the estimate. CACI's use of alternative factors or values from each source was made based on CACI's opinion of the accuracy or realism of the approach – not on the basis of how it would affect the resulting damage estimate.

(R4, tab 11/Bates 000007-08) The comparison indicates no departure from the original claim's failure to include actual costs (finding 58). We find, therefore, the revised claim did not include actual costs.

76. The claim adds 6,500 vendors that it attributes to the Defense Commissary Agency (DeCA). Although DeCA is referred to in the PAT report it is not in the PAT report deployment schedule. (Tr. 3/154-55, 236) Mr. Curry assigns all the DeCA vendors to CACI (tr. 3/236). He uses Dr. Kalos' deployment numbers (finding 64), adjusts them for DeCA, and has the adjusted number of 102,735 vendors Dr. Kalos introduced in the 24th month coming into the system on a straight line basis (12,842) commencing in the 17th month (tr. 3/232). As in Dr. Kalos' model, Mr. Curry projected expenses continuing for three months after receipt of revenue ends (R4, tab 11/Bates 000035-51)

77. Other new wrinkles include a churn component Mr. Curry called "frictional overlap," multiple license users, and the assumption of a stand-alone operation commencing in January 1995 (R4, tab 11/Bates 000013; tr. 3/131-32, 4/29). He reduced churn to 3.2 percent (*id.*). He projected higher numbers of CACI customers than Dr. Kalos. For example, in April 1998, the last month of operation, he estimated 42,106 CACI customers, compared to Dr. Kalos' estimate of 31,763. (R4, tab 11/Bates 000035; ex. A-58, revised ex. C)

Assessment of the Initial and Revised Claims Prepared by Mr. Curry

78. The claims were prepared by Mr. Curry, who is not only a CACI employee, but the head of the operation responsible for operation of the CACI VAN (findings 55, 57, 74). He is not in a position of objectivity. He is not an expert. The claims are based largely on assumptions (findings 58, 59, 75-77) and are, at best, estimates clouded by advocacy. The Board finds the claims and Mr. Curry's testimony thereon are not, therefore, sufficiently reliable and credible to be probative of the question of damages.

Review of the Claims by the Defense Contract Audit Agency

79. The government did not present an expert, but relied on the Defense Contract Audit Agency (DCAA), which reviewed CACI's claims and Dr. Kalos' damages model. The audit rejected the claims and model in total based, in part, on "severe cost estimate deficiencies because of inadequate supporting documentation." (Ex. G-37/Bates 000007)

DECISION

Entitlement

CACI argues the government breached the VLA in two material respects: by failing to follow the implementation plan in the PAT report, and by continuing to conduct electronic commerce with DoD suppliers. It relies principally on the doctrine of issue preclusion, citing our *Gap* decision. The government argues against application of the issue preclusion doctrine. It also contends that the *Gap* decision does not prevent us from finding that the government complied with the terms of the VLA and, in any case, CACI was not compliant with the VLA.

CACI argues as follows:

> For purposes of entitlement only, the ASBCA had previously decided in *Gap Instrument*: (1) that "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", and (2) that DoD's breach damaged holders of the License Agreement because the exclusivity of the License Agreement had business value. *Gap Instrument*, pp. 15,16. The Board expressed no opinion on the actual timing of the phase-in schedule contained in the PAT Report, and made no ruling on whether damages could be recovered during the initial 24 months of the implementation plan. *Id.*, p.15.

(App. br. at 54)

The facts in *Gap* are somewhat different than the facts here. There, the owner was a total outsider to the DoD EC/EDI community (we referred to his "peculiar circumstances," *Gap*, *supra*, 01-1 BCA at 154,865) and we were unable to find that he had access to the PAT report prior to execution of the VLA (*id.*). The government argued that the DoD-wide implementation was the phase-in plan set forth in the PAT report, and did not argue that it had the right to extend the phase-in period under the VLA. We very specifically held the VLA limited to small purchases and declined to make a finding on anything other than the total length of the phase-in period of two years (*id*. at 154,866-67). We also had specific, credible testimony that DLA was violating the VLA by conducting EC through means other than the VANs and that vendors were also using alternate means (*id.* at 154,863-64). We concluded that the non-participation of DoD agencies such as DLA and the non-participation of vendors doing EC with agencies such as DLA amounted to a breach of the VLA. We did not make any findings as to the extent of the non-participation. We also had specific, credible evidence in the form of Inspector General and GAO reports that DoD had, *inter alia*, by May 1996 begun active pursuit of EC by means other than VANs (*id*. at 154,864, finding 22). It was that finding that supported our holding that DoD had failed to require vendors to use only VANs for small purchase EC in violation of the VLA. We also concluded that the VLA had "business value" (*id.* at 154,867). We therefore consider CACI's arguments as quoted above to accurately interpret our holding in *Gap*. However, interpretation of the implementation plan, its effect and its timing is clearly still at issue.

