ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Total Procurement Service, Inc.	)	ASBCA Nos. 54163, 55821
	)	
Under Contract No. DCA200-94-H-0015	)	

APPEARANCE FOR THE APPELLANT: Gerald H. Werfel, Esq.
Pompan, Murray & Werfel, P.L.C.
Alexandria, VA

APPEARANCE FOR THE GOVERNMENT: Jo Ann W. Melesky, Esq.
Trial Attorney
Defense Information Technology
Contracting Organization
(DITCO)
Scott AFB, IL

OPINION BY ADMINISTRATIVE JUDGE PEACOCK

Total Procurement Service, Inc. (TPS or appellant) alleges that the government breached a license agreement pursuant to which TPS was to furnish services as a Value Added Network (VAN) provider in furtherance of the government's efforts to establish electronic commerce within the Department of Defense (DoD). We have previously addressed the VAN licensing agreement and breach of contract contentions by other VAN providers in *GAP Instrument Corp.*, ASBCA No. 51658, 01-1 BCA ¶ 31,358; *CACI International Inc.*, ASBCA Nos. 53058, 54110, 05-1 BCA ¶ 32,948, *aff'd,* 177 Fed. Appx. 83 (Fed. Cir. 2006); *Simplix,* ASBCA No. 52570, 06-1 BCA ¶ 33,240, *recon. denied,* 06-2 BCA ¶ 33,318, *aff'd sub nom. Imagination & Information, Inc. v. Gates,* 216 Fed. Appx. 990 (Fed. Cir. 2007); *GAP Instrument Corp.*, ASBCA No. 55041, 06-2 BCA ¶ 33,375, 07-1 BCA ¶ 33,567; and *Advanced Communications Systems,* ASBCA No. 52592, 06-2 BCA ¶ 33,429, 07-1 BCA ¶ 33,484. Both entitlement and quantum are before us. We dismiss ASBCA No. 54163 for lack of jurisdiction due to the failure of appellant's claim to state a sum certain. We deny ASBCA No. 55821, finding that the government breached the VAN licensing agreement but that TPS has failed to sustain its burden of proving damages resulting from the breach.

FINDINGS OF FACT

A. Pre-Contract Background

1. In July 1993, the DoD established a Process Action Team (PAT) to study and recommend ways to use electronic commerce (EC) to improve and streamline the acquisition process (SOF at 1[1]; ex. G-1).

2. The PAT issued its report (the PAT Report) on 20 December 1993. The PAT Report defines EC 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 (EDI) as "the computer-to-computer electronic transfer of business transaction information in a public standard format between trading partners." (Ex. G-1 at 53)[2] Methods then in use 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. . . . It should be noted that within the three major solutions there are many possibilities which are represented throughout DoD. Under the Direct Connect falls any project which sends data from Government computer to commercial business, not a value-added network (VAN), or receives data direct from Trading Partner. Listed under Network Solutions are those systems which use a gateway to VAN or gateway to [distribution point] 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.

[1] The parties entered into unnumbered stipulations of fact (SOF) which we reference by page number.

(Ex. G-1 at 158; SOF at 2-3)

3. The PAT Report recommended a multiple VAN approach and the creation of a DoD infrastructure to implement EC/EDI procurement within DoD. It projected, "over 300,000 vendors are interested in conducting business with DoD today" (ex. G-1 at 177). Major components of the recommended 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.

---

[2] Page references in the documentary evidence are to Bates numbers if available or to internal document numbers if Bates numbers are unavailable.

(Ex. G-1 at 52; SOF at 5)

4. The PAT Report stated, "[a] strategic goal of DOD is to present a 'single face to industry'" (ex. G-1 at 4). It defined "single face to industry" as follows:

> 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).

(Ex. G-1 at 53; SOF at 4)

5. The PAT Report set forth schedules for implementing EC within DOD over periods ranging from six months to two years noting that the "implementation schedules . . . represent the intention of the [DOD] components to make a good faith effort at achieving deployments in accordance with their submitted schedules" (SOF at 3, 6).

6. Based on the DoD components' deployment schedules, the Defense Information Systems Agency (DISA) was tasked with creating the requisite infrastructure, gateways, and Hubs/NEPs for DoD wide use. A sample VAN Licensing Agreement (VLA) was included in the PAT Report that anticipated creation of the infrastructure based on the projected deployment schedule of the individual services/DOD components. (SOF at 7; tr. 5/19, 70) The PAT Report stated, "[t]he addition of certified VANs, operating under the DoD Van agreement, will require 60-90 days lead time from approval of the technical plan and [DoD] direction to proceed. In the interim, VAN services will be supplied under existing contracts and agreements" (ex G-1 at 291).

7. The PAT Report identified procurements of $25,000 or less as "the best target for DoD's EDI initiative in contracting" and contained the following statistics:

> In FY92, more than 1,400 DoD contracting offices participated in performing the DoD total of 11.851M transactions of $25,000 or less (emphasis added). Approximately 10.2M of these transactions (85 percent) were performed by the 238 DoD activities, which accomplished 10,000 or more such actions in FY92. The small purchases represent approximately 6 million actions. Of these, approximately 85 percent are awarded at values of $2,500 or less and do not presently require competitive solicitation.

(Ex. G-1 at 289-91)

8. There is no evidence of negligence on the government's part with regard to any of the estimates in the PAT Report (SOF at 7).

9. On 28 April 1994, the Office of the Deputy Secretary of Defense issued a memorandum on use of EC EDI in procurement which stated in part:

> . . . 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 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 . . . .

(Ex. G-6 at 2)

10. Full deployment of the system within DoD originally was to be achieved by approximately April 1996, two years from the date of the above memo (*id.;* SOF at 6, 7; ex. G-1 at 178-84, 288-323). The PAT Report lists dates for phased deployment of various DoD components and their associated existing or legacy systems. The total number of vendors associated with each of these legacy systems to be serviced by VANs after deployment, as extrapolated from the implementation details and data in the PAT Report, is 124,565 (ex. G-1 at 69-99).[3]

B. The Van Licensing Agreement

11. The PAT Report proposed that a single standard VAN licensing agreement be used (ex. G-1 at 292-93). It contemplated that the government would create an infrastructure that would include DoD Distribution Points or hubs that would make covered DoD procurement actions accessible only to VANs that executed the license agreement (ex. G-1 at 265-80; SOF at 4, 7).

12. In December 1993, DISA convened a pre-solicitation conference to discuss the proposed VLA with prospective offerors and sent them a package of materials (ex. G-2). Among other things, the materials stated that approximately 6 million small purchases ($25,000 or less) transactions were annually projected and "65% of the 6 million actions could be expected to be available for solicitation via EDI" (*id.* at 25; SOF at 2).

[3] See also *Simplix, supra,* 06-1 BCA at 164,712-13; *CACI, supra,* 05-1 BCA at 163,243.

13. The Van License Agreement (VLA) signed by the parties in this case became effective 10 July 1995, the date it was executed by the contracting officer. Among other clauses, it incorporated FAR 52.233-1, DISPUTES (DEC 1991) and included the following pertinent provisions (R4, tab 1 at 1-4):

> **ARTICLE I. LICENSE GRANT – DECCO/RPPS (DEC 1993)**
>
> The EDI VAN Provider hereby provides the Government with the right to have access to the use of its EDI and Value-Added Network Services at no-cost to the Government for the purpose of exchanging business documents and information with individuals and organizations conducting business with the Government throughout the DoD Hub Gateway Computers.
>
> . . . .
>
> **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/RPP (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 7. EXCLUSIVITY – DECCO/RPP (OCT 1992)

This license agreement provides for EDI VAN Provider access to the EC data provided as described in the Technical Scope of Work. The DoD Hubs will provide DoD transactions offered under this agreement only to VANs signing this agreement. DoD will not provide these transactions to VANs under other agreements. This license agreement shall be used exclusively for obtaining access to the EC Data provided by the DoD Hubs computer during the term of this agreement.

ARTICLE 8. EXTEND TERM OF AGREEMENT - DECCO/RPP (OCT 1992)

This agreement shall be effective the date the Government signs the agreement and shall continue unless sooner terminated in accordance with the provisions of this agreement. The total duration of this License Agreement shall not exceed 60 months (one basic year with four one-year periods).

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.

ARTICLE 10. LIABILITY EXCLUSIVE – DECCO/RPPS (OCT 1992)

The Government is not responsible for errors or omissions of the EDI VAN Providers in providing information to other commercial entities. The Government is not liable for non-performance of the EDI VAN Providers.

ARTICLE 11. USE OF LICENSE AGREEMENT – DECCO/RPPS (SEP 1993)

The License Agreement is for use by both DoD and non-DoD Agencies.

. . . .

ARTICLE 13. LIMITATION OF LIABILITY – DECCO/RPPS (DEC 1993)

The EDI VAN Provider is not expected to assume liability for incidental, special or consequential damages, or third party claims against the EDI VAN Provider or the Government, under or related to the agreement and the VAN Provider's total liability under or relating to the Agreement will not exceed, in the aggregate, one hundred thousand dollars ($100,000).

