ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Simplix	)	ASBCA No. 52570
	)	
Under Contract No. DCA200-94-H-0015	)	

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

APPEARANCES FOR THE GOVERNMENT: Jo Ann W. Melesky, Esq.
Stephanie A. Kreis, Esq.
Trial Attorneys
Defense Information Systems Agency
Scott Air Force Base, IL

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is the third in a series of appeals involving a Value Added Network (VAN) License Agreement (VLA) between the government and VAN providers.[1] Here, Simplix filed its appeal from a contracting officer's decision denying Simplix's breach claim for $8,703,872,251.37. That claim has been modified and Simplix now seeks lost profits of approximately $204,000,000.[2] We have previously held that we have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613, as amended (CDA), in disputes under the VLA. *GAP Instrument Corp.,* ASBCA No. 51658, 01-1 BCA ¶ 31,358. Both entitlement and quantum are before us. We deny the appeal.

[1] *GAP Instrument Corp.,* ASBCA No. 51658, 01-1 BCA ¶ 31,358 and *CACI International, Inc.,* ASBCA Nos. 53058, 54110, 05-1 BCA ¶ 32,948 were the first two decisions. *CACI* was appealed to the United States Court of Appeals for the Federal Circuit and is currently pending. *CACI International, Inc. v. Rumsfeld,* No. 05-1495 (Fed. Cir. filed Jul. 28, 2005).

[2] Simplix also revised its claim to $6,000,000,000 plus (complaint). That amount, like the claim for $8,000,000,000 plus, is not before the Board (tr. 4/189-90).

FINDINGS OF FACT

Background

1. For purposes of this dispute, a VAN provider is defined as follows:

> 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, ¶ C.1)

2. Simplix is, according to its 20 May 1992 "CERTIFICATE OF ASSUMED NAME," the "assumed name" under which Imagination & Information, Inc.,[3] a Michigan corporation, transacts business. Simplix was formed in February 1992 for the specific express purpose of providing "Value Added Network services to connect to a Hub Gateway Computer located at various locations. The corporation, through connection to the Hub Gateway Computer will provide electronic services, which will support electronic commerce between the government and private industry." (Ex. G-1 at Bates/000001-3) George L. Chisa is the sole shareholder (tr. 3/253). He started Simplix after reading about a pilot EDI project at Wright-Patterson Air Force Base. The project was called Government Acquisition for Electronic Commerce (GATEC). He signed a license agreement with the Department of Defense (DoD) for GATEC in the summer of 1992 and Simplix received its first transactions in November 1992. (Tr. 1/22-23) It had no customers, however, until March 1993 (tr. 3/254; app. posthearing br. at 4).

[3] Hereinafter we refer to appellant by its assumed name of "Simplix."

3. Simplix is a small company, operating out of a strip mall and housed in a small office building it shares with an insurance company office. Simplix's office space was estimated at 1200 square feet. (Tr. 4/39, 6/38-39) Simplix employed six people directly, including Mr. Chisa, during performance of the VLA (tr. 3/282). All of the software used by Simplix as a VAN provider was created either by Simplix or its contractors (tr. 3/253-54).

4. In the role of an EDI VAN provider (finding 1), and, as such, uncompensated by the government (R4, tab 1, Article 3), Simplix would seek out trading partners (vendors) interested in doing business with DoD electronically. Simplix would charge the vendors a one-time registration fee of $200 and a monthly fee, initially set at $50. Some other VANs had similar pricing methods and some used a charge per transaction with minimums and maximums. (R4, tab 24 at Bates/000001-14; tr. 1/200-03) We find that the revenue of the VAN providers was intended to, and did, come from fees charged to vendors.

Electronic Commerce (EC) and the Process Action Team (PAT) Report

5. By letter of 30 November 1992 DoD forwarded to Simplix, among others, a draft license agreement "built on the approach and experience of the EC pilot project . . . (GATEC)." The initiative described was DoD-wide. The agreement presented an arrangement wherein no money would change hands between DoD and the licensees. The forwarding letter projected that a multi-VAN hub with all interested VANs, including the extant GATEC VANs, would be operational at a government site by early 1993. Interested VANs were instructed to return an executed agreement by 15 December 1992. (Ex. A-1; tr. 1/26) Simplix forwarded an executed agreement, but nothing came of it (tr. 1/26).

6. Another draft license agreement was forwarded with a 1 June 1993 letter. The letter announced a 22 June 1993 pre-solicitation conference and stated that DoD "is moving forward on several fronts to take full advantage of [EC/EDI] capabilities in their business process . . . [and] is interested in a common approach throughout DoD regarding the use of commercial [VANs] in the EC/EDI environment." (Ex. A-2) Mr. Chisa forwarded to Coni Jackson, the contracting officer, 42 questions in conjunction with the pre-solicitation conference (ex. A-3). In October 1993 questions and answers from the June pre-solicitation conference were forwarded to participants, including Simplix. Recipients were told, *inter alia*, that GATEC VANs would not be "grandfathered" into the program being developed. (Ex. A-8, Q&A 25; tr. 1/56-57)

7. DoD established a Process Action Team (PAT) in July 1993. This was, at least in part, as a response to a January 1993 report to Congress that advocated, *inter alia*, rapid implementation of EC in support of acquisition reform. (R4, tab 6 at Bates/000002)

A draft report was issued in October 1993, which Mr. Chisa received. He sent a letter dated 26 October 1993 to Colleen Preston, Deputy Under Secretary of Defense (Acquisition Reform), in which he raised six "areas of greatest concern." Among his expressed concerns was the DoD decision not to immediately implement GATEC. (Ex. A-9)

8. On 9 December 1993 a pre-solicitation conference for the VLA was held at Scott AFB. Among the attendees was Mr. Chisa. (R4, tab 8) A package provided to attendees was sent to all prospective offerors by letter of 10 December 1993. It included questions and answers germane to the VLA and hard copies of a slide presentation. One copy of a slide was titled "DoD EC/EDI PROCUREMENT TRAFFIC" and included information that small purchases ($25,000 or less) represent 6 million actions and that "65% of the 6 million actions could be expected to be available for solicitation via EDI." (R4, tab 7 at Bates/000001, 000025) Thus, 3,900,000 actions could be expected.

9. The PAT issued its report on 20 December 1993 (R4, tab 6). The report stated that "[t]oday approximately 30,000 United States firms use EDI and many do so using the several VANs and Value Added Services (VASs) providing EDI-related services. . . . Over 300,000 vendors are interested in conducting business with DoD today." (*Id.* at Bates/000177) The PAT recommended a multiple VAN approach (*id.* at Bates/000178). The PAT "assessed current capabilities of the EC/EDI infrastructure and systems to support simplified competitive acquisition under $25,000, consistent with the American National Standards Institute (ANSI X12) with improved access, notice, and participation of small businesses" (*id.* at Bates/000049).

10. According to the PAT report, DoD had been considering the use of EC/EDI to support its procurement processes since at least 1988. The PAT report references a January 1993 DoD report to Congress which recommended EC/EDI as a means of enhancing access to DoD procurement information for small businesses. It also references a September 1993 National Performance Review recommendation to expand use of electronic commerce for transactions "below a specified dollar threshold and for those acquisitions and orders that use simplified acquisition procedures." (R4, tab 6 at Bates/000002)

11. 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." (R4, tab 6 at 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 6 at Bates/000158)

12. 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.* at Bates/000023-24)

13. 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 6 at 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.* at Bates/000265, -277)

14. The sample agreement 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 6 at Bates/000265-80).

15. The PAT report stated "[a] strategic goal of DoD is to present a 'single face to industry'" (*id.* at 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 6 at Bates/000053)

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

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

(*Id.* at Bates/000049-50)

17. 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 [Defense Information Systems Agency] 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 6 at Bates/000052)

18. 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.

(R4, tab 6 at Bates/000290, -294, -296 to -298)

19. 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	66	29	208

The PAT report shows the 5 DLA sites under SPEDE, and notes it has "already begun and will carry over into FY94." (R4, tab 6 at Bates/000296 to -98) DoD rejected GATEC as a system to be implemented (tr. 4/250).