We need not resolve the potentially thorny question of issue preclusion.[10] Based on the record here, our outcome, as set forth below, is consistent with *Gap*. Indeed, we again agree with CACI's assessment:

> Appellant contends that the government breached the VAN License Agreement in two related respects: first, the government failed to follow the implementation plan set forth in the PAT Report; secondly, some DoD sites were never connected to the DISA hubs and continued to conduct electronic commerce with DoD suppliers in breach of the VLA.

(App. br. at 59) Clearly, DoD did not meet the implementation schedule, some sites were never connected to the hubs, and sites listed in the implementation plan continued conducting EC by means other than the VANs (findings 21, 49, 56). Moreover, as set forth below and in *Gap* at 154,867, we consider the nature of DoD's near-abandonment of the "single face to industry" approach in the VLA (findings 17, 55, 56) to be an action going to the heart of the VLA that transcends its right to unilaterally modify. DoD thus breached the agreement. Where we do <u>not</u> agree with CACI is in the assessment of the extent and effect of the breach.

Several other matters must be addressed before proceeding to our analysis of the implementation schedule. First is the question of whether CACI's status as a VAS provider qualified it as a VAN provider, as CACI argues. We think not. Clearly, VAS and VAN services are two different things (findings 30, 39). There can be no dispute as to whether the VLA required testing and certification as a VAN before CACI could offer VAN services (finding 30). Notably, CACI cites no cases to support its position, which would require us to totally ignore an unambiguous provision of the VLA (app. br. at 69-71).

---

[10] We note that our specific holdings in *Gap* were, and were intended to be, limited.

We find CACI's contention that it is entitled to damages for the period before it was a certified, operational VAN, indeed, before execution of the VLA, to be utterly without merit. We have held that we had jurisdiction commencing with the signing of the VLA on 2 September 1994 and that CACI's ability to prove damages based on its relationship with GEIS was not jurisdictional. We stated at note 8 that we had an ongoing duty to assure ourselves of subject matter jurisdiction. *CACI International, Inc.,* ASBCA Nos. 53058, 54110, 03-2 BCA ¶ 32,406 at 160,383-84. We also noted that we have held that a party may seek damages for actions relating to a contract even if they were incurred prior to the date of the contract. *Id.* at 160,384. However, the damages sought here for loss of profits before CACI became a certified, operational VAN and before execution of the VLA related not to the VLA but to its arrangement and agreement with GEIS (findings 6, 59, 75). We are without jurisdiction over CACI's agreement with GEIS, which was itself a VAN with a DoD VLA (finding 33). CDA, 41 U.S.C. § 602. Moreover, there is simply no logical or factual connection between the alleged GEIS-related damages and CACI's VLA. We find the argument tenuous in the extreme and unsupported by references to cases involving pre-contractual breach such as *Rumsfeld v. Applied Companies, Inc.,* 325 F.3d 1328 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 981 (2003) (*Applied Companies*), and cases involving agreements between the parties that the agreement could be applied retroactively, such as *Brewer v. National Surety Corp.*, 169 F.2d 926 (10^{th} Cir. 1948). The cases cited are either inapposite, not precedent for this Board, or both.

Next is the argument that somehow the government is responsible for CACI not being tested and certified until July 1996. According to CACI it would have been motivated to seek testing and certification much earlier if DoD had implemented the plan as set forth in the PAT report. However, the record will support neither this contention nor the allegation of culpability inherent in the litany of events strung together to support CACI's desired conclusion. (App. br. at 71-75) As to DoD's implementation, we have found no credible evidence that it affected CACI's decision to proceed with starting its business as an independent VAN (findings 37, 54). The litany of events in CACI's brief is not evidence supporting its contention that DoD is somehow to blame for CACI failing to seek certification earlier. The best that can be said is that it is unpersuasive and seeks from us inferences we may not draw without exceeding the limits of judicial discipline. CACI has simply failed to meet its burden of proof by a substantial margin.