14. The Technical Scope of Work (TSW) referenced in, and attached to, the VLA contained the following pertinent provisions (R4, tab 1 at 5-12):

A. OBJECTIVE

The objective of this attachment to the EDI VAN Provider license agreement is to describe the DoD technical approach to electronic commerce using multi-VAN DoD Hubs to exchange transactions with EDI VAN Providers participating

in the agreement. It defines technical requirements and procedures for participating EDI VAN Providers. Most functional areas within DoD including procurement, finance, transportation, supply, and administration are ultimately expected to use the technical approach described in this attachment. Procurement is the first functional area to use it. The application of this technical approach to procurement is provided in Addendum A to this agreement. Addendum A is consistent with and uses the technical approach described below.

B. OVERVIEW

The Department of Defense (DoD) is committed to implementing electronic commerce (EC) using electronic data interchange (EDI). . . .

DoD has set aggressive goals to make electronic commerce a standard way of conducting business in the 1990s. By 1995, DoD plans to conduct 75 percent of its most frequently used business transactions electronically. DoD believes 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.

To achieve these goals, DoD will use multi-VAN Hubs to exchange transactions between DoD and the EDI VAN Providers used by DoD's commercial trading partners. These commercial trading partners can choose to use any of the EDI VAN Providers participating in this agreement. A commercial trading partner will send and receive information to and from DoD via its EDI VAN Provider. 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. DoD activities will transmit data to the Hubs which will forward the data to the appropriate EDI VAN Providers used by the DoD activities' trading partners. DoD will send any one-to-all (i.e., available to the public) transactions sent by DoD activities to each of the participating VAN Providers via the Hubs. The participating EDI VAN Providers are required to make these

public transactions available to all interested subscribers. DoD will also exchange one-to-one transactions, i.e., transactions addressed specifically to one or more contractors, via the multi-VAN Hubs.

DoD will develop and distribute to all participating EDI VAN Providers a document detailing the policies and procedures that will be followed to establish and maintain connectivity with the multi-VAN DoD Hubs. Each EDI VAN Provider will establish redundant connectivity with Hubs in accordance with this agreement.

DoD will use a phased approach for implementing EDI in its various functional areas and across DoD activities. Procurement and payment transactions have been identified as priority targets for DoD's EC program but all business areas will move to an EC environment when it makes good business sense to do so. DoD has designed a standard framework and technical solution for all business areas.

C. EDI VAN PROVIDER SERVICES

C.1 DEFINITION OF AN EDI 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. . . . 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.

. . . .

C.3 Standards and Conventions for Standards Usage

C.3.1 Transaction Set Standards

The EDI VAN Provider must be able to exchange all transactions with the multi-VAN DoD Hubs using the

American National Standards Institute (ANSI) Accredited Standards Committee (ASC) X12 standards . . . .

C.4 Interface Between Multi-VAN DoD Hubs and EDI VAN Providers

All EDI transactions exchanged between commercial trading partners and DoD activities will be exchanged via the DoD Hubs. . . .

D. DATA RESPONSIBILITY

The DoD assumes responsibility of all data until it is delivered to each EDI VAN Provider's connection on the DoD Hubs, at which point it becomes the EDI VAN Provider's responsibility. The DoD will make every effort to ensure the communications session is properly completed and all data is transmitted to the EDI VAN Provider.

E. EDI VAN PROVIDER HOURS OF OPERATION AND AVAILABILITY

The EDI VAN Provider must be accessible to exchange transactions to and from the DoD Hubs 24 hours a day, 7 days a week except for eight hours weekly for regularly scheduled routine maintenance. The EDI VAN Provider must report any scheduled and unscheduled break in services under this agreement to the DoD Technical Representative in a timely manner.

. . . .

G. QUALITY CONTROL

The EDI VAN Provider must have an internal quality monitoring program that assures that reliable communication lines are maintained to enable the DoD Hubs computer(s) to exchange electronic transactions using the provided mailbox. The system availability must be at least 97 percent during normal service hours excluding regularly scheduled routine maintenance (see EDI VAN Provider Hours of Operation and Availability).

. . . .

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 regular enveloping and transaction standards; and (3) other requirements in this agreement. . . .

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.

. . . .

M. ACCESS TO ONE-TO-ALL (PUBLIC) TRANSACTIONS

All transactions sets sent by DoD that are intended for any interested party to see, will be sent to all participating EDI VAN Providers as "one-to-all" (public) transactions. These transactions will be addressed to a "public" mailbox controlled by the EDI VAN Provider itself and identified to DoD by the EDI VAN Provider. DoD will provide all public transactions to each EDI VAN Provider using the transaction exchange and interface methods selected by the EDI VAN Provider for exchanging all transactions as part of this agreement.

The EDI VAN Providers must make these one-to-all transactions . . . accessible to all interested subscribers to its services within the time limits specified for each transaction set. . . .

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.

15. Addendum A to the VLA, referenced in the TSW as well as the VLA, was entitled DOD Approach to Electronic Commerce for Small Purchases and Other Simplified Procedures. Addendum A included the following pertinent provisions (R4, tab 1 at 13-18):

1. OVERVIEW

This addendum defines how DoD will use the technical approach described in the Technical Scope of Work of this agreement in order to implement a DoD-wide approach to electronic commerce for small purchases and other simplified purchases consistent with the Federal Acquisition Regulation (FAR) and other applicable statutes and regulations.

EDI-capable DoD activities will be phased into using this approach based on a DoD-wide implementation plan. Requests for quotations (RFQs) will be issued by DoD activities, and the activities will be sent by interested contractors to these activities, and the activities will make awards. All electronic transactions will be exchanged via the multi-VAN DoD Hubs. All contractors will send and receive transactions via one of the participating EDI VAN Providers.

Before conducting electronic commerce with DoD, all contractors must register using a simple electronic registration transaction sent to DoD via a participating EDI VAN Provider.

DoD activities may issue public RFQs and award summaries as defined in the Technical Scope of Work. Award summaries provide basic award information about prior public RFQs against which awards have been issued, e.g., winning contractor, unit price, quantity. This addendum does not prescribe how EDI VAN Providers must provide subscribers access to public RFQs and award summaries nor does it prescribe the format of the information to be provided. A participating EDI VAN Provider may sort these

transactions and provide them to interested subscribers as deemed appropriate. For example, an EDI VAN Provider may choose to make RFQs and award summaries available to interested subscribers via electronic bulletin board type services allowing subscribers to browse through an RFQ bulletin board to select to which RFQs to respond. Other EDI VAN Providers may choose to select RFQs or award summaries of particular interest to their subscribers based on subscriber profiles and provide only these transactions to subscribers in a pre-selected, convenient format. . . .

2. TRANSACTIONS TO BE EXCHANGED

. . . .

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. DoD will require registered vendors 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.

2.2 Public (One-to-All) Transactions

Under this addendum, DoD activities may issue two types of public transactions: public RFQs and public award summaries. These will be issued electronically to all participating EDI VAN Providers via the multi-VAN Hubs in compliance with the Technical Scope of Work (section on "Access to One-to-All (Public) Transactions").

The EDI VAN Provider must provide DoD read-only access to one-to-all transactions in the same way it provides such access to its subscribers. . . .

DoD encourages the EDI VAN Provider to make the one-to-all transactions accessible to the widest number of interested

contractors to strengthen competition and improve DoD access to the U.S. industrial base.

2.2.1 Public (One-to-All) RFQs

DoD activities can elect to send an individual RFQ as a one-to-one transaction to one or more specific contractors concurrent with, or in place of, a one-to-all (public) transaction.

. . . .

The EDI VAN Provider must make available to all of its interested subscribers any changes to or cancellations of public RFQs within the time frame specified in Section 3. . . .

2.3 One-To-One Transactions

DoD activities will exchange all electronic transactions with individual contractors/vendors via the multi-VAN DoD Hubs and the appropriate participating EDI VAN Provider using the approach described in the Technical Scope of Work. These transactions are referred to as "one-to-one" transactions because they are addressed to individual contractors/vendors. . . .

Consequently, the term, "one-to-one transactions" applies to all procurement and contracting actions conducted on the EDI VAN. For example, one-to-one transactions will be used by the DoD to issue delivery orders against contracts (e.g., indefinite delivery, indefinite quantity requirements contract, etc.), competitively solicit quotations from two or more vendors, or to solicit a quotation from only one vendor (per FAR 13.106(a) and (b)). These transactions are all referred to as "one-to-one transactions" because they are addressed to individual contractors/vendors.

DoD activities will exchange all of their one-to-one transactions with individual contractors and vendors via the multi-VAN DoD Hubs and the appropriate participating EDI VAN Provider using the approach described in the Technical Scope of Work.

. . . .