20. The PAT report provides either the number of vendors and sites for each system, or a basis for estimate, as follows:

APADE – 50,000 (25 sites, each with 2000 vendors) (R4, tab 6 at Bates/000069, ¶ 2.4.3.1.6);

ITIMP – 65 (*id.* at Bates/000079, ¶ 2.4.3.3.6);

MADES – 7,200[4] (98 sites, no specific vendor data, estimate based on SACONS) (*id.* at Bates/000085-87, -91, ¶ 2.4.3.5.6);

SACONS – 17,000 (based on total in the data base, which we interpret as without regard to number of sites, and SACONS is to be incorporated into SAACONS with only 77 sites) (*id.* at Bates/000091, ¶ 2.4.3.5.6, at Bates/000298, ¶ 3.4.2);

SPEDE – 50,000 (*id.* at 000099, ¶ 2.4.3.6.5).[5]

The total number of vendors projected is 124,265.

21. Section 11.0, "MILESTONES," included a series of Gantt charts showing execution schedules for technical deployments of the above systems and other actions commencing as early as 29 January 1994 and completing as late as 28 February 1996 (R4, tab 6 at Bates/000309-22). The schedules are described at section 11.0 as setting forth various milestones:

> . . . [R]epresent the best estimates from all participating organizations at the time of submission. There may be

[4] This is consistent with our finding in *CACI*, 05-1 BCA at 163,243.

[5] SPEDE includes the 5 DLA sites (R4, tab 6 at Bates/000298, ¶ 3.5).

> deviations to these scheduled milestones during the implementations. The assigned implementation coordinators, functional and technical, will continuously evaluate and update all milestones, when appropriate.

(*id.* at Bates/000308-22) Although the schedule addresses milestones as estimates and permits deviations from milestones, we find that completion within two years is not stated as an estimate and there is no provision for deviation therefrom (*id.)*.

22. 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.

(R4, tab 6 at Bates/000292-93)

23. 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 I, 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. The trading partners did

not have to send X12 compliant data, however, so the "X12 COMPLIANT" bar should have been between VANs and network entry points (NEPs).[6] (R4, tab 29; tr. 4/197-203, 5/125-30) 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. 5/129)

24. The standard VLA in the PAT report (R4, tab 6 at 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 and implementing the DoD infrastructure. (Tr. 4/231) There is no evidence of negligence on the government's part with regard to any of the estimates in the PAT report.

25. Implementation of the plan in the PAT report was approved on 5 January 1994 (ex. A-26). The PAT report at paragraph 1.2.2.2 provided 60 to 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 6 at 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 (ex. A-26, *see* finding 34, *infra*).

The VAN Licensing Agreement

26. On or before 2 March 1994 Simplix received a copy of the proposed no-cost VLA. 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" (R4, tab 1, ¶ 1, OVERVIEW). It is undisputed that the "DoD-wide implementation plan" referred to in the VLA was that contained in the PAT report (gov't br. at proposed finding 58; tr. 1/97).

27. 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

[6] The terms and abbreviations for the central distributions points changed from "hubs" to "NEPs" (tr. 4/240) and are used interchangeably herein.

purpose of exchanging business documents and information with individuals and organizations conducting business with the Government throughout the DOD Hub Gateway Computers. The network charges that would otherwise be applicable to the Government, for transmission of documents in an electronic format will be waived for the duration of the license agreement. In consideration for the EDI VAN Provider granting the Government this right, the Government agrees that it will not use, resell, or otherwise make available Contractor's services outside the scope of this agreement without the prior written permission of the EDI VAN Provider.

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

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

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

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

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

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

. . . .

ARTICLE 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.

. . . .

ADDENDUM A: . . .

. . . .

2.1 Contractor Use of VAN Services

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

. . . .

4. VENDOR REGISTRATION INFORMATION AND CAPABILITIES

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

(R4, tab 1 *passim*)

28. 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." (R4, tab 1, § B., OVERVIEW)

29. 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, Technical Scope of Work at 6-7)

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

31. The VLA incorporated by reference FAR 52.203-1, OFFICIALS NOT TO BENEFIT (APR 1984); FAR 52.203-3, GRATUITIES (APR 1984); FAR 52.203-5, COVENANT AGAINST CONTINGENT FEES (APR 1984); FAR 52.232-23, ASSIGNMENT OF CLAIMS (JAN 1986)--ALT I (APR 1984); and FAR 52.233-1, DISPUTES (DEC 1991) (R4, tab 1, Article 12). 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 (R4, tab 1 *passim*).

32. Simplix signed the VLA with DoD on 2 March 1994. The contracting officer executed the VLA on 29 March 1994. (R4, tab 1 at 4th unnumbered page) Simplix was tested and certified on 8 April 1994 (ex. A-24). The Simplix VLA was extended after annual reviews in 1995, 1996, 1997 and 1998 (R4, tab 31).

33. Mr. Chisa understood that the VAN business was "a very high-risk proposition from the start. There was no guarantee." The nature of the business required Simplix to go out and attract vendors by competing with other private sector enterprises, which is where the revenue would come from. He understood that the VLA was not a contract for services with payment from the government. He recognized the VLA could be canceled on 30 days notice but thought the business was also "very high reward." He believed the 30 day cancellation provision "in itself, is a high-risk proposition for anybody entering the market." However, according to Mr. Chisa, "the total value of the market[] will drive a huge number of vendors." (Tr. 3/249-50) Other than his uncorroborated opinion, there is no evidence to establish this or to show that market studies were done by Simplix. There is contrary evidence (*e.g.,* findings 39, 40, *infra*).

Implementation of the PAT Report

34. On 28 April 1994 the Office of the Deputy Secretary of Defense issued a memorandum on use of EC/EDI in contracting which contained the following:

> . . . I approved implementation of a standard DoD-wide ED/EDI procurement system on January 5, 1994. This plan was coordinated with the Military Departments, certain Defense Agencies and various senior staff elements in the Office of the Secretary of Defense through the Senior Steering Group Advising the Deputy Under Secretary of Defense for Acquisition Reform. Implementation of this plan over the next two-year period will enable DoD to enhance the use of EC/EDI to support small purchases consistent with the existing $26,000 threshold, and provide the capability to accommodate an increase to $100,000.
>
> DoD components independently developed EC/EDI projects to address their unique contracting situations. While achieving some local benefits, this resulted in a proliferation of nonstandard systems. As a result, vendors who submit quotations through an EC/EDI system in use in one department, agency, or activity, are frequently unable to use the same software to do business with another DoD organization. Among other things, a standard DoD-wide EC/EDI system will establish a single face to industry by allowing vendors to use commercial software and hardware to obtain information on pending DoD small purchases, obtain copies of all small purchase solicitations, submit quotations, and receive awards through a single point of entry into the

> system. It will use a data transmission system established by and under the operational control of the Defense Information Systems Agency, as the final link for communications between DoD purchasing officials and their vendors.
>
> Use of existing nonstandard EC/EDI capable small purchase systems shall be discontinued as soon as the standard DoD-wide EC/EDI system is fully operational at a particular activity. Furthermore, no funding will be expended to upgrade, further deploy, or expand existing nonstandard EC/EDI small purchase systems or implement new nonstandard EC/EDI small purchase systems unless specifically approved by the Deputy Under Secretary of Defense for Acquisition Reform, acting on behalf of the Under Secretary of Defense (Acquisition & Technology) and the Director, Defense Information Systems Agency, acting on behalf of the Assistant Secretary of Defense (Command, Control, Communications, & intelligence).