Critical to the outcome here and particularly to the question of breach damages is the content of the implementation plan and the actual timing of the phase-in. We have now fully analyzed the plan and that timing. The evidence presented in these appeals, which was in substantially greater detail than the presentations in *Gap,* reveals that the government's performance, while still violative of the terms of the VLA, was significantly less at variance with the VLA than argued by CACI. Although the government may now dispute this, we think it unquestionable that the VLA provided for deployment in accordance with a "DoD-wide implementation plan" and that plan was contained in the PAT report (findings 27, 28). The implementation plan had a 24-month, 3-phased schedule (finding 21). As it was approved on 5 January 1994 with a lead-time of up to 90 days thereafter (finding 26), a reasonable interpretation is that the implementation would have started by 5 April 1994 and been completed by 4 April 1996.[11] Further, the PAT report characterized the phase-in dates as the best estimates from the sites, and dependent on funding (findings 20, 26). The VLA also gave DoD the right to unilaterally modify the VLA. We therefore cannot conclude that the government breached the VLA by not meeting the interim dates. However, we do not interpret the VLA as supplemented by the PAT report schedule as treating the two-year completion date as an estimate. Internal government briefings referred to the "DISA TWO YEAR PLAN" (finding 48). Moreover, two years is the uniform completion date for all sites in the PAT report implementation schedule (finding 21) and thus analogous to a contractual performance period. The VLA as supplemented by the PAT report allows for slippage in the start date, and thus ultimately the completion date, by caveats on approval and funding (finding 26). We know when the program was approved and internal government briefings refer to some completed Phase I deployments in January 1995 (finding 48). We may thus reasonably infer that funding was available from that and from the government's actions in implementing the program. Moreover, the government could have modified that completion date unilaterally but did not do so. We hold that the VLA, reasonably interpreted, contractually bound the government to fully deploy within two years from approval and receipt of funding. As stated above, we compute the full deployment date as 4 April 1996.

The VLA committed DoD sites deployed through the PAT report plan to exchange small purchase electronic transactions with contractors under the program through VANs, and to require all contractors conducting EC with those sites to use VANs for small purchases (findings 20, 28, 29). By 21 May 1996, 283 sites had been deployed (finding 49). Not all of the 208 sites listed in the PAT report were among the 283. For example, only one DLA site was deployed. Of the remaining 208 sites listed in the PAT report (finding 21), 85 of 98 Air Force sites and 25 of 28 Navy sites were deployed (finding 49). CACI's contemporaneous data (early 1996) does not show any deficit among the Army sites (finding 50). Therefore, there was a shortfall of at least some 21 sites, or 10 percent, after phase-in. Moreover, while the VLA gave unilateral authority to DoD to modify the schedule (finding 28), the length of the period to deploy all 208 sites was never contractually amended, nor was the list of sites (finding 31). VANs were apparently told of a revised schedule, and CACI would have known that DoD was behind schedule. Additionally, the VAN candidates had been told in December 1993 and in the PAT report that 65 percent of 6,000,000 (3,900,000) small purchase actions would be electronically handled and that 238 DoD sites handled 85 percent of DoD actions (finding 9). Extrapolating that to the 208 PAT report sites representing 87 percent of 238, it is reasonable to expect 74 percent (.87 x .85) of the 3,900,000 transactions (2,886,000 or

[11] *Gap* did not address the lead time and thus the start date.

721,500 quarterly) to be handled through the PAT report sites. From April to June 1996 there were 584,859 VAN transactions, or a shortfall of 136,641 (19 percent). While not a failure of major magnitude, it is evidence that the missing sites were having some effect on the number of VAN transactions.

In addition, Mr. Curry's testimony and the DoD audit report support the conclusion that DoD was not following-through on the VAN program and was instead in 1997 creating new electronic commerce architecture, using the Internet and electronic billboards, and thereby breaching the VLA requirement that all vendors at the PAT report sites use VANs for small purchase EC (findings 55, 56). As stated above and in *Gap*, this was a breach that went beyond mere delay. Thus, we need not address the government's argument that a delay cannot constitute a breach.

The government argues that CACI was itself in violation of the VLA. While CACI's actions may have been an impediment, we have found that the gateway at the heart of the government's argument was operational by January 1995 (finding 43). The government has not quantified the effect of this on the program (gov't br. at 212-18). Accordingly, we cannot assess the effect, if any, on the two-year implementation schedule.

We hold that the government violated the VLA by not fully deploying the sites listed in the PAT schedule within the promised two years, and by introducing new means of EC which resulted in not requiring small purchase EC to be carried on through VANs, thereby effectively abandoning the "single face to industry" promise in the VLA. The government thus breached the VLA.