The EDI VAN Provider must provide DoD access to one-to-one transactions as a test subscriber in the same way the EDI VAN Provider provides such access to its subscribers. DoD will use this capability to monitor compliance with this agreement. The capability will not be provided to contractors directly by DoD except as chosen by the EDI VAN Provider in Section 2.4.

. . . .

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.

The EDI VAN Provider must be able to provide any interested subscriber (1) basic information about the DoD approach to electronic commerce for procurement and how to register as a contractor; and (2) the capability to register. . . .

4.4 Registration Transaction

The EDI VAN Provider must directly or indirectly provide any interested subscriber the capability to complete the registration transaction set. The transaction set will be the ASC X12 838 transaction set following the DoD implementation conventions. The DoD expects the EDI VAN Provider to enable subscribers to conduct these four steps easily, preferably using electronic mail or similar electronic means.

16. Only small purchases conducted by the contracting offices that were scheduled to become EDI-capable were covered by the VLA. Vendors could also continue to contract with DoD through non-electronic means. (Ex. G-2 at 19, 25; R4, tab 1 at 15)

C. TPS Background and VLA Execution

17. According to its federal tax returns, TPS was incorporated on 1 July 1992 (ex. G-39). Mr. Richard Snyder has been the president and one of the principal shareholders since its inception. In 1993-94, TPS was in the business of providing procurement information to its customers in a paper format, entitled Sales Opportunity Reports (SORs). The SORs, containing information about government solicitations, were faxed or mailed to its customers. The SORs reformatted procurement data that appellant received from the government to make it more "user friendly" for its clients. If a customer was interested in responding to the solicitation, it submitted its bid/quotation/proposal directly to the government. TPS did not send information from its customers back to the government. TPS's "paper business" grew to about 100 customers and continued through 2000. (Tr. 1/63, 103, 117-18, 2/65, 67, 73-74, 127, 141, 3/83, 87-88; ex. A-36)

18. The original marketing plan for the "paper" customers was developed by Mr. Peter Weiglin, who, among other things has served as the marketing director for a local San Francisco Public Broadcasting System radio station. Mr. Weiglin designed a business plan for TPS that included a direct mail campaign targeted at firms identified from Commercial and Government Entities (CAGE) listings, referred to by the parties as CAGE code firms or entities. (Tr. 1/92-93, 3/29-34, 38, 51-52; ex, A-50, G-39)

19. Mr. Snyder signed the VLA on behalf of TPS on 15 January 1995, after developing software and assessing that TPS would be able to pass the testing required by the VLA and process the procurement transactions. Testing was completed on 23 June 1995. On 10 July 1995, the CO executed the VLA and TPS was certified as a VAN. (Tr. 1/172-74, 191-92, 6/122, 128; R4, tab 1; ex. G-25 at 1-2) Prior to executing the VLA, the government sought data related to appellant's responsibility and ability to perform. Appellant eventually submitted information in response to the request. There are discrepancies between the incomes reported for tax purposes and income statement information given to the government. However, different reporting periods were involved and there was no detailed cross examination or analysis of the alleged discrepancies in the documents. Similarly, there is no persuasive evidence establishing that appellant misrepresented its technical capabilities. We are unable to find based on the documents alone that appellant made material misrepresentations in its responsibility-related submissions. (Exs. G-9, -39, A-12, -13)

20. Mr. Snyder considered that the idea of "pushing [government vendors] through a VAN" was "crazy," "ridiculous" and "off-the-wall" even if government paperwork costs were reduced because the VANs would make it more expensive for vendors to conduct business with the government (tr. 1/145-47, 63-64). However, Mr. Snyder wanted to "get on the train" and operate as a VAN as an adjunct to its "paper" business (*id*.).

21. Because of the "no cost" to the government nature of providing services under the VLA, the revenues of VAN providers were to be earned from fees charged to vendors or trading partners (SOF at 1). Mr. Snyder and TPS expected that VANs operating pursuant to the VLA would be the mandatory conduits for DoD EC/EDI procurement transactions and that TPS's customer base would dramatically increase (tr. 1/153-55). TPS developed software that "massaged" or "translated" data delivered by the government hubs to make the data more "readable" for its customers while also permitting the clients to respond to solicitations (tr. 1/53, 2/193).

22. Although TPS's original business plan was updated to reflect the new VAN business sometime in 1995-96, Mr. Snyder indicated that the revised business plan was never used (tr. 1/131-41; exs A-50, G-39). There is no documentary evidence of a significant direct mail campaign in connection, or contemporaneous, with either TPS or government execution of the VLA.

D. Performance Under the VLA

23. To create the DoD infrastructure, DISA was tasked, among other things, with establishing the two DoD computer hubs/distribution points, also sometimes referred to as network entry points (NEPs), at Ogden, Utah and Columbus, Ohio, as well as creating and administering the Central Contractor Registry (CCR), and transferring to DoD the various Gateways then operated by DoD military services and components (tr. 5/31, 112; exs. G-5, -6). DISA encountered problems in particular with the Gateway used by the Army that delayed its transfer and timely execution of the implementation plan (tr. 5/132-143; exs. G-7,-8,-30). DISA provided VANs monthly updates on the status of the implementation plan listing sites that were connected to the infrastructure and estimated dates when remaining sites would be connected (tr. 1/200, 2/239; ex. G-12 at 25-46). Mr. Snyder discarded the monthly updates because he "really didn't care" (tr. 1/200). The PAT Report contained a listing of 208 contracting sites that were candidates for EDI (ex. G-1 at 309-23). By August 1995, there were approximately 136 DoD-certified sites that were capable of sending procurement transactions through the DoD infrastructure to the two hubs (tr. 5/141; ex. G-30 at 47). As of 18 September 1995, there were 215 such certified (sometimes referred to as Federal Acquisition Computer Network or FACNET) sites that were a functioning part of the DoD infrastructure and there were 814 total registrants in the CCR (ex. G-15 at 12-20; SOF at 11). As of 20 September 1996, there were 293 FACNET sites utilizing the infrastructure (including DoD and non-DOD sites not listed in the PAT Report) and by September 1997, the number totaled 325 (ex. G-30 at 64, 77).

24. Monthly transactions processed by the DoD hubs/NEPs rose from a total at both the Ogden and Columbus sites of 491,966 in December 1995 to 2,087,998 in August

1996 (ex. G-30 at 65; SOF at 12). At approximately this time, the number of transactions actually processed through the VANs reached a "plateau" (tr. 6/45-46) and began to decline (tr. 1/212-13, 230-31).

25. The decline in traffic through EDI infrastructure in late 1996 corresponded with increasing use by procurement activities of electronic bulletin boards, internet websites and other non-EDI means of conducting EC. Appellant knew contemporaneously of this diversion before the eventual termination of the VLA in 1999 and voiced complaints to the government about its effects on VAN providers. (Tr. 1/213, 230-37)

26. On 18 November 1995, TPS was advised that the VLA was under revision and that TPS would be required to reapply for certification once the revision process was complete (ex. G-25). The revised VLA was forwarded to VAN providers, including TPS, in the summer of 1996 as part of a VAN Application Package (VAP). The VAP required VAN providers to execute and return the revised VLA to the contracting officer. If the contracting officer determined that the VAN provider was responsible, recertification testing and a government site visit were to be performed before the contracting officer executed the revised VLA and terminated the original VLA. (R4, tab 18; tr. 6/178-81)

27. The revised VLA was executed by TPS on 9 October 1996 and on 18 October 1996 the government advised appellant *inter alia* of the recertification testing requirements (ex. G-18). The government made further minor changes to the revised VLA and TPS signed the final revised VLA on 12 March 1997 (ex. G-19). TPS never performed recertification testing and the contracting officer did not execute the revised VLA, nor did she terminate the original VLA until 15 January 1999. Appellant continued to perform under the original VLA until it was terminated. (Exs. G-18 at 57-62, 22, exs. 6-22, -26 at 113-71; tr. 2/107-10, 5/169-70, 179, 6/187-92, 207-08, 218, 220)

28. TPS had approximately 100 clients prior to executing the VLA (finding 17). Over the period that it operated under the VLA, approximately 100 additional customers used TPS's services for uncertain durations of time (R4, tab 2 at 3; tr. 1/228).

29. During its performance under the VLA, TPS had extensive technical problems and deficiencies of its own making (exs. G-18, 25, 26, 35, A-23, 24; tr. 1/47-48, 99, 5/45-46, 64-69, 6/31). These problems and deficiencies contributed to appellant's inability to obtain and/or retain clients (*see id.;* tr. 1/145-48, 227-28, 2/207-09).

