ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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

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 ON
GOVERNMENT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Before us is another in a series of appeals involving the VAN Licensing Agreement (VLA),[1] which is the contractual instrument underlying the appeals. The instant appeal is the quantum portion of an appeal which was decided on entitlement on 22 March 2001. *GAP Instrument Corporation*, ASBCA No. 51658, 01-1 BCA ¶ 31,358 (hereinafter *GAP I*). Familiarity with that decision is presumed and only brief summaries of relevant findings are repeated herein. In *GAP I*, we held the government had, in certain respects, breached the VLA. The government has filed a motion seeking dismissal and, alternatively, partial summary judgment. The government alleges as to its dismissal motion that the claim filed most recently by appellant is a new claim that has not been decided by the contracting officer. As to its alternative summary judgment motion the government argues that it is entitled to judgment as a matter of law on a portion of the claim. Appellant, among other arguments, counters that, even if the claim is a new claim, it was filed more than 60 days ago and should be treated as a deemed denial. We grant the government's motion in part.

FINDINGS OF FACT

1. The VLA was signed by appellant's CEO, James Edwardson, on 9 June 1994 and by the contracting officer, Constance Jackson, on 12 October 1994. It was a

[1] The VLA appears in its entirety as Appendix 1 of *GAP I* at 154,867-78.

"no-cost" agreement. The VLA was terminated by Modification No. P00001 on 17 September 1997. (Ex. G-3 at Bates 000001, -6, -7, -9) The VLA had evolved through a process which had as its goal the creation of a Value Added Network (VAN) utilizing VAN providers who would make available to vendors electronic data interchange (EDI) services for a fee. VAN providers had to sign the VLA and pass certification tests. A process action team had issued a report (the PAT report) in which a two-year phase-in schedule was outlined. *GAP I* at 154,860-62.

2. Appellant filed a claim seeking damages of $93,606,515 on 16 March 1998. The period for which damages was sought was November 1994 to September 1997. The claim, which was properly certified, asserted that appellant "has incurred significant expense meeting the requirements [of the VLA]." The claim continued:

> The Government has not complied with the following portions of the license:
>
> 1. ARTICLE 7 EXCLUSIVITY provides for the EC [electronic commerce] data described in Addendum A and in the Technical Scope of Work to be distributed only to VANs licensed and certified under LICENSE AGREEMENT DCA200-94-H0015.
>
> 2. 2.1 Contractor Use of VAN Services provides that contractors desiring to electronically conduct business to do so with a participating, fully tested EDI VAN provider.[]
>
> 3. Technical Scope of work B. [sic] calls for 75% of the DoD's most frequently used business transactions to be conducted via EC by 1995. It also affirms that this EC data will be only available by way of VANs licensed and certified under LICENSE AGREEMENT DCA200-94-H-0015. Procurement and payment transactions are called out as priorities.
>
> 4. Technical Scope of work c.3.3 [sic] explicitly identifies CALS [Continuous Acquisition and Life Cycle Support] data as included under this license agreement.

The claim alleged that the government had failed to comply with the above provisions by providing EC data through means other than VANs and by formation of a system that

proposed to provide CALS data via the Internet. The claim contained no further explanation of the nature or attribution of the alleged damages. (Ex. G-4) The claim was denied in a contracting officer's decision of 26 May 1998 (ex. G-5).

3. In its complaint in *GAP I*, appellant asserted that its original claim of $93,605,515 was its calculated cost of performance from 12 October 1994 to 17 September 1997. It set forth alternative damage theories explained as founded upon estimated lost revenues of $115,200,000 from 80,000 accounts, and value of services, estimated at $164,000,000. The complaint alleged breaches by DoD arising from its failure to conduct all EC transactions between it and its trading partners through participating VANs and by "allow[ing], permit[ting] and encourag[ing]" DoD's electronic contractors to circumvent the VAN providers. (Ex. G-6, ¶¶ 22-30)

4. In *GAP I* the Board decided entitlement. We held that DoD had breached the VLA "to the extent that [it] 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 [certain] mandatory items." We expressly refused to treat as breaches DoD's failure to meet interim target dates of the phase-in schedule. Indeed, we noted that the parties did not even present arguments on that issue. Accordingly, we confined our holding to the schedule's "outward limits [two years]." *Id.* at 154,867.