Damages

CACI seeks anticipatory profits as damages. CACI asserts that the revenue loss alleged was the proximate result of the breach. It argues that it has presented a sufficient basis for estimating those alleged lost profits and therefore, recovery of expectation damages. The government argues, *inter alia*, that CACI has not established causation or foreseeability, and that its "statements and conclusions ignore reality as well as the evidence" (gov't br. at 243).

At the outset of the discussion of damages, we note that damages generally are characterized as expectation, restitution and reliance damages. RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981). We do not perceive that CACI has sought restitution damages (app. br. *passim*; app. reply br. *passim*). CACI has limited its claims to anticipatory profits, with a nod to reliance damages as discussed below.

Lost Profits

Lost profits may be recovered for breach of contract when it has been established that:

> . . . (1) the loss was the proximate result of the breach; (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.

Energy Capital Corp. v. United States, 302 F.3d 1314, 1325 (Fed. Cir. 2002). Further, not all breaches are remediable in damages. *San Carlos Irrigation and Drainage District v. United States*, 111 F.3d 1557 (Fed. Cir. 1997).[12] This is particularly true of claims for lost profits, which must be "definitely established." *Applied Companies,* 325 F.3d at 1340.

The "proximate result" or causation prong is affected, as are all damages questions in these appeals, by the nature of the VLA. The VLA was a "no-cost" agreement involving a new venture. Profits were not to be derived from the VLA but from contracts with vendors. CACI got into the game late, and we have found that prior to its certification, the transactions were less than 20 percent behind that which the PAT report implementation plan had represented. Lost profits of the magnitude sought by CACI cannot be held the proximate result of the government's failure to meet the implementation plan or its subsequent failure to realize the "single face to industry." Damages for items such as the purchase of a new computer or the leasing of office space to support its VAN effort program might be direct and proximate costs of the attempt to carry out its bargain in the new VAN undertaking, but lost profits are a different matter:

> . . . [P]rofits are uncertain; they depend on so many contingencies, especially in a new enterprise, that it is, in most cases, impossible to say that the breach was the proximate cause . . . .

---

[12] This case was cited as an "excellent example" of the principle that "whereas speculative damages are generally not recoverable against private parties, this rule is strictly enforced in government transactions." Lionel M. Lavenue, *Area Summaries: Survey of Government Contract Cases in the United States Court of Appeals for the Federal Circuit: 1997 In Review*, 47 AM. U. L. REV. 1393, 1461-62 (1998).

> . . . Suffice it to say that almost always, in the case of a new venture, the fact that there would have been a profit, had there been no breach, is too shrouded in uncertainty for loss of anticipated profits to form a reliable measure of the damages suffered.

Neely v. United States, 285 F.2d 438, 443 (Ct. Cl. 1961).

Moreover, the Federal Circuit has recently declined to accept that causation can be found any time the breach is a "substantial factor" in causing the claimed lost profits. *California Federal Bank v. United States*, 395 F.3d 1263, 1267 (Fed. Cir. 2005). In rejecting that standard, the Court applied the more stringent standard it applied in *Applied Companies*, *supra*, that the causal link between breach and loss of profits must be "definitely established." *Id.* at 1267-68. The Court went on to uphold the Court of Federal Claims decision denying lost profits on the basis that California Federal Bank did not meet its burden of proof on causation. *Id.* at 1272-73.

While we are satisfied that CACI was a well-established and competent company with experience in computer-generated transactions, it was also primarily a *government* contractor. It did not enjoy wide recognition in the supplier (vendor) community. (Finding 2) CACI was entering a customer community in which it was not well-known and the venture itself was untried. While lost profits are not *per se* precluded where a venture is new, they are hard to prove. *Neely, supra.* In this instance, the matter is complicated by the fact that the profits were not to be made directly from the VLA, and thus the government, but from vendors to the government (finding 28). For all the reasons set forth above, and because the assumptions made in the damages models are at odds with our findings here, as discussed *infra*, we cannot find the government's breach was the proximate cause of the damages sought. We cannot, therefore, attempt a jury verdict, as causation must be shown. *Citizens Financial Services, FSB v. United States*, No. 93-306C, slip op. at 58 n.17 (Fed. Cl. March 7, 2005).