30. On 4 March 1997, the Office of the Inspector General, DoD issued a "Summary Report on the DoD Implementation of Electronic Commerce/Electronic Data

Interchange in Contracting for Small Purchases and the Federal Acquisition Computer Network" (IG Report) (ex. A-27). The Executive Summary of the IG Report set forth the following objectives, results and recommendations regarding the VLA and VAN system, referred to as the Federal Acquisition Computer Network (FACNET) (*id*.):

> **Audit Objectives.** The overall objective was to review the DoD implementation of electronic commerce/electronic data interchange for small purchases. The specific objectives were to identify impediments to timely and effective implementation of electronic commerce/electronic data interchange through FACNET.
>
> **Audit Results.** Despite intensive efforts, DoD has experienced delays in the successful implementation of FACNET for small purchases and significant issues still need to be resolved. As a result, the benefits anticipated by the Act of lower prices, reduced processing time, and improved access to DoD procurements, are not yet being achieved.
>
> **Summary of Recommendations.** We recommend that the Deputy Under Secretary of Defense (Logistics) perform an analysis of FACNET and alternative electronic commerce vehicles to identify how and when each electronic commerce vehicle should be used.

31. Noting that complete implementation of FACNET within DoD for small purchases had been extended to January 2000, the IG Report attributed the delays to: "the overall complexity of integrating various systems within condensed time frames, unanticipated impediments, reluctance to implement FACNET and a lack of vendor awareness" (*id.* at 11-12). With regard to the FACNET implementation time frame generally, the IG Report stated (*id*. at 12-13):

> FACNET users have reported numerous malfunctions about interrupted or inefficient service in sending and receiving transactions, as evidenced by the number of problems and complaints made by VANs, vendors, and DoD buying activities. Further, DoD, as well as other Federal agencies cited the lack of a sound operational infrastructure as the problem impeding the efficient and effective implementation of FACNET.

> Problems with the FACNET infrastructure are attributed to the design complexity. The FACNET infrastructure requires transactions to pass through five separate entities that function both independently and in conjunction with each other, including the Government buying organizations, the gateways, NEPs, VANs, and the vendor. Because of the complexity involved with integrating numerous entities and the condensed time frame for implementation, DIA was unable to adequately test the infrastructure prior to its implementation to ensure the design would function properly. The complexity of the task is evident as shown by the FACNET implementation problems. DoD implementation of complex systems typically includes steps to develop and test a system, and incrementally implement the system prior to full-fledged use.
>
> DISA is presently redesigning the FACNET infrastructure by combining the NEPs with the gateways, as well as building in functions to monitor and resolve potential system problems. Though software problems are currently causing delays, redesign should be complete by winter 1997. DISA officials anticipate that the redesign of the infrastructure should reduce the operational problems, as well as improve their ability to more expeditiously identify and resolve problems. In addition, the DoD Electronic Commerce Office and DISA anticipate successful implementation of DoD FACNET capabilities by January 1, 2000.

32. With respect to the impediments to FACNET implementation, the IG Report reached the following conclusions (*id.* at 13-15):

> The DoD Electronic Commerce Office, DISA, the Army, Navy, and Air Force made a tremendous effort to successfully implement FACNET. However, impediments that could not be anticipated occurred because of the magnitude of the project, the number of parties involved, the use of new technology, and the need to integrate numerous entities. Specifically,
>
> - certification procedures for DoD buying organizations and VANs were not effective;
> - the VAN license agreement was not being monitored and enforced;

- vendors were not registering in the CCR; and
- problems were being experienced with data transmission through the infrastructure that were not being resolved.

Certification of Buying Organizations and VANs. DoD buying organizations were tested and certified but some were not capable of transmitting and receiving transactions through FACNET. Consequently, those sites did not use FACNET and as a result limited the use of FACNET by potential vendors. In the Inspector General, DoD, draft report for Project No. 6CA-0013, we found that 5 of 13 DoD certified buying organizations that we reviewed were not capable of sending and receiving FACNET transactions. These buying organizations were inappropriately certified because technical certifications were completed at the automated information system level, rather than at the buying organization level. The certification testing at the automated information system level did not detect existing technical problems at the buying organization which precluded it from effectively using FACNET.

In addition, DISA did not establish an adequate certification process for VANs. In Inspector General, DoD, Report No. 96-172, "Certification and Management of Value Added Network," June 21, 1996, we reported that the evaluations performed on 25 certified VANs showed that 15 were certified even though the adequacy of their financial resources was questionable. Poor financial data at the start of the contract is often an indicator of future problems. In Inspector General, DoD, Report No. 96-105, "Contract Award Decisions Resulting in Contract Termination for Default," April 29, 1996, we reported that poor financial information resulted in contractor defaults. DISA certification of VANs with questionable financial resources could result in similar problems. To address this problem, DISA issued a new VAN license agreement in August 1996. Under the new VAN license agreement, procedural changes should improve the certification process by required more stringent functional tests. DISA relies on the credibility of

the VANs being demonstrated through the successful completion of extensive functional testing.

Monitoring and Enforcing the VAN License Agreement. Inspector General, DoD, Report No. 96-172, also stated that DISA did not adequately monitor and enforce the VAN license agreement for the 25 DoD certified VANs. The report showed that DISA did not perform reviews to verify that each VAN maintained audit trails of transactions, backed up all data for full data recovery capabilities, and had an internal quality monitoring program to assure maintenance of reliable communication lines. Relaxed monitoring procedures by DISA may result in a potential loss of business by DoD and its trading partners, because certified VANs may not be capable of handling the transaction workload that would be required for the full implementation of FACNET. DISA is addressing these issues. . . .

Central Contractor Registry. The intent of the CCR is to provide a single point of registry for vendors desiring to do business with the Federal Government. The CCR is a centralized database for use by DoD and other Federal agency buying organizations. An integral step in the FACNET process is for vendors to register with the CCR to conduct transactions using FACNET. The CCR is intended to expedite the use of FACNET as well as other future electronic commerce processes.

Despite the Federal Acquisition Regulation requirement to register with the CCR, vendors are not actively registering because of problems in the development of the data base and in submitting information for registration. Buying organizations, VANs, and vendors expressed concerns about the ability of vendors to become a part of the CCR. . . .

Since the CCR is not heavily populated or easily accessible, agencies often must award contracts to unregistered vendors. This occurs because the CCR does not have enough registered vendors to supply the full range of products and services needed. . . .

> **FACNET Transactions.** DoD organizations, VANs, and vendors are not relying on FACNET due, in part, to recurring transaction problems. In Inspector General, DoD, Report No. 97-002, "Vendor Participation in the Federal Acquisition Computer Network," October 4, 1996, 14 of 100 vendors sampled indicated that FACNET was not reliable because transactions were not timely, standard data was not being transmitted, and adequate feedback on transactions was not being provided. In addition, in the Inspector General, DoD, Report No. 97-010, "Defense Information Systems Agency Management of Trouble Tickets for Electronic Commerce/Electronic Data Interchange," October 28, 1996, 65 percent of 130 trouble tickets reviewed showed recurring problems with invalid transactions (33 percent), late and lost transactions (29 percent), and lack of functional acknowledgments of transaction receipt (4 percent). Recurring problems identified through the trouble ticket process are difficult to resolve, because FACNET has no automated capability to track transactions through the network system. As a result, DISA's ability to provide timely responses to users who inquire about transactions have been limited. . . .
>
> **Efforts to Resolve Impediments to FACNET Implementation.** FACNET can not be relied upon to process small purchase transactions until the problems with FACNET are resolved. . . .
>
> **Milestone Dates for Corrective Actions. . . .** Because of the problems being experienced, it is questionable whether the proposed implementation dates will be achieved.

33. The IG Report noted that the "unreliability of the infrastructure" had caused "Government buying organizations [to be] reluctant to post procurement actions through FACNET" and "[v]endors [to be] reluctant to expend funds to pay for the investment in computer software, and hardware, that can range from $2,100 to $5,800 or for VAN services that generally include a start-up fee of up to $1,200 and recurring monthly charges" (*id*. at 16-17). Pending full and satisfactory FACNET implementation, the IG Report stated, "In the interim, because of rapidly evolving technology, alternative vehicles to FACNET for electronic commerce are increasingly being explored for widespread use. . . . [including] electronic bulletin boards, electronic catalogs and use of Government issued commercial credit cards. . . . [and the internet]" (*id.* at 17).

34. On 15 January 1999, the government notified TPS that the government was exercising its right under Article 2 of the VLAs to terminate the license agreement. The termination became effective 30 days thereafter on 15 February 1999. (Ex. G-22; R4, tab 23)

E. Quantum

Documentation Generally

35. Appellant claims a total of $69,855,022 in damages allegedly resulting from the government's breach of the license agreement. The total amount sought consists of claims for loss of clients/anticipated revenues for the period 1997 through 1999 and software development costs for the period 1994 through 1996. (Ex. A-51) All of TPS's damage calculations were prepared by Mr. Snyder (tr. 2/12).