5. By letter of 6 June 2005 appellant informed the Board that it desired to proceed with quantum. We treated the letter as a request for reinstatement and in an 8 June 2005 Notice of Docketing informed appellant that the Board had assigned the quantum appeal a new docket number – ASBCA No. 55041. Enclosed with the docketing notice was an ORDER ON PROOF OF COSTS, requiring a detailed statement of costs within 60 days and a government response 30 days after receipt of appellant's statement of costs. We did not require a contracting officer's decision. (Bd. corr. file)

6. Thereafter, the parties proposed a schedule for proceeding in a 29 June 2005 Status Report. The Board adopted the schedule in a 6 July 2005 Order. The schedule provided for expert reports no later than 1 August 2005 with discovery proceeding through "at least December 31, 2005." (Bd. corr. file)

7. On 29 April 2005 the Board issued a decision in another VAN appeal in which it denied recovery of lost profits and, as only lost profits had been presented, treated the appeal as denied although finding a breach of the VLA. *CACI International, Inc.*, ASBCA Nos. 53058, 54110, 05-1 BCA ¶ 32,948 (*CACI I*). That decision was appealed to the United States Court of Appeals for the Federal Circuit. *CACI International, Incorporated v. Rumsfeld*, No. 05-1495 (*CACI II*). By Order of 8 August 2005 the Board

suspended proceedings until 18 September 2005 and directed the parties to attempt agreement on how best to proceed in the circumstances during the pendency of the appeal. On 28 September 2005 a telephone conference was held in which appellant's counsel informed the Board of estate issues (Mr. Edwardson had passed away in June 2004) complicating the proceedings in the GAP appeal. The Board issued another Order, dated 30 September 2005, directing appellant to inform the government as soon as the problems were worked out. (Ex. G-15; Bd. corr. file)

8. On 3 February 2006 appellant submitted a revised claim to the contracting officer. The title page of the claim identifies it as "SUBMITTAL OF QUANTUM CLAIM RE: ASBCA No. 55041, Appeal of GAP Instrument Corporation." The claim sought net income, which we equate to lost profits, of $143,000,000. The claim alleges, *inter alia*, that DoD breached the VLA by failing to maintain FACNET schedules and by signing an agreement with NTIS.[2] Specifically, appellant asserts "DoD failed to enforce those provisions of the VLA that mandated that the VANs exclusively be used by the Government for all transactions specified to be handled via FACNET." It goes on to state that "DoD failed to maintain FACNET's schedules . . . thereby obviating their mandate to participate in FACNET." (Ex. G-1 at 1, 34, 35, 65, 69) Neither of the alleged breaches were found in *GAP I*. Similarly, appellant for the first time raises an agreement between it and two other VANs, collectively called GAP-Net, "which was the total across-the-board operational infrastructure that was built from the ground up to exactly meet all FACNET specifications" (*id.* at 18-20). There is no mention of GAP-Net in *GAP I*. Appellant also identifies as a source of lost revenue the failure to implement the system government-wide, which it asserts is "another breach . . . more egregious and damaging than those . . . identified by ASBCA" (*id.* at 36). It, too, was not a breach found in *GAP I*, which limited its holding to DoD. Appellant also included a breach "not specifically identified by ASBCA" which appellant described as "the Government sign[ing] an agreement with NTIS to provide them a direct link to the Government's internal NIPERNET" (*id.* at 35). That alleged breach was not addressed in *GAP I*.

[2] The terms Federal Acquisition Computer Network and National Technical Information Service, as well as their acronyms, FACNET and NTIS, do not appear in *GAP I*.