As to foreseeability, CACI argues that "profits or losses recognized from trading partners [vendors] were within the contemplation of the parties" (app. br. at 78). The government argues that the VLA allocated risk to CACI and that the parties agreed in the VLA that the government would not be the source of CACI's revenues. We agree insofar as the VLA is specific in establishing that, as between CACI and the government, "[s]ole consideration shall be the EDI VAN services provided by the EDI VAN provider and access to the DOD data provided by the DOD Hubs" (finding 28). The VLA thus anticipated that CACI's revenues would come from user/vendors. This supports CACI's argument that the loss of some profits from contracts with those user/venders was a foreseeable consequence of a government breach. However, the foreseeability of some loss of the same general kind is not sufficient where, as here, for the reasons explained below, the loss actually incurred (or claimed) was not foreseeable. *Landmark Land Co. v. FDIC,* 256 F.3d 1365, 1378-79 (Fed. Cir. 2001).

In the VLA the government pledged to review the no-cost provision annually (finding 28), which should have left no doubt about the government's intentions at the outset. The VLA also gave the government the right, in its own interest, to place the VAN program in the marketplace as a competitive procurement (*id.*). The VLA also contained an express "no minimum guarantee" provision (*id.*). The parties could not have reasonably misunderstood the intention in the VLA that no money would change hands between the parties unless the government had a change of heart. Foreseeability of government responsibility for revenues, let alone profits, is therefore more questionable than where the contractor is paid by the government for its performance. As indicated above, the purchase of a new computer or the leasing of space may have been necessary items for which the government, as the entity motivating CACI to incur such costs, was primarily responsible. For such damages, foreseeability is a much less tenuous proposition. Profits, however, involve many variables. *Neely, supra.* Here, the magnitude of the profits claimed in CACI's models are unlikely to be foreseeable in any event. Indeed, CACI claims lost profits of more than 60 percent when company profits historically had been in the range of 6 percent (finding 72). There is nothing to indicate such profits were foreseeable by the parties when the VLA was signed.

Other matters that affect foreseeability may be found in the provisions that afford the government the power to unilaterally revise the agreement, without benefit of anything resembling a "Changes" clause (findings 28, 32). Moreover, the parties could terminate the agreement with only thirty days notice (finding 28). Thus, the duration and terms of the VLA were subject to change without any express provision for recompense. Assuming, *arguendo,* there was some level of foreseeability, it was not such as to treat the VLA as a "cash cow" for VAN providers. In such circumstances, anticipated but unearned profits may be properly precluded to avoid disproportionate compensation:

> A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires it in order to avoid disproportionate compensation.

RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981).

Although uncertainty as to amount will not, of itself, defeat a lost profits claim, the measure of damages must be reasonably certain. *California Federal Bank, supra,* 395 F.3d at 1267. As the government argues (gov't br. at 274), under the "reasonable certainty" prong, damages for speculative or remote losses may not be recovered. That standard requires reliable proof of the factual basis of the claim:

> We note, as an initial matter, that the claim for lost profits is, at bottom, a prediction about the success the bank could have expected to achieve had it been permitted to proceed with performance under its contract. In order for such a claim to satisfy the reasonable certainty standard, the proof relied upon must be rooted in fact. The court, in other words, must be able to look either to the actual performance of the bank or to the experiences of the industry of which it is a part, to ensure that the profits being claimed are consistent with the projected extension of the bank's economic activity. A claim whose basic structural components lack such factual foundation is simply speculation.

Castle v. United States, 48 Fed. Cl. 187, 206 (2000), *aff'd in part, rev'd in part on other grounds,* 301 F.3d 1328 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 925 (2003). CACI does not meet that standard.

CACI has relied on what it refers to as the "but-for world" (*supra*, n.8) in creating its lost profit estimates. The "but-for world" does not stand scrutiny. In the first place, the claims created by Mr. Curry are just that – claims. We have never looked favorably upon claims as proof of disputed facts. *Peterman, Windham and Yaughn, Inc.,* ASBCA No. 21147, 77-2 BCA ¶ 12,674. Moreover, Mr. Curry's position in the organization and the rationality of his assumption must be considered in assessing the probative value of his damage models (finding 78). *California Federal Bank, supra,* 395 F.3d at 1270. As can be seen from the "42 parameters" in both of the claims he authored, there are assumptions as to CACI-GEIS damages, the start date, the number of vendors, churn, "frictional overlap," DeCA subscribers, and the extent of the breach (finding 75), that are at odds with what we have found. For instance, although we believe that 300,000 is supportable as the total number of DoD vendors (findings 7, 11), we have calculated a total of 124,265 vendors in the deployment schedule of the PAT report (finding 65). The VLA as supplemented by the PAT report does not contain a schedule for deployment of other sites and systems to accommodate the remaining DoD vendors. The VLA cannot, therefore, be reasonably interpreted as promising the deployment of all sites and incorporation of all vendors. It does not include DeCA (finding 76). It does not include GATEC (finding 63). Further, the PAT report and a pre-award briefing told the potential VAN providers that only 65 percent of small purchase transactions would be handled through EC/EDI, and that 238 large volume sites handled 85 percent of that action (finding 9). As only 208 sites were to be deployed and the volume of transactions immediately before CACI was certified was only 19 percent below projections, we cannot conclude that CACI's "but-for world" is "rooted in fact." *Castle v. United States, supra.* Our analysis of Dr. Kalos' models leads us to conclude that it suffers from the same inconsistencies (findings 63-73). We hold, therefore, that CACI has not proved entitlement to lost profits with reasonable certainty. The damages models are just too speculative and too far afield from our analysis of the VLA, PAT report, and the surrounding facts.