36. Mr. Snyder deleted, destroyed and/or failed to maintain any pertinent records to establish revenues and earnings or the amount, incurrence and allowability generally of costs associated with the VLA and claim. The destruction of relevant accounting documentation continued after termination of the VLA and after the preparation and submission of its request for breach of contract damages from the government. (Tr. 2/29-40, 145-46, 3/127, 131-32, 138-39, 141-42, 193, 195, 198,200, 7/43-44, 59-62; exs. G-28, 36) The accounting system software created and designed by Mr. Snyder sometime in 1999 was programmed to delete data older than five years. At the end of 2001, the program destroyed all pre-1997 accounting records. Similarly, Mr. Snyder testified that he destroyed all pre-1998 and 1999 computerized records in 2002 and 2003. (Tr. 2/145-46, 3/141, 7/59-62) At the time of the termination in January 1999 (effective 15 February 1999), appellant actually knew the essential factual basis for its claims in these appeals (*see* finding 25). At that time, all pertinent accounting records had not been deleted, destroyed or discarded and appellant's new accounting software had not been designed (tr. 2/39).

37. Mr. Snyder also created a computerized billing system that prepared invoices for mailing to customers. No copies of the invoices, computer records or other documentation of TPS's billing of clients for the claim period were retained by TPS. No accounting, bank or other records establishing the identity of customers, the amount billed or the services provided by TPS to the customer were offered into evidence. Mr. Snyder did not know how many clients TPS had on a monthly basis or at any single point in time during 1995 through 1999. (Tr. 1/214-16, 2/146-48; ex. G-36 at 22-23) As discussed below, TPS seeks damages solely for allegedly lost actual and potential clients and for alleged direct software development costs to perform VLA-related services. No other possible costs of personnel, testing, facilities, equipment, advertising, ongoing

operations, management or indirect costs possibly allocable to the VLA are claimed or considered in its computation of damages.

38. Auditors from the Defense Contract Audit Agency determined that none of the amounts were recoverable as a consequence of the lack of supporting documentation and DCAA's inability to audit and verify the amounts claimed (tr. 3/127-28, 138-39, 183, 186, 193-96, 201-02).

Federal Tax Returns

39. No state tax returns were produced by appellant. Appellant's United States Corporation Income Tax Returns (Form 1120 or 1120-A—"short form") were available for calendar/fiscal years 1993, 1994, 1996, 1997 and 1999. For each of the years for which federal returns are in the record, appellant reported a net loss. (Ex. G-39) There is no explanatory testimony regarding the details of the amounts set forth in the returns. There is no persuasive evidence that TPS was profitable at any time.

40. In 1993, TPS reported gross receipts of $64 and total deductions of $43,513, including mailing costs ($5,765). A "prospect list" valued at $6,419 was listed in the Assets section in Schedule L of the 1993 return. (*Id.* at 1-10)

41. In 1994, TPS reported gross receipts and total deductions of $46,950 and $120,159, respectively. The deductions included the following expenses: telephone ($15,773), telephone marketing ($9,114), postage & fax ($692), depreciation ($13,805) and salaries/wages of $56,326. The 1994 return also noted the availability of a net operating loss carryover of $131,953. The Assets section of Schedule L of the 1994 return reduced the value of the "prospect list" to zero but listed a new "Data Processing Software" item valued by TPS at $150,524. This asset is unexplained. We are unable to determine the amount of, or when, any costs associated with this asset were incurred or precisely what software is involved. (*Id.* at 11-18)

42. No federal tax return was on file with IRS for 1995 (ex. G-23 at 25; tr. 3/136). There is no other documentary evidence that TPS submitted a tax return for 1995.

43. In 1996, TPS reported gross receipts of $25,313 and total deductions of $77,423. The deductions included the following expenses: salaries/wages ($33,367), postage/fax ($1,317), telephone ($5,592) and "consulting" ($17,752). The "consulting" expense is unexplained. The "Part III Balance Sheet per Books" section of the return lists under Assets, "Software/Databases" indicating that on 1/1/96 that asset was valued at $161,224 and on 12/31/96 it had increased in value to $187,181. (*Id.* at 21-23) As noted above this asset is not explained.

44. In 1997, appellant's reported gross receipts and total deductions were $38,739 and $79,494. The deductions included the following expenses: salaries/wages ($6,097), telephone ($7,553) and unexplained "consulting" costs ($38,442). The balance sheet information indicated that TPS had reduced the value of Software/Data Bases to $0. (*Id.* at 25-27)

45. No Form 1120 or 1120-A is in the record for 1998. However, an abbreviated "Account Transcript" furnished to appellant on or about 20 July 2006 by the IRS lists the following "INFORMATION FROM THE RETURN AS ADJUSTED": net receipts ($43,350), total income ($27,054), and total deductions ($37,496) (ex. G-23 at 28).

46. For 1999, appellant's Form 1120-A reports the following pertinent data: gross receipts ($54,922.40), "cost of goods sold" ($18,186--not explained or detailed), and total deductions of $39,927. The deductions included the following expenses: "telephone (other than marketing)" ($7,611), "telephone (marketing)" ($7,923) and "contract labor (consultants)" ($8,850). (*Id.* at 29-31)

Alleged Lost Actual Clients

47. Appellant claims that it lost actual clients and the revenues they would have generated totaling $4,908,420 as a result of the government's failure to fulfill commitments relating to the license agreement. Mr. Snyder determined the alleged number of clients lost during the three year period 1997 through 1999 and multiplied that number by the revenue they would have allegedly generated over that period. (Exs. G-36, -37; tr. 2/79)

48. TPS determined that it lost a total of 1,474 clients. It derived this number by obtaining the last client "number" (2574) allegedly assigned by its computer system to new clients over the period 1992 to 2003. It then subtracted the beginning number of 1000 to determine that TPS's services had been used by a total of 1,574 clients during that time. Finally, it subtracted the number of clients that still used TPS's services of "approximately 100" as of 2003 to derive the number of clients of 1,474 that were allegedly lost as a result of the government's breach. TPS had no DoD VAN customers prior to approximately October 1995. (*Id.*; tr. 1/230, 2/65, 167, 170-73, 226; ex. A-51A)

49. Although appellant had a computerized client list (tr. 3/106), it failed to offer any list of clients, client subscription forms/agreements or other documentary support for the number of actual clients. Mr. Snyder admitted that there was often rapid client turnover and some of TPS's clients were with it for "an hour and a half" (tr. 1/227-28, 2/75). The total alleged client figure included an indeterminate number of "paper" only or commercial clients that did not use the DoD VAN services (tr. 2/196,199). TPS's 21 October 2002 request for payment stated that the number of its customers peaked in

December 1996 at 200 (R4, tab 2 at 3). Mr. Snyder could not provide information regarding the number of total TPS customers (or DoD VAN customers) for any specific time period during the years 1992 through 2000 (ex. G-36 at 22-23; tr. 1/216).

50. To determine the lost revenue attributable to the allegedly lost actual clients, Mr. Snyder stated that the average monthly revenue from each client was $92.50. Mr. Snyder multiplied the monthly amount by 12 to determine the yearly lost revenue per client and multiplied the yearly amount by 3 to derive the lost revenues per client for the period 1997 through 1999. The total lost annual revenues per client for the three year period were then multiplied by the number of "lost" clients (1,474) to obtain the amount claimed. (Tr. 2/175-76; ex. G-27 at 1-2)

51. There is little documentary evidence supporting the claim. Among other things, there is no evidence that the "average" monthly fee was paid by any client (none of whom were identified), much less represented a true "average" for the amount paid by all clients during the claim period. TPS made no deduction for costs of providing its services to alleged actual or potential clients. Contemporaneously, TPS estimates of these costs were substantial (ex. G-39 at 33-34). There is no evidence independent of Mr. Snyder's allegations that any VAN customer canceled an agreement with TPS as a consequence of the government's breach of the license agreement as opposed to other reasons including dissatisfaction with TPS (tr. 2/207-09).

Alleged Lost Potential Clients and Revenue

52. The amount claimed for this portion of the claim varied from the time of the initial submission to the government sometime in 2002 or 2003 (ex. G-27) in the amount of $60,958,980 to the amount claimed of $64,775,993 in documents presented at the hearing (ex. A-51c). We explain the methodology using the initial numbers which are better documented and detailed. To compute the number of lost potential clients, Mr. Snyder determined that the total government-wide number of active entities identified in the 2002 Commercial and Government Entities (CAGE) code files was 684,663. He reduced this number by his estimate of the number of firms that had been added after 1999 (*i.e.*, the end of the claim period) and determined that there were a total of 584,663 potential clients. The latter total also eliminated colleges, universities, governmental (including state and local), foreign and merged entities. He then assumed that each firm assigned a CAGE code would select a VAN and that this selection process would result in an equal division of the 584,663 potential firms among the 28 licensed VANs in 1998. Thus, Mr. Snyder concluded that TPS and each of the other 27 VANs would have had 20,880 clients if all firms had contracted with a VAN and the number of firms was distributed equally among the VANs. TPS next subtracted 2,574 (rather than 1,574) from the total to eliminate the actual clients TPS "has and had" leaving 18,306 as the number of potential clients that TPS allegedly lost. Mr Snyder used the same

monthly rate ($92.50) per client and determined the amount of potential revenue lost over the three year period 1997 through 1999 or $3,330 ($92.50 x 12 x 3).[4] Multiplying the lost revenues per client ($3,330) times the 18,306 total number of clients, TPS determined the total lost revenue from clients would have been $60,958,980. (Ex G-27 at 2; tr. 1/152-53, 2/83-95)

53. There is no documentary evidence verifying the number of active, separate CAGE code entities used by Mr. Snyder, whether they might be disposed to contract with a DoD VAN provider, or the extent of their small purchasing activity with DoD, as opposed for example to the General Services Administration (GSA). There is no evidence supporting Mr. Snyder's assumption that any entities interested in contracting with a VAN would be shared equally among licensed VANs. There is no evidence establishing that TPS was competitive with other VANs. TPS offered no persuasive market research evidence realistically analyzing its prospects within the EDI/VAN marketplace. There is no evidence of the number of CAGE code entities in the 1995 through 1999 time period. Companies may have multiple CAGE codes (tr. 5/157-58). The record does not establish that duplicative listings have completely been eliminated. The only evidence of a significant mail advertising campaign indicates that one was conducted well before appellant's execution of the VLA and was designed to increase its "paper" customer business (tr. 3/32-34). The total number of clients claimed far exceeded TPS' own, albeit unexplained and unsupported, projections in its contemporaneous business plan of the number of clients (2,857) it would have after four years of operation under the VLA (exs. A-50, G-39).