9. Appellant's claim contains the following cost breakdown:

GAP INSTRUMENT CORP.
PROJECTED STATEMENT OF INCOME AND EXPENSES
VLA1 CONTRACT PERIOD 10/12/94 THROUGH 9/17/1997

(All Values in Thousands of Dollars)

	Nov. 1, 1994 to Dec 31, 1995	**1996**	**Jan 1, 1997 to Sep 17, 1997**	
Sales				
VAN Start Up	$57,689	$63,975	$2,537	
VAN Renewal		$62,705	$93,892	
Non-VAN Sales	$433	$950	$723	
Total Sales	$58,121	$127,630	$97,152	
Cost of Sales				
Telephone & Network	$398	$1,189	$1,095	
VAN Support Salaries	$4,220	$6,645	$4,172	
Total Cost of Sales	$4,617	$7,835	$5,267	
Gross Profit	$53,504	$119,795	$91,885	
Sales Expenses				
Marketing	$12,541	$16,416	$7,937	
Total Selling Expenses	$12,541	$16,416	$7,937	
General & Administrative Exp				
Payroll Expenses	$1,499	$1,703	$1,096	
Occupancy	$515	$769	$694	
Utilities	$256	$1,113	$1, 054	
Telephone	$101	$109	$64	
Office supplies & postage	$265	$347	$208	
Professional fees	$313	$286	$161	
Seminars & Conferences	$134	$147	$12	
Miscellaneous	$126	$217	$229	
Insurance	$153	$284	$309	
Depreciation	$176	$186	$30	
Maintenance	$141	$383	$418	
Total G & A	$3,679	$5,546	$4,275	
Total Operating Exp	$16,220	$21,962	$12,211	
Net income before taxes	$37,284	$97,833	$79,674	
Taxes	$12,304	$32,285	$26,292	
				TOTAL
Net income after taxes	$24,980	$65,548	$53,382	143,910

Figure 4 – Projected Statement of Income and Expenses for GAP, 21 Oct 1984 through 17 Sep 1997

(Ex. G-1 at 55)

DECISION

JURISDICTION

According to the government, we do not have jurisdiction over appellant's 3 February 2006 claim. The government argues that it is a new claim because it contains new allegations and new theories not based on the operative facts in *GAP I*, and for which entitlement was not found. It further argues that the claim contains new breach allegations not addressed by the contracting officer. The government also raises the defense of laches and argues that Board Rule 31 is applicable. Appellant counters that the claim is not a new claim due, in large measure, to the bifurcated Board proceedings, but that, even if it is, the contracting officer must be deemed to have denied it because she has had it for more than 60 days.

The procedure followed by the Board where an appeal has been bifurcated – divided into entitlement and quantum segments – is generally to do what was done here. We hear and decide entitlement and, if the party seeking recompense is successful, we remand the matter to the parties for settlement. If settlement is not forthcoming, the Board reinstates the appeal upon request, and, for administrative reasons, issues a new docketing number. We have taken jurisdiction over "quantum-only" appeals with, *General Dynamics Decision Systems, Inc.*, ASBCA Nos. 51789, 54978, 05-2 BCA ¶ 33,091, *appeal docketed*, No. 06-1191 (Fed. Cir. Jan. 24, 2006), or without, *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 05-1 BCA ¶ 32,903, benefit of a contracting officer's decision on quantum. It must be presumed that if we had jurisdiction to hear and decide entitlement, we have jurisdiction to hear and decide the disputed quantum portion of the case, albeit under a new appeal number. Thus, we agree with appellant's argument that we have jurisdiction, but only to a point. Where we fall out with appellant and agree with the government is discussed below.

In *GAP I* we held that the VLA was limited to small purchases and other simplified procedures[3] and "respondent [DoD] was required to use the VAN providers for electronic transmission[ ] of the mandatory items once the plan was phased-in at each DoD activity pursuant to the schedule in the PAT report." *Id.* at 154,866. We also declined to find a breach for any DoD failure to meet interim targets of the two-year phase-in schedule:

> . . . In summary, respondent breached the agreement to the extent that respondent did not use, or failed to require

[3] Small purchases are purchases of $25,000 or less (*GAP I*, findings 1, 7, 11).