(Ex. A-26)

35. At an August 1994 DoD briefing it was disclosed that program execution was delayed (ex. G-66 at Bates/000002). Information as to the status of implementation was provided to the VANs (tr. 5/20-21). In December 1994, an in-process review showed 15 VANs had been successfully tested and 30 others were in the certification process (ex. G-66 at Bates/000008-10). In that same month, DoD sent out a policy memorandum requiring electronic bulletin boards that advertised purchase actions to adhere to the policy set forth in the 28 April 1994 memorandum (ex. A-41; finding 34). By May 1995 19 VANs had successfully completed the certification process, with 22 in progress (ex. G-66 at Bates/000019-44).

36. The Federal Acquisition Computer Network (FACNET) was a term the DoD functional program office for EC/EDI began to use in 1994 or 1995.[7] If a contracting site was FACNET certified it was using the NEPs and the DoD infrastructure and was part of the implementation of the PAT report. (Tr. 4/306-07) We construe this to mean that a FACNET certified site was using the VANs, operating pursuant to the VLA and therefore a functioning part of the implementation plan set forth in the PAT report. As of 18 September 1995 there

[7] The term is in the Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 251 *et seq*., which was passed on 13 October 1994. According to one DISA representative, the term "FACNET" evolved through popular usage and was never an actual network—"The 'FACNET' has no wires" (ex. A-117 at 1).

were 215 FACNET operational DoD sites and 814 total registrants to the Central Contractor Registration (CCR), of which 609 were active (ex. G-60).

37. Progress with FACNET certified sites is set forth below:

	Thru 2/15/96	3/28/96	4/24/96	5/21/96	Total
ARMY	44	14	7	5	170
NAVY	25	0	0	0	25
AIR FORCE	79	2	4	0	85
DLA	0	1	0	0	1
DoD Misc	2	0	0	0	2
TOTAL	250	17	11	5	283

(Ex. G-66 at Bates/000060) Sites that were FACNET certified were capable of sending and receiving transactions (tr. 5/140). Internal government reports continued to refer to the VAN program as a "Two Year Plan" well into 1995 (ex. G-66 at Bates/000040).

38. The comparison with the original sites as per the PAT report and the sites as implemented was reported in a 20 September 1996 DoD briefing as follows:

Original Sites	Army	Navy	USAF	DLA/Misc	Total
PAT Report	112	37	90	5	244
Removed	13	4	19	1	37
Still Active	99	33	71	4	207
Certified Sites					
PAT Report	92	9	69	0	170
Non PAT	88	16	16	3	123
Total	180	25	85	3	293

(Ex. G-66 at Bates/000064) We note that our review of the PAT report (finding 19) shows, and we find, only 208 sites to be established. We cannot explain the discrepancy.

39. An 8 January 1996 Inspector General report looked at use of electronic bulletin boards and whether that usage impeded implementation of FACNET. The report concluded the use of bulletin boards was "appropriate" and not an attempt to circumvent implementation of FACNET. (R4, tab 36 at 1, 6) A 24 May 1996 Inspector General report identified issues arising in implementation of FACNET. Specific problems included realization of the "single face to industry" concept, adequacy of transmission of data by the DoD FACNET infrastructure, implementation of security controls, level of vendor participation, adequacy of management controls, and adequate development of implementation plans. (R4, tab 37 at 1-2) Most of the problems are attributed to DoD (*id.*

at 5-14). In addressing these issues, the report found that as of November 1995 only 1,500 DoD trading partners were registered in the central contractor registry, and commented:

> . . . Vendors are unable to justify the expenditures involved with FACNET because the value of the requests for quotes going through the Infrastructure [sic], at this point in time, is not high. In addition, trading partners must subscribe to a VAN that charges fees to transmit requests for quotes and bids between DoD and trading partners. Vendors feel that the VAN service fee structure is too complicated and expensive. According to the Deputy Under Secretary of Defense (Acquisition Reform), competitive alternatives to the VAN service fee will be available by September 1996.

(*Id.* at 12) The report also commented that as of 1 March 1996 the Deputy Under Secretary of Defense (Acquisition Reform) should have "valid data" for tracking transaction volume (*id.* at 10). The report observed that the Internet and electronic bulletin boards would improve the system. It made no recommendations. (*Id.* at 14, 15)

40. A 4 October 1996 DoD Inspector General report amplified concerns about the VAN program. The report contained the results of a vendor survey in which vendors were asked about impediments to use of FACNET. (R4, tab 41) Responses indicated that, of 100 vendors surveyed, 46 were unaware of FACNET (*id.* at 7), and this in spite of DoD expenditure of $122.8 million from FY 1993 through 1995 to fund 11 regional centers and provide outreach, training, consultation, and technical support to small and medium size vendors (*id.* at 8). Only 6 vendors stated that use of FACNET could improve their business opportunities while 48 stated that FACNET was not "an appropriate procurement method for small purchases." Of that 48, 25 stated that DoD organizations they did contracting business with did not use FACNET to initiate the procurement request. Specific examples included DLA's use of electronic bulletin boards and direct electronic means used by DLA's Defense Personnel Support Center. (*Id.* at 9) Twenty vendors also cited the lack of capability to transmit certain items (*e.g.*, drawings). The cost to the vendor of FACNET use was also cited as an impediment. (*Id.* at 10) Of 54 users surveyed, 14 identified technical problems related to reliability (*id.* at 11).

The report included the following summary:

> Vendors are either not aware of or not willing to participate in FACNET to conduct small purchase transactions with DoD. Until vendors are aware of FACNET, consider it appropriate to their business needs, and consider it reliable, DoD

> credibility in the development and implementation of FACNET will continue to be impaired. Furthermore, widespread vendor participation in FACNET will not occur, as envisioned in acquisition streamlining strategies.
>
> Efforts to make vendors aware of EC/EDI technologies, including FACNET, have not proved worthwhile. Accordingly, DoD needs to reevaluate the methods used to disseminate information on FACNET and channel funds where they can realize the greatest benefit.
>
> In addition, Federal Acquisition Circular 90-29 and recent changes to the Federal Acquisition Streamlining Act provide flexibility for when FACNET, or other procurement methods, may be used for small purchases. By contrast, the DoD Director, Electronic Commerce, issued guidance that FACNET will be the method of choice in DoD. Guidance is needed to clarify when FACNET should be used.
>
> Finally, DISA needs to resolve quickly the problems in the transmission of data through FACNET by implementing either the Electronic Commerce Processing Node or interim measures. Either alternative should address the issues identified in this report.

(R4, tab 41 at 12)

41. Monthly transactions processed by the NEPs from December 1995 through August 1996 are set forth below:

	Columbus	**Ogden**	**Total**
December 1995	396,912	95,054	491,966
January 1996	551,997	128,601	680,598
February 1996	588,586	155,069	743,655
March 1996	778,033	193,599	971,632
April 1996	947,861	256,048	1,203,909
May 1996	914,563	275,624	1,190,187
June 1996	819,269	450,312	1,269,581
July 1996	1,044,868	523,511	1,568,379
August 1996	1,483,880	604,118	2,087,998

(Ex. G-66 at Bates/000065; tr. 5/39)

42. According to a 5 December 1996 newsletter from the Director, Electronic Commerce, Office of the Assistant Deputy Under Secretary of Defense (Acquisition Reform/Electronic Commerce) (ODUSD AR/EC), which we construe to be the DoD functional office for EC/EDI, in July, August and September 1996 there were approximately 100,000 monthly award summaries, quotes, RFQs, purchase orders and text messages (referred to therein as "procurement transactions") from interim FACNET certified sites (ex. A-102; tr. 2/151-52). Simplix, as a certified VAN, received the ODUSD AR/EC newsletters (tr. 2/142). According to Mr. Chisa, this was well below what the VANs expected and the reason for the shortfall was that the DoD sites were not making use of the system (tr. 2/151-52). However, *see* findings 39, 40, indicating vendor indifference and stating outright that widespread vendor participation will not occur.

43. In a 13 March 1997 newsletter from ODUSD AR/EC, the following item is reported as an action item and its status:

> 12) Use the Internet, not FACNET, for transmissions (and so eliminate VANs and costly subscriptions paid by small vendors to network intermediaries.)
>
> STATUS: DISA is in the process of building the necessary fire walls to accommodate the department's use of Internet. It is scheduled in the 4th QTR FY97.

