

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Systore Companies, Inc. d/b/a)
Advanced Communications Systems) ASBCA No. 52592
)
Under Contract No. DCA200-94-H-0015)

APPEARANCE FOR THE APPELLANT: Cyrus E. Phillips, IV, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Systore Companies, Inc. d/b/a Advanced Communications Systems (Systore) appeals the denial of its claim for government breach of a license agreement. We find that the government breached the agreement. Systore, however, has failed to prove by a preponderance of the evidence its claimed damages of \$12,821,450 or damages in any other amount. The appeal is denied.

FINDINGS OF FACT

1. In December 1993, a Department of Defense (DoD) Process Action Team (PAT) recommended establishment of a standardized DoD-wide electronic commerce/electronic data interchange (EC/EDI) procurement system that would transmit electronic data in a uniform format from DoD procuring activities to interested vendors by way of two DoD "hub" computers and a number of licensed value added networks (VANs) to which the interested vendors would subscribe (exs. G-1, -5; tr. 2/213-25). The report and recommendations of the PAT were approved by the Deputy Secretary of Defense in January 1994 (app. supp. R4, tab 2).

2. Effective 2 March 1994, the government and Systore entered into the captioned EDI VAN license agreement (VLA 0015). Systore at this time was a small business providing EDI service and support to business customers. It had a total staff of 15 persons. Its gross revenues for its fiscal year ending 31 July 1995 were \$620,976. (Ex. G-4 at 18-20; ex. A-6 at 100) VLA 0015 stated in relevant part:

ARTICLE 1. LICENSE GRANT - DECCO/RPPS (DEC 1993)

The EDI VAN Provider hereby provides the Government with the right to have access to the use of its EDI and Value-Added Network Services at no-cost to the Government for the purpose of exchanging business documents and information with individuals and organizations conducting business with the Government throughout [sic] 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....

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

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

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

3. The Technical Scope of Work referenced in and attached to VLA 0015 stated in relevant part:

B. OVERVIEW

....

DoD has set aggressive goals to make electronic commerce a standard way of conducting business in the 1990s.... 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.... 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....

....

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.

(R4, tab 1 at 11-12)

4. Addendum A to the Technical Scope of Work stated in relevant part:

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....

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.

....

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 activities participating in this approach will be phased into it in accordance with a DoD-wide implementation plan. [Emphasis added]

....

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.

(R4, tab 1 at 19-20, 23)

5. In addition to Systore, the government entered into the same VLA 0015 with a number of other EDI VAN providers. Ultimately, there were 29 DoD certified EDI VAN providers with VLA 0015 license agreements. Eight to 12 of the licensed VANs actively competed for the business of vendors desiring to do electronic commerce with DoD. (Ex. G-13 at 000003-16; tr. 1/180-81)

6. A two-year implementation plan, starting after receipt of funding, was included in the PAT report. This plan called for integrating the existing or planned individual agency EC/EDI procurement systems at 208 DoD procurement sites into the DoD-wide EC/EDI procurement system, initially for small purchases only. (Ex. G-1 at 000293-94, 000309-22) Funding for the implementation plan was provided in May 1994 (tr. 2/261).

7. In October 1994, Congress mandated establishment of a government-wide EC/EDI procurement system to be called the FACNET (Federal Acquisition Computer Network). Pub. L. No. 103-355, § 9001, 108 Stat. 3399-3404 (1994). Policies and procedures for the FACNET were set forth in FAR Subpart 4.5, effective 3 July 1995. These policies and procedures included, among other things, a requirement at FAR 4.503(a) for contractors conducting electronic commerce with the government to provide registration information to the Central Contractor Registration (CCR). FAC 90-29, 60 Fed. Reg. 34,732 (July 3, 1995).