> 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. [Emphasis added]

Id. at 154,867. We defined "mandatory items" as items falling within the context of the Overview to Addendum A (*id.* at 154,875), which deals exclusively with DoD, and we set forth the following list of specifics to further define and limit the "mandatory items:" "requests for quotations (RFQs), quotes, awards, summaries of awards, 'some information [provided by DoD] regarding the DoD electronic commerce approach and contractor registration,' and priced orders against established contracts." *Id.* at 154,866. Thus, entitlement was established only for damages incurred as a result of government failure to implement the requirements of the VLA by the end of the two-year phase-in set forth in the PAT Report.[4] Damages were further limited to DoD electronic procurement activities for small purchases, and the above list of "mandatory items."

Appellant has presented a claim that it undeniably identifies as the quantum segment of *GAP I* (finding 8). The claim plainly includes bases for recovery that are beyond the breach holding in *GAP I* and for which it must prove entitlement before it can recover damages or an equitable adjustment. Appellant seeks, *inter alia*, damages for breaches arising from an agreement with NTIS, failure to meet FACNET schedules, creation of GAP-Net, and failure to implement the system government-wide (hereinafter "alleged breaches"). Appellant did not establish entitlement to damages for those alleged breaches in *GAP I*. Indeed, with respect to the NTIS agreement and the failure to implement the system government-wide, appellant's claim specifically states the Board did not find entitlement to those two alleged breaches in *GAP I*. (Finding 8) They are not, therefore, properly before us in the quantum phase of this bifurcated appeal.

Appellant argues that section 605 of the Contract Disputes Act, 41 U.S.C. §§ 601-613, as amended (CDA), requires the contracting officer to issue a decision on its claim within 60 days, and since its 3 February 2006 claim has been before the contracting officer for more than 60 days it does not matter that there are new items. According to appellant, the failure of the contracting officer to act gives us jurisdiction over the claim based on a "deemed denial." *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004). However, appellant has not presented the elements of its claim in a way that makes it possible to determine how much it seeks for the alleged breaches, so there is no discernible sum certain set forth in the claim for those breaches. Indeed, it has given

[4] In both *CACI I* and *Simplix*, ASBCA No. 52570, 06-1 BCA ¶ 33,240, *recons. denied*, 13 June 2006, we held 4 April 1996 to mark the date by which the network was to have been completed and phase-in ended.

the contracting officer a confusing document which it entitled as a quantum claim regarding ASBCA No. 55041 while raising new entitlement issues (finding 8). In any event, for a written demand to be considered a CDA claim, it must contain a request for a sum certain as to the relevant operative facts. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1576 (Fed. Cir. 1995) (*en banc*). As a consequence, it makes no difference that the claim has been with the contracting officer for more than 60 days. There is no CDA claim to be deemed denied under section 605 of the CDA without a sum certain. *Sandoval Plumbing Repair, Inc.*, ASBCA No. 54640, 05-2 BCA ¶ 33,072. Accordingly, we strike, without prejudice, those portions of the 2006 claim identified above for which we did not find entitlement in *GAP I* due to the lack of a discernible sum certain.[5] In so holding, we offer no opinion as to whether a future claim based thereon may be barred by either *res judicata* or law of the case. *See, e.g., Black River Limited Partnership*, ASBCA No. 51754, 02-1 BCA ¶ 31,839 at 157,326-29, *motion for recons. denied*, 02-2 BCA ¶ 31,885.