(Ex. A-106 at item 12)[8] We find that DoD had thus decided by early 1997 to abandon the VAN program, and that DoD's schedule to replace it with an Internet-based system called for replacement of the VAN program with the Internet program by the final quarter of FY 1997 (July through September of 1997). This did not occur, however, as internal discussions continued into April 1998. At a meeting of the Joint Electronic Commerce Program Office (JECPO) (tr. 2/231) on 17 April 1998 there was a consensus reached that there were no longer any legal, technical or contracting reasons for continuing the VLA. An action item to coordinate this with DISA was assigned. The government was in the process of reducing and ultimately ending the VAN program. (Ex. A-136)[9]

---

[8] The newsletter also contains on page 1 data regarding total procurement transactions for the Army, Navy, Air Force and DLA during September–November 1996 about which no testimony was offered. The columns do not line-up properly, making it difficult to interpret without explanatory testimony. We have, therefore, not relied on the data. (Ex. A-106 at 1)

[9] Although there was no testimony on the exhibit and it was not introduced through a witness, there was no objection to its admission and it was included (tr. 6/184-85).

44. In July 1997 a DISA representative, Lebbeus Curtis, emailed the VANs. In his message he indicated that pending legislative action required "clarification of certain facts." The gist of the email was that even if the Congress eliminated FACNET (which, according to the email had become a synonym for the Electronic Commerce Infrastructure (ECI)) and the Internet was widely used by government procurement activities, VANs would still be needed. He pointed out that in a GSA system using the Internet all the X12 EDI formatted data used by the system was transmitted via the ECI, which was composed of gateways, hubs and VANs. He stated that he believed a role would continue to exist for VANs as he did not believe the government would want to interface directly with trading partners. (Ex. A-117)

Other Events During Performance of the Simplix VLA

45. A second version of the VLA was signed by Simplix on 8 October 1996. A revised version was executed by Simplix on 19 May 1997. (R4, tab 15 at 2, 9) Article 8 of the new VLA included the following:

> The Government will not assume liability for incidental, special or consequential damages, termination of the License Agreement, or third party claims against the Government under this License Agreement. The Government's total liability under or relating to this License Agreement will not exceed, in the aggregate, one hundred thousand dollars ($100,000) for the life of the License Agreement.

(*Id.* at 6) However, Simplix never completed testing and DoD never executed the agreement (tr. 2/141-42).

46. At the end of 1996/beginning of 1997, Simplix increased its monthly charge from $50 to $75 per month (ex. A-171 at 4; tr. 6/39).

47. In January 1998 Simplix was threatened with termination if it transmitted any more transactions of a particular type ("864" transactions) (ex. A-128). On 3 March 1998 the Simplix VLA was terminated for submission of another type of transaction ("3040 838") (ex. A-133). However, when Mr. Chisa telephoned and explained that Simplix had not transmitted a 3040 838 transaction since 18 February 1998, the VLA was reinstated (ex. A-134). This precipitated Simplix's March 1998 complaint to the DoD Inspector General alleging unfair treatment of Simplix (ex. A-135; tr. 2/231-33). The Inspector General replied in a 5 June 1998 letter concluding that Simplix had not been treated unfairly and that:

> Our office conducted a review of each of your concerns and we determined that the government is in compliance with the VLA. We noted that technology advance over the last four years dictated that the government had to consider newer ways of doing business. As electronic commerce evolved there have been considerable changes reflected in the government's practices and agreements. We concluded that the program office (1) has taken adequate measures to ensure VAN provider compliance, (2) has provided the required level of service according to the VLA, and (3) is continuously increasing the infrastructure capabilities.

(Ex. A-137; tr. 2/233-34)

48. By letter of 15 April 1998 the contracting officer, Diane Brendel, advised all VANs that they must be Year 2000 compliant and requested execution of a contract amendment to that effect (ex. G-33). Mr. Chisa resisted, responding on 29 April 1998 "[s]ince it is bilateral we do not have to agree to do this, correct?" (ex. G-34). DoD issued a termination notice on 28 September 1998 with the proviso that if Simplix chose to sign the modification previously sent, the termination would be cancelled (ex. G-37). The termination was rescinded on 30 September 1998 and the modification was executed by Simplix on 5 October 1998 (exs. G-36, -37).

49. A cancellation notice was sent on 15 January 1999, to be effective 30 days from that date (R4, tab 1, Mod. No. P00003). The Simplix VLA was thus terminated on 14 February 1999.

Simplix's Financial Performance

50. According to Mr. Chisa, during the 59-month period between 15 March 1994 and 15 February 1999 Simplix incurred total costs of $1,947,241 and received revenue of $1,399,149 (a monthly average of $23,714.39), for a net loss of $548,092 (exs. A-167, -168, -169; tr. 3/219, 6/94-95). However, Simplix had other business and did not segregate its costs (tr. 5/229-30). Mr. Chisa explained that as a small company Simplix had no reason to segregate costs although it had "a number of projects." He gave programming as an effort that crosses project lines and does not lend itself to cost segregation. (Tr. 6/171-73) Mr. Chisa estimated that Simplix's costs under the increased number of customers in the claim as modified would have been $15,812,238 (ex. A-167).

51. Even though Simplix was not profitable and the Internet loomed as the wave of the future, Mr. Chisa did not give up on the VAN program. His rationale was explained as follows:

> A Well, we had hopes that everyone would see the benefits of doing things if they could just get them done correctly doing the public solicitation and the vendors were very happy with it when it worked. Plus, this was now [in July 1997] a whole other market that was being expressed where you'd get all these other documents and hopefully another full set of businesses who would be interested over and beyond just small business contractors.

(Tr. 2/194)

52. In 2001 Mr. Chisa prepared a document based on data for FY 1997. He compared a variety of transactions and concluded that among transaction types he considered relevant Simplix's market share was 20 to 28 percent during that fiscal year. (Ex. A-164; tr. 3/199-206) However, there is no evidence in the record of the ratio of Simplix's sales to the total sales of the VANs operating under the VLA. Indeed, neither evidence of the relevant market nor Simplix's share of that market has been presented in dollars and cents. He also prepared an analysis, "Simplix Expected Market Share Analysis with full implementation of the PAT Report" [sic], which was made after the Board issued its decision in *GAP Instrument Corp*., and thus sometime after March 2001. In it he analyzes what would have changed with a full implementation of the PAT report and compares Simplix with other VANs. At page 13 he concludes:

> The preceding analysis shows that Simplix, with a strong product, a successful service in comparison with the other VANs, and a record of technical innovation, and effective pricing, stood a good chance of not just maintaining its market share position but actually increasing it under a complete implementation.

He also concluded at page 17 that Simplix had adequate capacity to handle the increased transactions. (Ex. A-162; tr. 3/170-80)

The Claims

53. Simplix forwarded a certified 13 March 1999 claim to the contracting officer by means of a 23 March 1999 FAX. The claim alleged that DoD breached the VLA through a variety of actions or inactions and sought damages in the amount of $8,703,872,251.37. (R4, tab 2 at 1) The profit margin was 57,900 percent (tr. 6/152-53). The claim did not contain any supporting calculations (tr. 4/91). Simplix subsequently explained that the pricing was based on a Federal Electronic Commerce Acquisition

Team (ECAT) report stating there were 19,600,000 transactions—"[t]hat would be potentials for going through this infrastructure for the federal government as a whole." He took one-seventh of that number "based on my belief that Simplix's market share at that point would be about that" from the number of GATEC VANs Mr. Chisa deemed "serious," and he charged $.1125 per kilocharacter. (Tr. 3/18-19) However, under the VLA Simplix always charged a flat monthly fee or an "up-to" monthly fee, plus a registration fee (tr. 1/201-02). The claim was denied in a contracting officer's decision dated 30 November 1999 (R4, tab 3). Simplix thereafter reduced the claim to $6,560,606,384.62 in paragraph 27 of its complaint.