54. At approximately the time that appellant obtained its first VAN customer in October 1995, there were several large established VAN providers. Three of the largest had 8,000 to 30,000 customers each. (Ex. G-12; tr. 2/172-73) In November 1996, there were 29 DoD EDI VANs (ex. G-13 at 3-16).

Alleged Software Development Costs

55. TPS also seeks to recover costs associated with software programmers who wrote personal computer (PC) software used for communications between TPS and its clients and software used on the TPS mainframe computer for communications between TPS and the government. Programming was performed to comply and maintain

[4] In its revised computations for the hearing, appellant claimed a different amount rather than an equal amount for each year. The difference in methodology and rationale for the differing amounts each year was not explained but accounts for the $3,817,013 upward revision in total amount (ex. A-51C). The only model and detailed explanation for the lost profits claim related to potential clients is that set forth in this finding.

compliance with VAN/VLA requirements (tr. 1/181, 191-93, 222-24). However, some software programming work was unrelated to the VLA (tr. 1/119-20, 189). Mr. Snyder originally claimed that TPS hired two programmers for one year and one additional programmer for approximately 1 ½ years all at salaries of $36,000 per year or a total paid to these employees of $126,000. TPS also maintains that it hired contract programmers "on and off from 1996 to 2001" and paid them a total of $68,457.24. The total amount originally requested for the amounts paid to both employee and contract programmers was $194,457.24. (Ex. G-27 at 1-2, A-36)

56. In July 2006, Mr. Snyder listed the TPS personnel who were allegedly paid as programmers for the years 1994 through 1996. In 1994, he listed Mr. Jerry Farber as a TPS employee programmer who was paid $3,503.82. For 1995, Mr. Snyder listed Mr. Farber, along with Messrs. Michael Prochnow and Reed Harris as TPS employees who were allegedly paid $37,000.08, $7500.00, and $16,281.70, respectively during the year. In 1996, Mr. Snyder listed Messrs. Farber, Prochnow and Mr. Michael Robson as TPS employee programmers who were paid $15,367.08, $7,500.00 and "approximately $36,000," respectively during the year. (Ex. G-36 at 18)

57. At the hearing, appellant claimed that it paid "staff programmers" $102,152.70 during the years 1994 through 1996. The amount claimed was based on the wages listed in W-2 forms. The W-2 forms constitute the only documentary evidence of amounts claimed to have been paid to TPS programmers. In April 2004, appellant requested that the IRS provide it with W-2 information for its employees. In August 2004, the IRS notified appellant, *inter alia*, that it would send photocopies of any available W-2s for the tax years 1994 through 1996. (Ex. G-54) There is no cover letter or documentary evidence of actual receipt, or transmission of, the forms by any government entity (including the IRS or Social Security Administration) to Mr. Snyder. None of the "staff programmers" testified at the hearing or otherwise corroborated the amounts listed on the W-2s. No canceled checks, accounting or bank records or other documentation support or verify that the amounts claimed were incurred. (Tr. 2/36-38, 43, 50, 61; exs. A-25, -46, -47, -54)

58. Only one non-employee, contract programmer, Mr. Michael Robson, testified at trial. The claim seeks to recover an alleged $36,000 that Mr. Robson was allegedly paid for his services. Mr. Robson testified that he was paid "at best a few thousand dollars" (tr. 1/50-51).

59. No Form 1099s or other documentation for contract programmers were submitted to the IRS documenting any payments. TPS did not issue Form 1099s to such consultants because, "[i]n most cases, they didn't want to and in most cases we felt we didn't want to report it" (tr. 1/191).

60. The incurrence of programming costs could not be verified by DCAA because the source accounting documents had been destroyed by Mr. Snyder (tr. 3/201). The record also fails to establish how costs incurred were necessary for, reasonable and allocable to the VLA. Appellant pursued commercial work and work involving other governmental agencies unrelated to the DoD VAN. (Exs. G-13, -36, tr. 1/140, 184, 2/112, 192-193)

F. The Appeals

61. By letter dated 21 October 2002, TPS sought breach of contract damages for the government's alleged failure to honor its obligations to utilize the VANs and to require contractors to utilize the services of authorized VAN providers. The letter demand for payment alleged that the damages suffered by TPS were "in an amount in excess of $66,000,000." (R4, tab 2)

62. The contracting officer treated appellant's 21 October 2002 letter as a claim and denied it in a final decision dated 29 January 2003 (R4, tab 3). The CO's denial was timely appealed by TPS on 16 April 2003 and docketed as ASBCA No. 54163.

63. At the commencement of the hearing of the appeal on 9 January 2007, the presiding judge *sua sponte* raised potential jurisdictional infirmities with the appeal, specifically the failure of the claim to state a sum certain. The potential jurisdictional problem was discussed with the parties and it was agreed that proceeding with the trial was the preferable practical alternative rather than sending home the witnesses and reconvening the hearing at a later date after the Board had an opportunity to formally render an opinion on the jurisdictional issue. The presiding judge concurred in this solution with the understanding that: 1. a new claim setting forth a specific sum certain would promptly be submitted to the contracting officer, and 2. assuming that the new claim was again denied by the CO, TPS would appeal that denial, and 3. the parties would agree to consolidation of the appeals and further agree that the record made in ASBCA No. 54163 would be used to decide both appeals, including the transcript of proceedings, the Rule 4 files and any other exhibits received into evidence at the hearing.

64. Following conclusion of the final St. Louis, Missouri portion of the hearing, appellant submitted a certified claim dated 16 January 2007 to the government. The claim was in the amount of $69,855,022.44 as recomputed based on calculations presented by TPS at the hearing. (R4, tab 4)

65. The claim was denied by the contracting officer in a final decision dated 9 March 2007 (R4, tab 5). Appellant's timely appeal of 9 March 2007 was docketed as ASBCA No. 55821.

66. In a teleconference convened on 23 April 2007, the parties requested that the ASBCA Nos. 54163 and 55821 be consolidated and that the Board decide both appeals on the record made in ASBCA No. 54163 as previously agreed at the hearing of that appeal. The Board so ordered.

DECISION

Jurisdiction

Appellant's original demand for payment of 21 October 2002 alleging breach of the license agreement sought damages "in an amount in excess of $66,000,000." The contracting officer treated the request as a claim and proceeded to deny it. That denial was appealed by TPS and docketed as ASBCA No. 54163.

Appellant has not argued at any time that the 21 October 2002 demand for payment satisfied the CDA's "sum certain" requirement for claims or that we have jurisdiction over ASBCA No. 54163. In short, absent a sum certain, it is well established that appellant's 21 October 2002 demand was not a CDA claim. *E.g., Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1576 (Fed. Cir. 1995) (*en banc)*. Accordingly, we lack jurisdiction in ASBCA No. 54163 and dismiss that appeal. However, ASBCA No. 55821 encompasses the same subject matter and is properly before us. We proceed to decide that appeal in accordance with the parties' agreement and as ordered by the Board (findings 63, 66).

Entitlement

Appellant argues that the government breached the identical license agreement with other VAN providers as determined previously by the Board on substantially similar facts in *GAP Instrument Corp.*, ASBCA No. 51658, 01-1 BCA ¶ 31,358 (*GAP I*); *CACI International, Inc.*, ASBCA No. 53058, 05-1 BCA ¶ 32,948, *aff'd,* 177 Fed. Appx. 83 (Fed. Cir. 2006); *Simplix,* ASBCA No. 52570, 06-1 BCA ¶ 33,240, *recon. denied,* 06-2 BCA ¶ 33,318, *aff'd, sub nom. Imagination & Information, Inc. v. Gates*, 216 Fed. Appx. 990 (Fed. Cir. 2007).