Logically, if there is no discernible sum certain for the part of the 2006 claim that raises new entitlement issues, neither can there be a sum certain for the part for which *GAP I* found entitlement. Therefore, insofar as appellant's deemed denial argument is concerned, our holding above applies with equal force to the part of the 2006 claim for which *GAP I* found entitlement. However, we see no useful purpose to be served by dismissing this appeal, as distinguished from striking the 2006 claim. As we said above, if we had jurisdiction for entitlement, we have jurisdiction for quantum. Our normal procedures require a request for reinstatement from the prevailing party on entitlement when the parties have been unsuccessful in negotiating quantum. That has happened here (finding 5). We were prepared to go forward on that request. We assigned a new docket number and issued an ORDER ON PROOF OF COSTS. We did not require a contracting officer's decision, merely a government response within 30 days (finding 5). We cannot, however, deal with the ramshackle remains of appellant's 2006 claim as some sort of substitute statement of costs. We conclude that it, too, must be stricken. This is so for several reasons: 1) because it was presented to the contracting officer as a quantum claim and not to the Board as a statement of costs; 2) because there is no obligation on the contracting officer to issue a decision on a demand for money which does not contain a discernible sum certain; and, 3) because, even if we were inclined to treat it as a substitute statement of costs, the Board has no realistic way to figure out what it is that appellant is seeking. Accordingly, we strike appellant's 2006 claim. We reinstate our 8 June 2005 ORDER ON PROOF OF COSTS. Appellant shall have 60 days from receipt of this

[5] Moreover, appellant does not explain if we were to exercise deemed denial jurisdiction over its new claims, how we could adjudicate the quantum of such claims in the proceeding in ASBCA No. 55041 without an entitlement decision on the new claims.

Opinion to respond. Appellant shall respond in strict accordance with this decision and with entitlement as found in *GAP I*.[6]

SUMMARY JUDGMENT

Summary judgment is appropriate under FED. R. CIV. P. 56 where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

More than mere assertions of counsel are necessary to counter a motion for summary judgment. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. Mere conclusory assertions do not raise a genuine issue of fact. *Id*. The party with the burden of proof must support its position with "more than a scintilla of evidence." *Walker v. American Motorists Insurance Co.*, 529 F.2d 1163, 1165 (5th Cir. 1976).

Evidence sufficient to establish the existence of a genuine material factual issue need not be admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 324 (1986). Even so, a hearsay affidavit is not a substitute for the personal knowledge of a party. *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988). Indeed, Rule 56(e) requires affidavits to be "made on personal knowledge [and] set forth such facts as would be admissible in evidence." Thus, statements inadmissible under FED. R. EVID. 408 were inadequate to defeat a motion for summary judgment. *Scott Aviation*, ASBCA No. 40776, 91-3 BCA ¶ 24,123. Moreover, while summary judgment need not be denied merely to satisfy the speculative hope that discovery will result in the uncovering of evidence to support a complaint, *Pure Gold, supra*, 739 F.2d at 627, an adequate opportunity for discovery must usually precede summary judgment. *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993). Finally, summary judgment may be denied if "there is reason to believe that the better course would be to proceed to a full trial." *Anderson, supra*, 477 U.S. at 255.

[6] As we strike on the grounds articulated herein, we do not address the government's alternative laches and Rule 31 arguments.

The government seeks partial summary judgment, arguing that appellant is not entitled to lost profits for the phase-in period, from 5 April 1994 to 4 April 1996, as a matter of law. Appellant has not addressed the government's alternative summary judgment motion, even though appellant has the burden of proof and Rule 56(e) requires it to "set forth specific facts showing that there is a genuine issue for trial." Indeed, appellant has not even offered argument. The Supreme Court has said the following about the nonmovant's obligation and the consequences of inaction under Rule 56:

> . . . In our view, the plain language of Rule 56(c) *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." [Emphasis added]

Celotex Corp., supra, 477 U.S. at 322-23.

We have said that we retain jurisdiction over the appeal for those portions that align with the entitlement decision, and we have directed appellant to respond to our ORDER ON PROOF OF COSTS. By resolving this motion it is our intent to provide definitive guidance on whether or not lost profits for the phase-in period of the PAT report schedule, which the government defines as, and we have held to be (*see* n.4), from 5 April 1994 to 4 April 1996, may be recovered. In the 1998 and the 2006 claims appellant seeks damages for the period from 1 November 1994 to 17 September 1997 (findings 2, 9). The contracting officer signed the GAP VLA on 12 October 1994 and the VLA was terminated effective 17 September 1997 (finding 1). Thus, the period for which appellant seeks damages includes the portion of the phase-in period from 1 November 1994 to 4 April 1996.