The Expert Report

54. Simplix retained Ronald L. Tracy, Ph.D., an associate professor of economics at Oakland University. Over the government's objection, the Board accepted Dr. Tracy as an expert in economics. (Tr. 3/28, 32) He and Mr. Chisa are friends and he has socialized with Mr. Chisa (tr. 3/76-77). Dr. Tracy prepared a report on revenues allegedly lost by Simplix due to the various breaches asserted by Simplix in its claim. The report does not address costs. (Ex. A-171) As set forth below, we find the report badly flawed.

55. Dr. Tracy's approach was to use a market share of 20 percent based on 1997 purchase orders, which was "what I had," which we interpret to mean all the information provided. Mr. Chisa provided the purchase orders and Dr. Tracy did not attempt to verify them or ascertain that all the purchase orders were from DoD. (Tr. 3/53-55, 126) He applied the purchase order ratio from 1997 to 300,000 potential vendors and treated 20 percent of that number (60,000) as Simplix's share, which he phased in over the 21-month period from April 1994 through December 1995 at a linear rate of 13,750 per month, for a total of 288,750 (21 x 13,750). He assumed that 11,250 vendors were in the system as of March 1994 (288,750 + 11,250 = 300,000). (Tr. 3/41-46; ex. A-171) After December 1995 Dr. Tracy assumed that the full vendor population of 300,000 would be in the system through cancellation of the VLA, effective 14 February 1999. He accounted for the phase-in period by use of an equation that values the total period of the VLA as the equivalent of 4.073 years of operating with all 300,000 vendors in the system. (Tr. 3/47-48) In his analysis, he ignored the total number of United States firms reported in the PAT report as currently using EDI (30,000) (finding 9). Even assuming that the entire 30,000 were vendors interested in doing business with DoD and thus subsumed within the 300,000, we think it unrealistic to assume that the 30,000 would uniformly multiply by a factor of ten to the full 300,000 within the period analyzed in Dr. Tracy's report, as well as go from potential to actual DoD vendors, or that the means of accomplishing that growth did not need serious examination in his report before the report could be considered authoritative and persuasive.

56. Consistent with Simplix's actual pricing policy of charging a flat monthly rate, he applied a flat monthly rate of $75 as an annual rate, which he calculated as $850. This was multiplied by 20 percent of the 300,000 vendor population (60,000) for annual revenue of $51,000,000. He multiplied that revenue figure by 4.073 for a subtotal of $207,723,000. He also added in set-up fees of $200 x 60,000 (20 percent of the 300,000 vendor population) for additional revenues of $12,000,000. Total revenue was thus calculated as $219,723,000, from which he subtracted estimated actual revenue of $1,279,600, for net lost revenue of $218,443,400. (Ex. A-171 at 7-8) When combined with Mr. Chisa's assertions as to costs (finding 50), the profit margin for Simplix under Dr. Tracy's report is 1,360 percent (tr. 6/152). From 1994 to 1999, competitor firms in the field had profit margins ranging from -23.1 percent to 13.8 percent (ex. G-55). Dr. Tracy distanced himself from profits, as he testified he did not "do" lost profits (tr. 3/75).

57. Dr. Tracy testified that he believed it was mandatory for the 300,000 vendors mentioned in the PAT report to use VANs (tr. 3/92). He did not read the VLA (tr. 3/98). He did not attempt to ascertain the number of vendors specifically identified with the systems to be implemented in the PAT report (tr. 3/93). His use of a $75 monthly fee ignores the period prior to 1997 when the monthly fee was $50 (finding 46). His use of $850 per year includes a mathematical error (12 x $75 = $900, not $850). He did not verify the number of vendors Simplix actually serviced or any of Simplix's client files (tr. 3/109). He saw no business plans from Simplix (tr. 3/145-46). He accepted information and estimates from Mr. Chisa (indeed, Mr. Chisa was the only person he interviewed), including the market share estimate, without attempting to verify (*see, e.g.*, tr. 3/73, 109-11, 126). He did not attempt to analyze the market share of the four largest VANs in competition with Simplix (tr. 3/168-69).

58. There is no evidence that Dr. Tracy did market research or other independent research in settling on his methodology or that he considered such factors as any management or marketing efforts necessary to go from a six-employee firm averaging monthly revenue of less than $24,000 (findings 3, 50) to a $51 million a year operation (ex. A-171 *passim*, tr. 3/27-169). He testified that this rate of accelerated growth passed his "sniff" test. This involved looking at Forbes 500 largest private firms and ascertaining that the revenues did not place Simplix anywhere near the top. Next, he projected Simplix's alleged $51,000,000 revenue over the entire market and compared it to potential sales of $10,000,000,000, which he said was from the PAT report, concluded VAN costs represented 2.5 percent of that market, and, apparently based on an off-the-top-of-his-head comparison to credit cards, testified that Simplix's projected annual revenue of $51,000,000 was "unbelievably" reasonable. (Tr. 3/63-65) However, Dr. Tracy also testified that in his "sniff" test he did not look at the VAN market alone and did not analyze what other VANs were making (tr. 3/145). We conclude that his "sniff" test was superficial and unreliable, that he did no market research or other

independent research in settling on his methodology other than looking at Forbes 500, and did not consider management or marketing efforts necessary for growth to a $51 million a year operation. As noted *infra* he incorrectly assumed that 300,000 vendors were *required* to enter the VAN system,[10] ignored the statistic in the PAT report that only 30,000 United States vendors were using EDI, and did not ascertain the number of vendors identified in the PAT report as using the systems to be implemented. Similarly, he used the wrong monthly fee and did not even read the VLA. Moreover, we would expect an expert's conclusion on market share to involve an assessment of the market at issue. We find Dr. Tracy's report is not probative.

The Audit

59. When DCAA audited Simplix, it found inadequate cost or pricing data (tr. 5/230). Mr. Chisa informed the government auditor, Susan Tiedemann, that Simplix's costs had not been segregated. She concluded that an allocability problem existed. (Tr. 5/229-30) Mr. Chisa testified that Simplix had not attempted to segregate costs among the company's projects because "[w]e had no reason to. We're a small company and it wouldn't make any particular difference to us." (Tr. 6/172)

60. On 28 March 2003 DCAA issued a letter to Defense Information Technology Contracting Organization (DITCO) stating:

> [Simplix's] submissions are based on many estimates and many assumptions were made from these estimates. In addition, the actual costs represent costs for the whole company, not just the contract. At this time, we have determined that Simplix's claim, submission, and proposal are not adequate for audit due to inadequate supporting documentation.

(Ex. G-52 at 2) We find that Simplix was unable to produce sufficient supporting information to provide credibility to its claim or Dr. Tracy's report (tr. 5/219 to 6/120 *passim*).

Other Performance Issues

61. Simplix presented evidence of technical problems attributable to the government that affected the viability of the network (*e.g.,* trouble tickets, ex. A-88; Inspector General reports, R4, tabs 42, 45). The government presented evidence of

[10] The VLA, which he did not read (finding 57), provides otherwise (finding 27, Addendum A, ¶ 2.1).

unsatisfactory business practices by Simplix (*e.g.*, letters from vendors, ex. G-18). While we find that the evidence establishes that technical issues were a government problem that no doubt affected implementation, and that Simplix's business practices probably affected its individual success as a VAN, the issues presented are subsumed within other findings and conclusions. However, there is no evidence of government bad faith in any phase of the program.