8. At the conclusion of the two-year implementation period in April 1996, 267 DoD procurement sites had been integrated into the FACNET and certified for electronic small purchase transactions (ex. G-15E). However, only 2,000 vendors had registered in the CCR at that time (app. supp. R4, tab 72 at 1036). On 24 May 1996, the DoD Inspector General (IG) reported that vendors were reluctant to use the FACNET because they were unable to justify the expenditures for hardware, software, data transmission (X12) standards and VAN services involved (app. supp. R4, tab 42 at 368).

9. As of 1 October 1996, only 4,000 vendors were registered in the CCR (app. supp. R4, tab 72 at 1036). Beginning 1 October 1996, the government allowed vendors to register in the CCR through the internet, by-passing the FACNET VANs (app. supp. R4, tab 54 at 868). Systore, however, does not allege that any of its FACNET VAN customers registered through the internet.

10. On 4 October 1996, the DOD IG issued an audit report on vendor participation in the FACNET. On the basis of a survey of vendors, the report identified the major impediments to vendor use of the FACNET under the following headings:

Vendors unaware of FACNET

Not appropriate for some small vendors to use
DoD using non-FACNET Systems

Not cost-effective
Not suitable

Not reliable
Transactions not timely
Not transmitting standard data
Not providing adequate feedback on transactions

(App. supp. R4, tab 49 at 524, 536-41)

11. Contemporaneous with the FACNET, the Defense Logistics Agency (DLA) used electronic bulletin boards (EBBs) and its own EC/EDI procurement system (DAASC). The DLA considered these means of electronic commerce more efficient and appropriate for the types of products it was procuring.¹ The DLA DAASC system had its own VANs and Systore operated one of those VANs. During the week of 21-27 July 1996, 927 vendors were doing electronic commerce with DLA using its DAASC system. (App. supp. R4, tab 49 at 538-39; ex. G-9 at 1, 10; tr. 2/339-43) Apart from these 927 vendors, there is no credible evidence of the actual number of vendors conducting electronic commerce with the DoD by means other than the FACNET during the period 1 April 1996—31 December 1997.

12. There were continuing unresolved technical problems with the operation of the FACNET in 1997. In January 1997, the General Accounting Office (GAO) reported that: “Difficulties doing business through FACNET have overshadowed the benefits of using it.” Among the cited difficulties were lost, late and duplicate transactions and network interruptions that delayed procurements. (App. supp. R4, tab 54 at 828-29) Similarly, a DoD IG report dated 4 March 1997 stated that:

[T]he FACNET infrastructure has not been reliable in transmitting transactions between Government buying organizations and vendors. Because of the unreliability of the infrastructure:

- Government buying organizations are reluctant to post procurement actions through FACNET.
- Vendors are 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

¹ The DLA DAASC system allowed solicitation from lists of pre-qualified vendors. The FACNET required public solicitations. (Tr. 2/340-41)

generally include a start-up fee of up to \$1,200 and recurring monthly charges.

(App. supp. R4, tab 58 at 951)

13. As of 15 August 1997, 13,236 vendors had registered in the FACNET CCR out of a universe “of about 400,000 potential Government contractors” (app. supp. R4, tab 72 at 1035). Systore registered every one of its FACNET VAN customers in the CCR and charged each customer \$150 for submitting the registration (tr. 1/96-97). However, most of the FACNET VANs, and especially the larger ones, refused to register their customers. The vendor contact data in the CCR was open to public inspection and there was a fear that other VANs would use that data “as a source to do cold-calls and try and steal their clients away from them.” (Tr. 2/354-55)

14. On 16 January 1998, the contracting officer terminated the Systore VLA 0015 (R4, tab 1 at 1). On 27 March 1999, Systore submitted a one-page certified claim in the amount of \$1,832,565,543.40 for government breach of the Contractor Use of VAN Services clause of the VLA 0015 contract. The alleged facts constituting the breach were that the government had “provided electronic data directly to contractors, through other sources [such] as the DLA bulletin boards, electronic malls, and other government systems.” (R4, tab 2) On 30 November 1999, the contracting officer denied the claim entirely (R4, tab 5 at 1, 9). This appeal followed.