As appellant has not argued against the government's summary judgment alternative or even sought additional time for discovery,[7] we may be entitled to assume it has abandoned its claim for profits allegedly lost during the phase-in period. However, to the extent that appellant has not abandoned that part of its claim, the government is entitled to partial summary judgment as a matter of law. Specifically, we hold appellant is not entitled to lost profits (or "net income," to use the term in appellant's 2006 quantum claim) for the phase-in period. In the first place, the phase-in portion of appellant's claim defies logic inasmuch as it seeks profits for a period *before* the VAN network was contractually required to be up and running. Proof of lost profits arising before a business enterprise has begun would involve evidence of extraordinary circumstances, particularly when the contract at issue is a no-cost contract. Yet, appellant offers nothing.

Further, as discussed below, neither *GAP I* nor two other cases interpreting the VLA have found the government breached the VLA during phase-in. Our precedent, therefore, establishes that the government in implementing the VAN program did not breach the VLA by failing to meet interim dates of the phase-in period. Appellant must distinguish its circumstances from those decisions if it is to meet its burden of proof. Under modern summary judgment practice it must do so by establishing that it can provide evidence which, if believed, is sufficient to demonstrate the existence of a material issue. It has instead been silent in its response to the summary judgment alternative in the government's motion, and its silence establishes there are no material issues to be resolved. *Celotex, supra; Sermor, Inc.*, ASBCA Nos. 46754 *et al*., 94-3 BCA ¶ 27,273 at 135,879 ("appellant is obligated to do something to at least place in issue the facts essential to its case"). We think our precedents interpreting the VLA and the government's conduct during the phase-in period are clear. In *GAP I* the parties did not present arguments on breach during the phase-in period and we offered no opinion on the subject while confining our holding to the period after phase-in (*id.* at 154,867). However, in *CACI I* we stated "[w]e therefore cannot conclude that the government breached the VLA by not meeting the interim [phase-in] dates." *Id.* at 163,248. In *Simplix* we similarly stated "we cannot find [the government] breached the VLA with regard to interim [phase-in] dates." *Simplix*, 06-1 BCA at 164,722.

In *Simplix* we also observed:

> 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

[7] Although not raised as an issue, we hold there has been adequate time for discovery since the appeal was docketed on 8 June 2005 (finding 5).

> 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).

Id. at 164,727-28.

Since appellant has not raised a material issue, offered argument on whether there was a breach entitling it to lost profits during phase-in, or explained how it would meet the "daunting challenge" of proving lost profits under the VLA in the period *before* the network was contractually required to be operational, our holdings in *CACI I* and *Simplix* apply with equal force here. Given that there was no breach during phase-in, there can be no entitlement to lost profits prior to 4 April 1996. The government's alternative motion for summary judgment is granted and the appeal is denied with respect to lost profits prior to 4 April 1996. Appellant's response to the Board's ORDER ON PROOF OF COSTS shall not include lost profits from the phase-in period.

SUMMARY

1. Recognizing that this is the quantum portion of a bifurcated appeal, we do not dismiss ASBCA No. 55041. However, we strike appellant's 2006 claim because it contains elements for which entitlement was not sustained in *GAP I* and because it does not contain a discernible sum certain.

2. Our 8 June 2005 ORDER ON PROOF OF COSTS is reinstated. Appellant shall provide a statement of costs within 60 days from receipt of this decision, and the

government shall file a response within 30 days from receipt of appellant's statement of costs.

3. The government's motion for partial summary judgment is granted with respect to whether there was a breach entitling appellant to lost profits during phase-in - *i.e.*, prior to 4 April 1996. The appeal is denied on that issue.

Dated: 28 July 2006

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

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55041, Appeal of GAP Instrument Corporation, rendered in conformance with the Board's Charter.

Dated:

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