62. Simplix's system was based on use of Standard Mail Transfer Protocol (SMTP), which is the protocol used in common email, as opposed to File Transfer Protocol (FTP). Messages attached to SMTP communications may cause loss of tracking of individual contents. There is also manual processing involved. The government considered FTP, which permitted multiple files to be included in one transmission and is the standard way to move files around, to be the more desirable protocol. This is, in part, because GATEC used SMTP and the government had problems with it. Most of the VANs used FTP. Simplix considered SMTP to be the better protocol. (Tr. 4/220-23, 251-57, 6/161-65)

DECISION

Entitlement

Simplix argues that the government breached the VLA in a variety of ways: by failure to follow the implementation plan; by continued use of electronic bulletin boards; by conducting EC outside the VLA; by issuing a revised VLA while the old VLA was still in effect; by using alternative CCR registration methods; by implementing multiple ANSI X12 versions; and by failing to operate a reliable and effective network. It argues that the doctrine of issue preclusion mandates a decision in its favor on some issues. The government argues that it did not breach the VLA and that issue preclusion is not applicable. As the record is adequate for resolution of the issues appellant considers precluded and our disposition of those issues is the same as in *CACI* and *GAP*, we do not address the doctrine of issue preclusion.

The VLA stated that EDI-capable activities would be phased in pursuant to a "DoD-wide implementation plan" (finding 26). It is not disputed that the implementation plan in the PAT report is the DoD-wide plan referred to in the VLA (app. br. at 11; gov't br. at 30). That plan was to be implemented over a two-year period and the milestones are described as "best estimates" of participating organizations (findings 19, 21). However, the PAT report contained several hedges on implementation. It provided for lead time of 60 to 90 days from approval of the PAT report before execution of the plan. It also made implementation contingent on funding. (Finding 25) As the PAT report was approved on 5 January 1994, the VLA allowed the government until 5 April 1994 to begin implementation. Full implementation was thus to be accomplished by 4 April

1996. Because the government could have unilaterally extended the time for the interim dates, which were identified as estimates from which participating organizations may deviate (finding 21), and the VANs were provided information on the status of implementation (finding 35), we cannot find it breached the VLA with regard to interim dates. *CACI, supra*, 05-1 BCA at 163,248. This was not so for completion within two years, however. Completion was not stated as an estimate and internal briefings continued to refer to a "Two Year Plan." (Findings 21, 37) All of the sites set forth in the PAT report were not active by 4 April 1996. For example, only 1 of the 5 DLA sites was capable of sending and receiving transactions by that date (finding 37). However, although the record data is imprecise, the number of PAT report, FACNET-certified sites appears to have been in the 75 percent range in April 1996, and the total number of 267 PAT report and non-PAT report, FACNET-certified sites that had been implemented on 28 March 1996 exceeded the total of 208 sites in the PAT report (findings 19, 37, 38). The record gives us no way of knowing how much business the non-PAT report sites were capable of generating.

While the government painted a rosier picture of its implementation of the program than that which materialized in the event, we cannot conclude that the magnitude of the lesser implementation rises to the level necessary to give persuasiveness to the extreme losses argued by Simplix. Neither can we fault most of the government's efforts in trying to make the program successful and in the PAT report's presentation of relevant statistics. According to an Inspector General report, the government spent $122.8 million on outreach, training, consultation and training support (finding 40). Although the Inspector General recommended refinement of those efforts (*id.*), we have not found that the amount spent or the efforts represented by that amount were inadequate. As to the relevant statistics, Simplix has not argued and we have no basis to conclude that the basic statements in the PAT report as to the potential number of DoD vendors (300,000), the total number of United States firms using EDI (30,000) and the number of transactions of $25,000 or less (6,000,000) was faulty. Simplix does not argue and there is no evidence of negligence or bad faith by the government in the PAT report estimates (findings 24, 61). However, Simplix's expected usage of the VAN network did not materialize. The failure to fully implement the system within two years was no doubt part of the reason. However, there was resistance to the VAN program from vendors. In this regard, one Inspector General report unequivocally stated "widespread vendor participation in FACNET will not occur, as envisioned in acquisition streamlining strategies." Part of the problem was identified as the cost to vendors of obtaining VAN services and the appropriateness of the system for small purchases. (Findings 39, 40) In any event, the size of the government expenditures set forth by the DoD Inspector General indicates the total effort by the government was substantial and that the program's ultimate ineffectiveness was not for a lack of trying on the government's part. Nevertheless, there were government technical problems that contributed to the failure to fully implement (finding 61).

The failure to fully implement in two years was not, however, the government's only violation of the VLA. As the Inspector General reports indicate, DoD was having difficulty meeting its goals with the VAN program. Use of electronic bulletin boards continued and the "single face to industry" had not been realized. (Findings 39, 40) By 1997 DoD had fundamentally decided to abandon the VAN program, as witnessed by the 13 March 1997 newsletter identifying the elimination of VANs as an action item, and it took action thereafter to do so (finding 43). It could, with contractual impunity, have simply terminated with 30 days notice at that point, but instead it began the process of reducing the program while waiting until 15 January 1999 to issue a termination notice (finding 49). We hold that its actions to "eliminate VANs and costly [VAN] subscriptions" (finding 43) were a failure of performance going to the very core of the government's contractual responsibility and amounted to a breach of the VLA, notwithstanding the government's right to unilaterally modify the VLA. *Air-A-Plane Corp. v. United States*, 408 F.2d 1030, 1032-33 (Ct. Cl. 1969).

In this regard, we note that we found in *CACI* that the government breached the VLA by its "near abandonment of the 'single face to industry' approach in the VLA." *CACI International, Inc., supra* at 163,247. In that appeal, the evidence of the 13 March 1997 newsletter was either not presented or not argued. "[N]ear abandonment of the 'single face to industry'" provision of the VLA is subsumed within the holding here.

We next consider the myriad of other government actions or inactions which Simplix has alleged are breaches (*e.g.*, use of multiple X12 versions, CCR violations, lack of reliability in the system (hereinafter "other breaches")). We conclude that Simplix has not proved breach of contract with respect to those alleged "other breaches" other than to the extent they constituted part of the elimination of the VANs. In this regard, the VLA gave the government contractual rights unheard of in routine acquisition contracts. The unilateral power bestowed on the government in Article 2 of the VLA allowed it to amend the contract to permit the changes at the heart of Simplix's complaints and included the right to terminate on 30 days' notice, all without a time or cost remedy provided to Simplix, although Simplix was also provided the unilateral right to terminate with impunity with 30 days' notice. (Finding 27) Moreover, as we read Article 2, only the termination provision imposed any requirement for prior notice on the government and a change to one VLA signatory applied to all. Mr. Chisa fully understood the hazards. He called the VLA "a very high-risk proposition" with "no guarantee." (Finding 33) Simplix cannot now be heard to argue that those "other breaches" were beyond the scope of the VLA and that the government's authority to impose the underlying changes was not agreed to when it became a party to the VLA. *Air-A-Plane, supra.* We see no need to further address the variety of "other breaches" argued by Simplix.

Damages

Lost Profits

Simplix seeks anticipatory profits as damages here. In *CACI* we analyzed precedents of the United States Court of Appeals for the Federal Circuit and concluded that lost profits were not available as damages under the VLA. After we issued that decision, we gave the parties herein the opportunity to file supplemental briefs. Following consideration of the parties' arguments we believe our holding in *CACI* must also govern here. Our analysis is set forth below.

In its supplemental brief Simplix argues, *inter alia*, that we made factual errors in *CACI* effectively invalidating the result. The appropriate device for such arguments would have been a motion for reconsideration in *CACI.* None was filed. We do not think it wise for us to attempt resolution of this appeal based on those arguments, particularly with the appeal in *CACI* pending before the Federal Circuit. Moreover, those arguments do not affect our analysis of legal issues addressed in *CACI*. We re-examine that analysis and apply it to this appeal *infra.*

However, it needs to be said at the outset that the VLA made no provision for monetary payment by the government. At the simplest level, no costs, let alone profits, were to be paid by the government. Simplix could not reasonably have failed to understand this. Moreover, Simplix clearly understood that the government could terminate the VLA on 30 days' notice and change its terms virtually at will (finding 33). The VLA requires the government to provide access to data. It simply does not contain any provision giving rise to an expectation that Simplix will receive profit *from the government.* It does contain provisions explicitly giving rise to the opposite expectation. (Finding 27) Agreements are to be enforced by their terms where, as here, they are clearly stated and understood by the parties. *Pagan v. Department of Veterans Affairs,* 170 F.3d 1368, 1371 (Fed. Cir. 1999). The parties' agreement as embodied in the VLA is thus a formidable obstacle to recovery of profits allegedly lost by Simplix.