CACI is also faced with the Court's holding in *Applied Companies*, *supra*. There the Court affirmed this Board's holding of government liability in *Applied Companies, Inc.*, ASBCA Nos. 50749 *et al.*, 01-1 BCA ¶ 31,325, and, because the Board had indicated anticipatory profits might result, offered guidance as to damages. Although that case dealt with a requirements contract, we find it sufficiently similar to treat the denial of anticipatory profits there as analogous to CACI's appeals. In that case, the government breached the contract by its negligence in the preparation of estimates of the quantities of products it would need in the coming year. It discovered the error in its estimates after release of the RFP but prior to contract award. The error was not disclosed to the contractor. The Court upheld the Board's breach determination but offered guidance as to damages due to the Board's statement that recovery of anticipatory profits may be appropriate. *Applied Companies*, 325 F.3d at 1336. The Court stated that when a requirements contract is breached by the government's failure to fill all its requirements through purchases from the contractor, anticipatory profits may be recoverable. This was not so, however, when the government breach was solely from negligently prepared estimates. The Court pointedly asserted "[a]llowing Applied to recover lost profits on the [estimated quantity] would effectively convert the contract from one to satisfy all of DLA's requirements to one [that guaranteed] a certain level of business. Contract estimates 'are not guarantees or warranties of quantity,' however." *Id.* at 1339. We think the principle must be applied here, where the contract was no-cost, consideration to the contractor was expressly identified as access to DoD data from the DoD hubs, the PAT Report schedules were set forth as estimates, the government reserved the right to use other sources than the VANs until the system was fully in place, there was no minimum guarantee, and the breach was principally from the inaccuracy of the PAT Report estimates. Allowing lost profits here would convert the VLA from an agreement with no minimum guarantee of business to one that guaranteed the level projected by the PAT Report estimate, a process eschewed by the Court in *Applied Companies*, and affirmed in *Hi-Shear Technology Corp. v. United States*, 356 F.3d 1372, 1380 (Fed. Cir. 2004), where the Court said "*Applied Cos*. makes it clear that, *regardless of the evidence,* as a matter of law lost profits on unordered quantities are not available to a contractor in a case such as this" (emphasis added).

Finally, even if CACI had made a more persuasive case, it would still have to overcome the fact that the profits allegedly lost come not from the VLA but from other non-government contracts. Generally, such lost profit claims are not allowable:

> The cases seem to lead to the conclusion that only in exceptional circumstances can an equitable adjustment be made for extra cost in performing one contract, caused by the

> government doing things it has a right to do, respecting other contracts. Such rare cases will be those of concealment from the plaintiff, when it bids, of already formulated plans and intentions respecting other contracts, which plans and intentions the plaintiff needs to know to estimate its costs, possibly some instances of intentionally and knowingly hindering the plaintiff in doing the contract work, and perhaps other instances where some degree of government culpability and "proximate cause" exist.

General Dynamics Corp. v. United States, 585 F.2d 457, 466 (Ct. Cl. 1978); *see also Rocky Mountain Construction Co. v. United States,* 218 Ct. Cl. 665, 666 (1978).

Lost profits from other contracts generally are viewed as consequential. *Rocky Mountain* at 666. "[R]emote and consequential damages are not recoverable in a common-law suit for breach of contract. . . . especially . . . in suits against the United States." *Northern Helex Co. v. United States,* 524 F.2d 707, 720 (Ct. Cl. 1975), *cert. denied*, 429 U.S. 866 (1976). The claims and damage models as well as the facts proved in these appeals demonstrate that any profits that would have been earned, and thus the profits allegedly lost, have their genesis in projected revenues to be realized from contracts with vendors and not from the VLA (findings 60, 62, 74). Profits that are not the direct and immediate results of contract performance, but instead of the kind realized from other independent or collateral enterprises, are too remote and uncertain to be part of the recovery in a breach of contract case:

> 2. Our predecessor court, the Court of Claims, in breach of contract cases repeatedly refused to award damages for profits lost on transactions not directly related to the contract that was breached. *See Roberts v. United States,* 18 Cl.Ct. 351, 358 (1989) (citing Court of Claims cases denying lost profits damages). Of course, not every injury resulting from a breach of contract is remediable in damages. *Globe Ref. Co. v. Landa Cotton Oil Co.,* 190 U.S. 540, 23 S.Ct. 754, 47 L.Ed. 1171 (1903).
>
> In *Ramsey v. United States,* 121 Ct.Cl. 426, 101 F.Supp. 353 (1951), *cert. denied*, 343 U.S. 977, 72 S.Ct. 1072, 96 L.Ed. 1369 (1952), where the government delayed payment on contracts with the plaintiff, the court, in denying lost profits damages, stated:
>
> > The profits lost from the corporation's over-all business activities, because of its shortage

> of capital allegedly occasioned by the Government's failure to pay the contract amounts when due, may not be recovered either. It is important to bear in mind that the corporation's claim is not for the anticipated profits of the contracts in question, but is a claim for the anticipated profits of its entire business enterprise. The lost profits of these collateral undertakings, which the corporation was unable to carry out, are too remote to be classified as a natural result of the Government's delay in payment. . . . "[T]here is a distinction by which all question[s] of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages, to be recovered against the delinquent party upon a breach of the agreement. . . . But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit."

Id. 101 F.Supp. at 357-58 (quoting *Myerle v. United States*, 33 Ct.Cl. 1, 26 (1897)).

This reasoning is equally applicable to the present case. Here the Court of Federal Claims awarded damages for the profits Wells Fargo allegedly would have made on the additional loans it could have made if the guarantee had been issued. Like the lost profits in *Ramsey*, Wells Fargo's loss of interest on additional loans it allegedly could have made had there been no breach is "too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit."

Wells Fargo Bank, N.A. v. United States, 88 F.3d 1012, 1022-23 (Fed. Cir. 1996). We think it undisputable that the profits sought here by CACI were not the direct and immediate fruits of the VLA. The profits sought would have been realized, if at all, through contracts with vendors. The profits would thus have been from independent and collateral undertakings. As such, the damages sought are too remote and speculative to be allowable.

In so holding, we recognize that in *Energy Capital Corp, supra*, our appellate court granted lost profits. We think that case is distinguishable. There, Energy Capital had previously successfully provided institutional financing to provide optimized use of energy. 302 F.3d at 1317. It recognized the need for energy improvements also existed with properties managed by the Department of Housing and Urban Development (HUD) and approached HUD. Thereafter, in September 1996 an agreement ("AHELP") was negotiated to eliminate regulatory barriers to financing energy improvements in HUD properties. *Id.* The Court said of the AHELP "the express purpose of the AHELP agreement was to permit Energy Capital to make up to $200 million worth of loans." *Id.* at 1329. Energy Capital agreed to structure the loans so that cost savings due to energy improvements would cover 110 percent of the annual loan payment. AHELP had a cap of $200,000,000 for loans originated under the program and set forth both the interest rate at which Energy Capital would loan money (3.87 percent over Treasury rate) and the rate of interest for money borrowed from Fannie Mae (1.87 percent over Treasury rate). After conducting training programs for HUD, Energy Capital began marketing efforts and in February of 1997 already had 123 applications. However, when an article appeared in THE WALL STREET JOURNAL stating (apparently erroneously) that the agreement was a political pay-off, HUD terminated the agreement, which did not have a termination clause. *Id.* at 1318-19.

The Court of Federal Claims granted Energy Capital's claim for lost profits. *Energy Capital Corp. v. United States,* 47 Fed. Cl. 382 (2000). The Federal Circuit, with modifications to the discount rate, affirmed. *Energy Capital,* 302 F.3d at 1334. There are significant differences between that decision, *Wells Fargo,* and the facts here. In the first place, the Court described the "express purpose" of the agreement as permitting Energy Capital to make loans of a specific amount. The rate it could charge for loans was 3.87 percent over the Treasury rate. That was included in the agreement. The cost of Energy Capital's financing from Fannie Mae was 1.87 percent over the Treasury rate. Thus, Energy Capital's gross profit rate was two percent. That was calculable from the agreement. In short, the only variable of any consequence was how many loans could Energy Capital make? The universe of users was also calculable with some degree of certainty and there was persuasive testimony that only 34 percent of tenants would not be interested. *Id.* at 1320-23. The situation in *Wells Fargo* (which is quoted with approval in *Energy Capital*) was different, in that the underlying agreement was a guarantee that did not cover the part of the business venture from which profits were allegedly lost. "In the present case, in contrast, the purpose of the guarantee was to enable Wells Fargo to make its loan to High Plains, not on some other loans it might make." *Wells Fargo,* 88 F.3d at 1023. The Court thus denied recovery. *Id.* at 1025. We find *Wells Fargo* more persuasive on the facts before us, as explained below.