In *GAP I*, we concluded that DoD breached the VLA, *inter alia*, "to the extent that [DoD] did not use, or failed to require affected contractors to use, the VAN providers in the period after the PAT report phase-in schedule, for electronic small purchase transactions involving the mandatory items." *Id.,* 01-1 BCA at 154,867.

In *Simplix*, we concluded that:

> DoD had fundamentally decided to abandon the VAN program [as of early 1997] . . . . 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 . . . . We hold that its actions . . . 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.

Id., 06-1 BCA at 164,723.

In *CACI,* we held that the government breached the VLA, among other things, by "introducing new means of EC which resulted in not requiring small purchase EC to be carried on through VANs, thereby effectively abandoning the 'single face to industry' promise in the VLA." *Id.,* 05-1 BCA at 163,249.

According to appellant, there are no significant factual distinctions that preclude the application of the above holdings to the license agreement in this case.[5] We agree. We have rejected most of the government's contentions in the decisions cited above. The government quibbles with appellant's characterizations of, for example, the extent of electronic bulletin board use, the number of DoD agencies and small purchase transactions covered and the speed and "good faith" with which EDI electronic commerce was implemented within DoD.

We have again reviewed, in particular, the PAT Report, the VLA and its addendums, and the highly critical IG reports. Because the government has objected at length to the appellant's attempts to summarize and characterize the content of those documents, we have quoted their contents extensively to insure that nothing could be said to have been lost in the paraphrasing. Based on that review, we again conclude that the government breached the license agreements by failing to timely terminate them after

[5] In its post hearing brief, appellant contends for the first time that the government should be collaterally estopped from challenging the Board's prior rulings that the government breached the VLA. We need not reach the issues of collateral estoppel or issue preclusion because we reach the same disposition here on the complete record already made. Our result is consistent with the prior appeals. We agree with appellant that the Board's conclusions were based on substantially the same documents as those in the present record. The government has failed to persuade us that we should interpret and weigh them differently. In short, the government position on entitlement is meritless.

abandoning the "single face to industry" approach for covered small purchase transactions and conducting EC by other means, including the internet. *See, e.g., CACI,* 05-1 BCA at 163,249. In particular, the IG report contains a thorough and highly critical analysis of DoD's failures. There has been no persuasive rebuttal of the documentation of those failures in the record. The government failed to honor the exclusivity provisions and intent of the VLA.

Many of the government's contentions relate to the details of its compliance with the implementation schedule, the complexities of the technical undertaking involved and excusability of delays in implementation. The government continues to maintain that it fully complied with its obligations with respect to the VLA and implementation of the FACNET system within DoD. It states that: it exceeded the projected number of EDI-capable contracting sites called for in the implementation schedule; no minimal level of transactions or vendors was guaranteed; not all DoD agencies and transactions were covered; and, appellant was apprised of delays in deploying EDI within DoD and waived any delays to the implementation schedule.

We need not address the technical complexities and details of the government's implementation of the FACNET system within DoD. Although there is nothing in the current record that warrants different conclusions than we have reached in the prior cases, the details are not as relevant to the instant appeal because TPS has not based its damage computations on factual nuances associated with the implementation schedule. The claim seeks lost profits for the period 1997 through 1999. We determined that the full deployment date was scheduled to be approximately April 1996. *See also CACI, supra,* 05-1 BCA at 163,248; *Simplix, supra,* 06-1 BCA at 164,722. The lost profits claimed here by appellant are for the period 1997 through 1999 well after the April 1996 scheduled date for full implementation. Therefore, the precise timing of implementation is less relevant and not "critical" to resolution of the damages claim presently before us. The claim is grounded in the more fundamental failure of the government to fulfill the post-implementation "single face to industry" exclusivity promise stated in the VLA. *Cf. CACI, supra,* 05-1 BCA at 163,248. In addition and as discussed below, there are elementary problems with appellant's claim for lost profits that render penetrating analysis of implementation specifics unnecessary.

The government raises other peripheral technical issues, including appellant's expertise and competence, relating to the parties' relative culpability for the numerous problems encountered in implementing FACNET. For the most part, these contentions also ignore the overriding reality of the government's failure to fulfill its commitment to FACNET within DoD as promised. There is no question that the government must bear considerable blame for technical problems generally as emphasized in the IG reports. However, appellant was also responsible for technical deficiencies of its own making. The primary relevance of appellant's self-induced problems is to bolster our conclusion

that appellant has failed to prove that it is entitled to award of any damages as discussed below. Given the extensive and fundamental failures of proof of damages in this case, there is no reason to make detailed findings and determinations on the relative fault of the parties.

Other government contentions address contract formation issues, in particular the responsibility determination regarding TPS prior to the government's execution of the original VLA. Although the government alleges that appellant made misrepresentations in the responsibility-related information submitted, it has failed to offer persuasive proof substantiating these allegations or establish its reliance on specific misrepresentations. The documents alone do not establish intentional misrepresentations. To the extent considered essential or consequential in evaluating TPS's responsibility, the government should have followed through, resolving any perceived inconsistencies and firmly conditioning its execution of the VLA on submission of adequate data, in particular financial information. The government requested information regarding TPS's responsibility contemporaneously with the issuance of the revised VLA in 1997. However, it again declined to find TPS nonresponsible nor did it execute the revised VLA in reliance on any data submitted. We also note that the government could have terminated the original agreement at any time. In any event, we have considered appellant's lack of profitability in our determination that it failed to prove the extent of any loss of existing or potential clients as a result of the breach.

Quantum

Appellant claims anticipatory profits resulting from the loss of existing and potential customers. It also seeks to recover software programming costs incurred to comply and maintain compliance with VLA requirements. The record fails to support recovery of any amount for either lost profits or programming costs.

Lost Profits

In *CACI*, the board thoroughly analyzed existing precedents and detailed the requirements for proving lost profits in the context of the VLA concluding that it posed a "formidable obstacle" to recovery. *Id.* 05-1 BCA at 163,249-54; *see also Simplix, supra,* 06-1 BCA at 164,724-28. In both *CACI* and *Simplix*, we declined to award anticipatory profits.

To recover anticipatory profits, appellant bears the burden of proving the amount of the losses with reasonable certainty and that the losses were proximately caused by, and a foreseeable consequence of, the breach. *CACI, supra,* 05-1 BCA at 163,249.

In determining that neither contractor had established proximate causation or foreseeability in *CACI* or *Simplix*, the Board assigned great importance to the unique terms and nature of the VLA. We stressed that the VLA was a "no cost" license involving an untried, high risk venture in an unstable, rapidly evolving market without minimum guarantees. We emphasized that the VLA granted the government the unilateral right to revise or terminate the agreement on short notice without express provision for compensation. Also decisive was the VLA's clear intent that any profits were to be derived from collateral undertakings with each VAN provider's third party customers that were subject to numerous subjective factors and circumstances unique to each VAN. We concluded in each case that any profits lost were too remote, uncertain, consequential and speculative to warrant an award. Our prior conclusions in *CACI* and *Simplix* regarding lack of proof of causation and foreseeability apply equally to this case. The same circumstances pertain here and militate against any recovery for anticipatory profits. TPS has failed to establish the requisite causal link between the government's breach and the claimed lost profits or prove that they were a reasonably foreseeable consequence of the breach given the nature of the VLA and attendant circumstances.

In addition, appellant has failed to establish the amount of any lost profits with reasonable certainty. Indeed, TPS's simplistic, inexpert and unpersuasive methodology for estimating this element of its claim reinforces our conclusion that appellant has failed to prove that the claimed lost profits were proximately caused by the breach or reasonably foreseeable.

Before addressing the details of appellant's damages calculations, three critical problems pervade the entire claim and to a large extent influence our decision to deny any recovery. First, all elements of the claim were prepared by Mr. Snyder, without benefit of any expert or independent analyses. Mr. Snyder has been a principal shareholder of TPS and appellant's president since its incorporation. We consider that he lacked the objectivity, credibility and expertise to convincingly weigh and estimate the numerous factors to be considered in evaluating the loss of any profits. *Cf. Simplix, supra,* 06-1 BCA at 164,726; *CACI, supra*, 05-1 BCA at 163,251.

Second, TPS deleted, destroyed or failed to properly maintain virtually all documentation and records that might have provided some evidence of damages experienced. We find these actions to be grossly negligent, capricious and inexcusable, particularly as they occurred in large part after issuance of the notice of termination of the VLA in January 1999 and continued even after the preparation of the initial October 2002 demand for payment in this appeal. Had appellant taken appropriate actions to preserve essential evidence, any pertinent data should have been available and produced for all years in question. Even were we otherwise disposed to make a "jury verdict" award, which we are not, we would decline to do so because of the inexcusable destruction of relevant records.