Other issues affect our analysis. Simplix's claim and Dr. Tracy's report simply ignore the statistic in the PAT report regarding the total firms actually using EDI (30,000) and settled on the "vendors interested in doing business with DoD today" (300,000) as the foundation for its claim. The Simplix view of how things should have developed is even more optimistic than the government's implementation plan. The burden of proof is on Simplix, and it has not shown that its treatment of the 300,000 potential vendors as a "sure thing" to be phased into the market in a proportional monthly progression is realistic. Indeed, assuming that all 30,000 EDI users were also potential DoD vendors, for at least 270,000 potential trading partners the VANs needed to be concerned not only

with accurately assessing how many potential vendors would actually become DoD small purchase contractors, but with the potential partners' lack of EDI experience. Missing from Simplix's presentation of evidence as to its business practices during the period in question, *inter alia*, are management and marketing methods, a business plan, a strategy for enticing the 270,000 interested vendors not using EDI to use it in pursuit of DoD business, and any indication of awareness of or accommodation to the march of technology. Instead we are offered simplistic and unrealistic explanations prepared *after* the claim was filed and a claim asserting that many millions (initially billions) in profits were lost. Thus, while the government did not meet the VLA schedule and ultimately gave up on the VAN program, we cannot say that this was the cause of Simplix's failure to meet the heady expectations it has set forth.

The VLA was not a typical procurement contract. It was a no-cost license with a Disputes clause and a few other FAR provisions not relevant here (finding 31). The parties have not presented us with case precedent involving comparable agreements, and we have found none. However, in *CACI* we looked to *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 981 (2003), for guidance. Referring to that case, we said in *CACI* that requirements contracts are "sufficiently similar [to the VLA] to treat the denial of anticipatory profits there as analogous . . . ." *CACI*, 05-1 BCA at 163,251. Indeed, if anything, there is more reason to disallow lost profits under the VLA than there would be under a requirements contract. In a requirements contract the government promises to order all its specified supplies or services during the contract period from the contractor. A negligently prepared government estimate of services or supplies, while a breach, is not a basis for damages based on lost profits. *Applied Companies*, *supra*, at 1339. Under the VLA, as stated above, not only was there no promise made to buy required supplies or services, the parties expressly, specifically agreed that no payment would be forthcoming from the government (finding 27). Moreover, there is no showing that the government's estimates were negligently prepared, so under the requirements contract analogy there is no basis for recovery. We believe allowing recovery of lost profits would be contrary to the terms and spirit of the VLA. As we said in *CACI*, "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." *Id.* at 163,252. It would also convert the government's role from provider of free access to DoD data to that of underwriter of the VANs' financial success.

Although not argued by Simplix, we feel compelled to address the distinction drawn in *Applied Companies* between breaches caused by faulty estimates and breaches caused by diversion of business. We have held that the government breached the VLA when it took action that was tantamount to abandonment of the program. This was not, in our view, the equivalent of diverting business from a requirements contract. In the first place, a requirements contract has a set price for supplies or services delivered to the

government. Here, the VANs were delivering to third parties and free to price their services as they saw fit. The high price of the services was cited as a reason for the failure of the expected number of vendors to subscribe (finding 39). Moreover, in the usual diversion of business scenario the government is motivated by lower prices or other issues of self-interest and has no interest in the contractor's success. Here, judging from the money it spent on the VAN program, the government undertook a substantial effort to make it succeed (finding 40). Yet, the VAN program did not succeed.

Further, Simplix has not attempted to present a claim based on diversion of business. While we know that DLA continued to use electronic means other than the VANs, there is no attempt at quantification. Simplix's claim is based on the difference between the business it claims it should have had based on phasing in 300,000 vendors in accordance with the PAT report schedule and the business actually experienced. We consider the basis of the claim to be grounded in Simplix's position that the implementation estimates contained in the PAT report were not met and thus sufficiently similar to the situation in *Applied Companies* as to make the guidance of that precedent compelling in its denial of recovery of lost profits.

To carry the requirements contract analogy forward one more step, variations in requirements may give rise to a sustainable claim where the government has acted in bad faith. *Technical Assistance International, Inc. v. United States,* 150 F.3d 1369, 1373 (Fed. Cir. 1998). There is no proof of bad faith here (finding 61).

In *CACI* we also reasoned that lost profits were not recoverable because the profits would have "come not from the VLA but from other non-government contracts. Generally, such lost profit claims are not allowable[.]" *Id.*, 05-1 BCA at 163,252. In so holding, we adopted the Court's reasoning in *Wells Fargo Bank, N.A. v. United States,* 88 F.3d 1012 (Fed. Cir. 1996) and found the lost profits claimed by CACI too uncertain to be allowable. *CACI,* 05-1 BCA at 163,253. We also analyzed *Energy Capital Corp. v. United States,* 302 F.3d 1314 (Fed. Cir. 2002) and concluded that the facts relied on by the Court in that case were "very different from the VLA and the situation surrounding CACI." *CACI,* 05-1 BCA at 163,254. We see no reason to repeat our analysis here. As CACI was and is a well-established and competent company with substantially more resources than Simplix we think the uncertainty of damages principle applies more starkly here than there.

As to Dr. Tracy's report and testimony, the government vigorously argues that both were inadmissible under FED. R. EVID. 702. According to the government, we did not properly carry out our "gatekeeper" responsibility. While we disagree, the government's arguments have merit with respect to the *weight* to give to Dr. Tracy's report and testimony. Gov't br. at 126-48. We do not address all of the shortcomings set forth by the government, but address those that are most prominent. First, it must be said

that Dr. Tracy's personal relationship with Mr. Chisa gives us pause (finding 54). Next is the issue of market share. It is well-settled that even uncontradicted opinion testimony from an expert is inconclusive if, as here, it is intrinsically unpersuasive. *Sternberger v. United States*, 401 F.2d 1012, 1016 (Ct. Cl. 1968). Dr. Tracy was given and used only 1997 purchase orders to determine market share. He examined nothing else. The concept of purchase orders as a measurement of market share has no rational connection to the claim, which is based on projected sales, and thus Dr. Tracy's position on market share is "intrinsically unpersuasive." Market share is measured as a ratio of brand sales to total sales of a product-type in a defined market (geographical or related companies),[11] and there is no demonstrated connection between sales ratio and transmittal of purchase orders over the Simplix VAN. *Cf. Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1246-50 (11th Cir. 2002). A further flaw is Simplix's use of market share for one fiscal year as the market share for all years of the claim. Finally, Dr. Tracy's version of Simplix's market share extrapolates into 60,000 Simplix customers by December 1995 (finding 55), which is double the total number of users of EDI in the United States in December 1993 (finding 9). We find this to be inherently unreasonable.

Dr. Tracy made errors of the sort that cause concern over attention to detail (finding 57) and he also proceeded under a fundamental misconception—the erroneous notion that 300,000 vendors were *required* to use the VANs (*id.*). This is wrong for several reasons. Foremost is his apparent notion that the 300,000 vendors were somehow guaranteed by the PAT report. As section 2.1 of Addendum A of the VLA makes clear, DoD vendors were not required to participate in EC/EDI (finding 27). He also ignored the statistic in the PAT report showing current users of EC nationally (30,000) (finding 9). We think it unpersuasive to undertake an analysis that does not factor in the time, cost and effort necessary to motivate the non-users comprising the vast majority of potential Simplix customers. Indeed, how was Simplix to identify the potential users? How did it plan to contact them, if at all? How did it plan to finance any marketing campaign? We are not told and, as best we can determine, Dr. Tracy made no effort along these lines. Further, the number of sites to be deployed set forth in the PAT report was 208 and the number of potential vendors that can reasonably be extrapolated at those sites was 124,265 (finding 20). Thus, the government's promise to "phase-in" according to the PAT report schedule cannot reasonably be construed to have encompassed deployment of all DoD sites and incorporation of all potential DoD vendors. *CACI, supra,* 05-1 BCA at 163,251. Dr. Tracy did not consider this. Moreover, Dr. Tracy did not even read the VLA and did not analyze the market shares of the four largest VANs in competition with Simplix (finding 57). For the foregoing reasons and for the reasons argued by the government (gov't br. at 130-48), we find his report without probative value. *Cf. Southern National Corp. v. United States,* 57 Fed. Cl. 294, 304-07 (2003)

---

[11] Market Share Resources, Duke University Libraries, Perkins Library, www.lib.duke.edu/reference/subjects/business/m_share.htm.