In *Energy Capital* the Court was presented with a company that had previously and with apparent success executed a similar program. It had a product with undeniable appeal. Indeed, the Court found that tenants could save 10 percent more in energy costs than the cost of the loan. There is no mention of competitors in the decision, and we may infer from the reaction to THE WALL STREET JOURNAL article that HUD had given Energy Capital a singular advantage with its regulatory waiver. The market was established and the gross profit was easily discernible from the AHELP agreement. The Court described the "express purpose" of the AHELP agreement as permitting Energy Capital to make $200,000,000 in loans, so the amount of the loans Energy Capital could make was also part of the AHELP agreement. This is very different from the VLA and the situation surrounding CACI.

There was significant competition in CACI's world. CACI did not enjoy widespread recognition in the supplier community (finding 2). It was in direct competition with other VANs, including GEIS (findings 9, 33, 38). The VLA expressly provided no minimum guarantee (finding 28). As the VLA was no-cost, it said nothing about prices (finding 31). Pre-existing DoD policy allowed existing systems to stay in place until the VAN system was "fully implemented" (finding 26). Thus, government agencies had some flexibility in using other systems while the VAN system was being completed. The schedules, or "Milestones," were characterized as estimates and retained for DoD components "flexibility to deploy their EDI capability to their priority locations in variance of the schedule" (findings 20, 22). In short, neither the VLA nor CACI's circumstances contained any of the assurances inherent in *Energy Capital.* Accordingly, we are guided by *Wells Fargo,* as extensively quoted above. CACI's claims for lost profits are denied.

<u>Reliance Damages</u>

As to reliance damages (there is no suggestion appellant seeks restitution), in the government's brief it requested the opportunity to file a reply if appellant "request[s] reliance or restitution damages or set forth new theories with regard to breach damages" (gov't br. at 303). In its reply brief, appellant acknowledges that it did not present a claim based on restitution or reliance. Appellant then, in the same three-sentence paragraph, argues "certainly there is evidence in the record of CACI's actual losses [which are] the measure of reliance damages." It then argues "[t]here is nothing in the record to indicate that a remedy of reliance damages in lieu of expectation damages cannot be considered." (App. reply br. at 125) We are not persuaded that, without CACI's specific factual and legal arguments there is a way for us to do so, given the way the case was presented.[13]

As we understand reliance damages, they must be based on fully proven actual costs. *Glendale Federal Bank, FSB v. United States*, 378 F.3d 1308, 1313 (Fed. Cir. 2004). We have found no basis in this record to ascertain what CACI's actual costs were. Mr. Curry did not include actual costs and Dr. Kalos based his calculations of costs on Mr. Curry's (findings 58, 70, 75). In addition, Dr. Kalos testified he made no calculations for reliance or restitution damages (finding 73). Accordingly, we did not afford the government the opportunity to file a reply to appellant's reply brief and are unable to craft an award for reliance damages.

SUMMARY

We have found the government breached the no-cost VLA when it did not timely complete the implementation schedule incorporated by reference into the VLA and when it did not follow-through on its "single face to industry" approach. However, CACI has sought only lost profits, and the lost profits alleged by CACI are not recoverable because:

1) the profits allegedly lost were not the proximate result of the breach;

2) the profits allegedly lost were not foreseeable by the parties;

3) the profits allegedly lost were not reasonably certain;

4) the damage estimates were not consistent with the facts of the case; and,

5) the profits allegedly lost were too remote and consequential because they would have been realized, if at all, through collateral enterprises.

---

[13] As early as 8 November 2002, the Board reminded the parties that "damages can be presented under three theories – 'expectation,' 'reliance,' and restitution.' *See* RESTATEMENT (SECOND) OF CONTRACTS." (8 November 2002 telephone conference memorandum)

The appeals are denied.

Dated: 29 April 2005

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

I concur

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

I concur

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 Nos. 53058, 54110, Appeals of CACI International, Inc., rendered in conformance with the Board's Charter.

Dated:

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