Third, appellant has neglected to reduce the amount of anticipated profits by the costs and expenses allocable to services provided under the VLA. Expenses of appellant's operations are particularly relevant because appellant has failed to prove that it operated at a profit at any time. The absence of any presentation or analysis of likely costs of operation also dictates against even a nominal "jury verdict." Such costs contemporaneously were projected by appellant to be substantial.[6]

Turning to the details of the calculations of lost profits and the flawed, improbable assumptions on which they are based, TPS estimates lost profits resulting from alleged losses of both "actual" and potential customers caused by the breach.

The calculation of lost profits related to "actual" customers totaling $4,908,420 is dependent on at least three unproven assumptions: 1. Appellant had 1,574 actual DoD VAN customers in 1997 at the beginning of the claim period, and would have retained them for the entire period through 1999; 2. With the exception of the "approximately 100" customers that continued to conduct business with TPS (as of 2003), the remaining 1,474 customers terminated their relationship with TPS as a result of the government's breach; and, 3. On average, each customer would have paid appellant $92.50 per month for the three year period all of which would have flowed to net income without diminution for costs.

There is no proof that appellant had 1,474 clients at any time. That figure at best represents the total number of businesses that were assigned a client number by TPS during its entire corporate existence to 2003. Thus, it includes clients assigned numbers during the pre-claim period in 1992 though the time appellant obtained its first DoD VAN customer in October 1995, as well as a post-claim period beginning January 2000 through 2002. The number of clients, in particular DoD Van clients, at any one time simply cannot be determined with any acceptable degree of certainty either before, during, or after the claim period. The number of actual clients claimed differs from the maximum number of 200 clients reported by Mr. Snyder that appellant possibly had at any time during the period of operation under the VLA. Even appellant's self serving and uncorroborated best estimates were that it had about 100 "paper" clients before becoming a VAN provider and that its client base doubled to about 200 customers after it became a VAN provider. Although appellant maintained a computerized client list, it failed to produce or offer the list or any other documentary corroboration of the number or identity of its VAN-related clientele, including, *e.g.*, subscription forms or agreements. Nor can we determine the length of any business relationship that TPS had with any client, much less an average client term of engagement during the claim period.

[6] We also note that appellant claims lost profits for the entire 1999 calendar year despite the termination of the VLA effective 15 February 1999.

Mr. Snyder conceded that client turnover was often rapid, in some cases lasting no longer than "an hour and a half."

Appellant's second assumption, that the government's breach was the sole reason that caused its loss of DoD VAN clients, is also unproven and highly implausible. There is no evidence that any VAN customer terminated any agreement with TPS as a result of the breach. Numerous other obvious, possible reasons, including withdrawal from the government marketplace, dissatisfaction with TPS and/or the availability of more desirable terms with other VAN providers, may have contributed to decisions by appellant's customers to end their relationship. Appellant's assumption that the breach caused any client loss is baseless.

There is also no persuasive evidentiary support for Mr. Snyder's assertion that the average monthly amount paid by each customer would have been $92.50 per month for the entire claim period. Again we emphasize that, *inter alia*, no billing records, subscription forms, invoices to customers or other corroborating documentation were produced. Assuming that appellant ever had even 100 customers during any year that paid TPS an average of $92.50 per month, gross revenues earned would have been $111,000 (100 x $92.50 x12) for that year assuming no other source of income. That amount was 438% of the "gross receipts" of $25,313 reported in its federal tax return for 1996, the year immediately preceding the start of the 1997 through 1999 claim period when it allegedly had 1,474 customers.

We conclude that all of the above assumptions supporting TPS's claim for anticipatory profits associated with lost "actual" clients are unproven and fundamentally flawed. Accordingly, this portion of the claim is denied.

The essential assumptions supporting appellant's claim for anticipated profits associated with the loss of potential clients are equally implausible, unproven and unsound.

In calculating the amount of lost profits that would have been earned but for the government's breach, Mr. Snyder made the following unproven assumptions, among others: 1. There were 584,663 potential VAN clients, *i.e.*, the number derived from the CAGE listings as adjusted by Mr. Snyder; 2. The total potential clients would have been shared equally by each of the 28 VANs giving TPS 18,306 clients (after eliminating the clients it "has and had"); 3. Each potential client would have paid TPS the same average monthly amount that TPS allegedly received from its "actual" clients, discussed *supra*; and, 4. TPS lost all of these potential customers and profits as a consequence of the breach.

The number of potential clients assumed by appellant is approximately 470% of the maximum number that the government reasonably could have been considered to have projected from PAT Report deployment schedule data (124,265). There is no basis in this record from which to project a greater "universe" of potential VAN customers than the PAT Report figure. Moreover, assuming *arguendo* and without corroboration that appellant has reasonably approximated the total number of entities assigned a CAGE code in 1999, there is no basis for assuming that all of these firms would be EDI-capable, interested in conducting small purchase transactions covered by the VLA and/or interested in selling to DoD (as opposed, *e.g.,* to GSA).

Appellant's assumed equal share of the assumed total potential client base also was 640% of its most optimistic, contemporaneous client projections in its business plan (2,857). There were at least three other established VANs with 8,000 to 30,000 client in October 1995 at the time that TPS obtained its first VAN customer. Nothing in the record warrants a conclusion that TPS would have experienced the client growth rate that it claims. There is no evidence of any extensive market research or analysis of the EDI/VAN market that was conducted by TPS contemporaneously or for purposes of the hearing. Although appellant did conduct a substantial mail advertising campaign in connection with its "paper" business, the tax deduction information fails to establish that there was a significant campaign to expand its VAN customer clientele. There is no evidence concerning the identity of potential customers, when they were contacted and the degree of success of any other marketing activity that TPS may have conducted. Appellant's optimism in earning a significant market share we consider to be wholly unfounded. Nor is there any other basis to conclude that appellant was competitive with other VANs. The equal sharing assumption is based solely on a simplistic mathematical computation without any rational factual support.

Appellant's assumptions regarding causation and the average monthly payment per customer are unproven and flawed for the same or similar reasons stated above. There is no proof that even its actual customers paid appellant the claimed monthly amount.

In summary, appellant has failed to prove the claimed lost profits with reasonable certainty or that they were proximately caused by, or a reasonably foreseeable consequence of, the government's breach. They are too remote, speculative and dependent on unpredictable collateral undertakings with third parties. Accordingly we deny this portion of the claim.

Software Programming Costs

Appellant seeks to recover $102,152.70 for amounts allegedly paid to TPS employees who wrote software programs permitting appellant to comply and maintain

compliance with VLA requirements and process VAN transactions. TPS also claims the amount of $36,000 allegedly paid to an independent contractor, Mr. Michael Robson, for software programming.

In *Simplix, supra*, 06-1 BCA at 164,728, we noted our willingness to consider an award for similar costs, which we consider to be in the nature of reliance damages:

> 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.

There is no question that incurrence of software programming costs was necessary for compliance with VLA requirements for processing covered procurement transactions with clients/trading partners and the government. However, appellant here has failed to prove the amount, reasonableness and allocability of any costs that were incurred. Because of the almost complete absence of documentation or other corroboration of these costs and indeed the destruction of pertinent records, as well as conflicts in the amounts claimed, we also do not consider that a "jury verdict" is appropriate. The failure to maintain, preserve and promptly produce to the government fundamental accounting data and records goes to the credibility of the entire claim. Appellant's actions with respect to those records were irresponsible and militate against any award.

Addressing the $36,000 amount claimed for Mr. Robson first, we note that he testified that he was paid "at best a few thousand." Not only is there no documentation of record, Mr. Snyder acknowledged that appellant failed to prepare and file pertinent forms with the IRS evidencing the payments because, "[i]n most cases, [the independent contractors] didn't want to and in most cases we felt we didn't want to report it."

The amount claimed for TPS's employee programmers was recalculated prior to the hearing, using amounts set forth on IRS form W-2s. The government challenges the

provenance of the W-2s. There is no independent documentary evidence that they were actually transmitted by TPS to the IRS with its tax returns or that they were received by TPS from the IRS or SSA. Not only are the amounts not corroborated by appellant's internal accounting records, there are no substantiating bank records, including statements and/or canceled checks. None of the TPS programmers testified or otherwise verified the amounts listed on the W-2s. Under the circumstances here, we decline to accept the W-2s alone as adequate proof of the amount of staff programming costs incurred by TPS.

Not only is there insufficient proof of the total amount, appellant has failed to establish that the costs claimed were reasonably necessary for performance of, and allocable to, the VLA. Some of the programming during the period in question was unrelated to and/or not required by the agreement. In particular, appellant's "paper" business continued. It also was pursuing commercial work and work involving other agencies unconnected to the DoD VAN in dispute.

On balance, we consider that the record does not support any award for programming costs and deny this portion of the claim as well.

CONCLUSION

ASBCA No. 54163 is dismissed for lack of jurisdiction. We conclude that the government breached the VLA. However, we decline to award appellant damages for the reasons detailed herein. Accordingly, we deny ASBCA No. 55821.

Dated: 24 March 2008

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 54163, 55821, Appeals of Total Procurement Service, Inc., rendered in conformance with the Board's Charter.

Dated:

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