(Court rejected expert's model as speculative because, *inter alia*, it did not operate in a known market, failed to identify specific types or categories of investment opportunities applicable in the "but-for world," and failed to recognize competition).

Exhibits and testimony from Mr. Chisa that affect damages fare little better. For example, the presentation of damages is both disjointed and lacking in completeness. Revenues are presented through Dr. Tracy, but Mr. Chisa provided Dr. Tracy only with data on the number of transactions involving purchase orders to establish market share. Mr. Chisa presented cost data himself instead of giving it to Dr. Tracy and presenting to the Board a cohesive, straight forward accounting of the alleged damages. This resulted in a disjointed attempt to support the claim. Similarly, his analysis of how a small business would accommodate the significant changes that would have occurred if there had been full implementation is too speculative. It is also a subject that normally is the province of an expert, not a party-witness who is also the appellant's only stockholder. (Findings 50-52) While we do not require an expert to perform such analyses, Mr. Chisa lacked the expertise and objectivity necessary to be persuasive here. In this regard, we are entitled to take into account his interest in the outcome. *California Federal Bank v. United States*, 395 F.3d 1263, 1270 (Fed. Cir. 2005). Further, the claim as filed was ridiculously large with no supporting calculations and its explanation revealed inflated transaction numbers, absurdly high profit margins and a pricing method never employed under the VLA (finding 53). While we recognize that the claim currently before us is not in the original amount, nevertheless the presentation of such a claim at any stage is troubling. We think it incumbent upon a litigant under the CDA to file claims that are not absurdly inflated and that are at least marginally supported. *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355 (Ct. Cl. 1982). That did not happen here, and even the reduced claim of $204,000,000 is, in our view, inflated, based on an unreasonable profit margin, and remains without persuasive support despite creation of this litigation record. In short, even if we thought lost profits were not barred here by legal precedent, Simplix has failed to establish by a preponderance of the credible evidence, *inter alia*, the reasonable certainty of those alleged profits and thus its right to recover lost profits.

We note that the Federal Circuit has recently stated, with respect to *Winstar*-related cases, that "lost profits theory . . . has not been susceptible of proof due to its speculative nature." *Fifth Third Bank of Western Ohio v. United States*, 402 F.3d 1221, 1236 (Fed. Cir. 2005). We find the same to be true of VAN cases. As stated above, the VLA was a no-cost agreement which, on its face, limited any expectation of payment by the government. Revenue was thus to come from third-party contracts for services. While what the government provided to the VANs may be seen as a business opportunity, it was an exceedingly risky enterprise, as Mr. Chisa acknowledged. The territory was unknown—indeed, only 30,000 firms in the United States used EDI in 1993—and the success of an individual VAN was, among other things, dependent on the expansion of that usage as well as a VAN's ability to identify, attract and competently

service customers. VANs could not merely ride the government's coattails to financially succeed. They had competitors and, as we read the Inspector General reports, there was a certain inertia among vendors which the expenditure of considerable government funds did not overcome. Indeed, the Inspector General flatly stated that widespread participation would not occur. (Finding 40) We think the VANs themselves had to participate in marketing and educational efforts if the market was to expand. They had to price their product attractively so as to make its use feasible for vendors. All of this required skillful exercise of business, technical, and managerial abilities. For example, those abilities would come to the fore in addressing how the VANs were going to deal with "technology advance" (finding 47). In the specific case of Simplix, there is a clear difference of opinion regarding FTP and SMTP (finding 62). It is the kind of thing that affects, *inter alia*, the number of customers Simplix could attract and maintain, and thus the viability of Simplix's market share projections. The SMTP/FTP debate is unresolved on this record. In a similar vein, while we have not tried to quantify the effects of practices engendering complaints from Simplix's customers, we know that it happened (finding 61) and it logically follows that practices engendering complaints would have a negative effect on profitability. And how can we quantify the effect of changes in technology on profitability in this technologically charged area of business? The certainty that profits would have resulted but for the government's breach is, under the circumstances, a speculative proposition at best. The application of the preponderance standard to the body of evidence necessary to hold that lost profits have been "definitely established" (*see Applied Companies*, 325 F.3d at 1340) under the VLA is a daunting task for any board or court. It must be remembered that the award sought represents profits from third-party contracts allegedly lost because of a government breach of a no-cost agreement under circumstances where the non-breaching party must bear responsibility for its actions in obtaining and maintaining those third-party contracts. While lost profits are not *per se* consequential or incidental damages, we think the attenuation of the connection between the government's breach of the no-cost VLA and the claim for profits allegedly lost under third-party contracts reduces any claim for lost profits under the VLA to a claim for consequential damages which are too remote and speculative to be recovered against the government. As we said in *CACI*, 05-1 BCA at 163,253:

> . . . 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.

Proving lost profits presents a daunting challenge under the VLA. Even setting aside for the moment the "no cost" basis of the VLA, had the PAT report been fully implemented, a VAN and its customer base would have been exposed to a wide variety of changing conditions. We do not believe that wide variety of conditions, which would involve a variety of disciplines, and the manner in which an individual VAN would accommodate those conditions, can be presented through a non-breach damages model without engaging in an unacceptable level of conjecture. Even a much more conservative model than presented here, based on the smaller market we have found from the PAT report and assuming profit margins based more on the facts of the VANs' experience, would have an impossible task in establishing persuasively what the economic fortunes of Simplix would have been. We are persuaded that resolution of such claims involves a highly speculative inquiry and presents a great risk that the VANs will collect a windfall. Such damages have been held unrecoverable in suits against the United States. *Ramsey v. United States*, 101 F. Supp. 353 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952).

Other Damages

While we have looked to precedent in requirements cases for guidance, we recognize the uniqueness of the VLA. In entering into the VLA the government must be viewed as inviting the licensee to begin making preparations to satisfy its obligations under the VLA. This may result in provable expenses incurred as a result of reliance on the government's promises in the VLA which, if the government subsequently breaches its commitments under the VLA, may be recoverable as damages. Thus, while we have held that anticipatory profits may not be recoverable under the VLA, we believe the government should not be able to encourage parties to incur costs based on its promises in the VLA and then be able to breach those promises without consequence. We believe, further, that reliance or restitution damages, if proven, should be recoverable, and that some sort of jury verdict not based on profits might be possible.

Curiously, Simplix in its reply brief states unequivocally that it is not seeking reliance or restitution damages, while also declaring that we could determine reliance damages by subtracting revenues from costs. Simplix further states that "the cost to Simplix of creating the VAN and its software was largely incurred prior to its signing the VAN License Agreement since it was a participant in the GATEC program." (App. reply br. at 95) Simplix would appear to be conceding it cannot prove reliance damages. In addition to eschewing reliance and restitution damages, Simplix did not segregate costs, and the only data presented are essentially estimates on profit and cost. Accordingly, we can find no basis to award reliance, restitution, or jury verdict damages.

SUMMARY

Although we have found the government breached the VLA, Simplix has sought only lost profits. We have found that lost profits are not recoverable here, and Simplix does not seek reliance or restitution damages. We have also found there is no basis for "jury verdict" damages. The appeal is, therefore, denied.

Dated: 14 March 2006

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 No. 52570, Appeal of Simplix, rendered in conformance with the Board's Charter.

Dated:

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