15. After the appeal was filed and before hearing, Systore restated its claim as a claim for lost anticipatory profit, initially in the amount of \$44,905,267 and subsequently in alternative amounts of \$20,266,293 or \$7,560,970 (ex. G-34 at 000001; amended compl. dtd. 9 Nov. 2006 at 37).² At hearing, Systore offered in evidence its “Third Revised Economic Damages Report” with ten alternative lost anticipatory profit amounts ranging from \$4,429,829 to \$21,487,537. The ten different calculations were for two “equally plausible” market share “scenarios” applied to five hypothetical FACNET VAN customer markets ranging from 80,000 customers to 300,000 customers. (Ex. A-6 at 3-4)

16. In the conclusion to its post-hearing brief, Systore narrowed its claim to the \$12,821,450 alternative in its Third Revised Economic Damages Report (app. br. at 90; ex. A-6 at 4). This alternative was based on the following assumptions: (i) a market of 198,884 potential customers for its FACNET VAN and related software and bid sorting services during the claimed damages period of 1 April 1996 to 31 December 1997

² The Board has decided jurisdictional and other motions relating to this appeal *sub nomine Advanced Communications Systems* at 06-2 BCA ¶ 33,429, 07-1 BCA ¶ 33,484, and 07-2 BCA ¶ 33,629.

(ex. A-6 at 115)³; (ii) a Systore market share of approximately 26,811 customers (13.5%) (*id.* at 93)⁴; (iii) gross revenue over the 21-month damages period of \$46,310,194 (*id.* at 115)⁵; and (iv) profit (earnings before interest and taxes) of 27.7% of the gross revenue (*id.*)⁶.

17. Systore's contention that, but for the government's breach, there would have been a total market of 198,884 potential customers for its FACNET business is based in part on Table 1 in the 22 October 1997 DoD IG audit report on the CCR. Table 1 showed that 98,884 vendors at 12 procurement activities were registered in locally developed contractor databases and not registered in the CCR. Systore assumes that, because they were not registered in the CCR, all of the locally registered vendors were conducting small purchase electronic commerce with the government by means other than the FACNET. That assumption is not correct. The locally developed contractor databases in the DoD IG report consisted of all contractors who had submitted a Standard Form (SF) 129 "Solicitation Mailing List Application" to the local activity in accordance with 48 C.F.R. § 14.205, and not just contractors desiring to do business electronically. "Some subset" of that number was doing business electronically, but that subset is nowhere quantified or even approximated in the audit report or elsewhere in the record. (App. supp. R4, tab 72 at 1040-41; tr. 3/10-11)

18. The remaining 100,000 vendors allegedly doing small purchase electronic commerce with DoD activities other than through the FACNET were derived by Systore from statements in the December 1993 PAT report as to the number of vendors doing business with the government at various locations where agency EDI systems were in use and planned for integration in what became the FACNET (ex. A-6 at 10). The total number of vendors cited in the December 1993 PAT report at those locations, however, were the total number of vendors doing business both electronically and non-electronically and not the total number doing business electronically (ex. G-1 at 000069, 000099; tr. 3/30-33).

19. Systore alleges that, as of 31 October 1996, it had 564 customers for its FACNET business. The evidence, however, shows that of the claimed 564 customers, 119 had canceled their contracts with Systore before 1 April 1996 and, thereafter, another 69 cancelled by 31 October 1996. (Ex. A-6 at 11, 140-47, ex. G-29 at 7-12; tr. 3/141-43)

³ The related services were the software and bid sorting services for the AT&T FACNET VAN customers that were subcontracted by AT&T to Systore (ex. A-6 at 140, 146-47; tr. 2/29-31). Hereinafter, in this decision the term "FACNET business" will be used to refer to Systore's FACNET VAN and related software and bid sorting services collectively.

⁴ Scenario 1, line 7 (Year 3 + Year 4) ÷ 2 = 26,811; 26,811 ÷ 198,884 = 13.5%.

⁵ Line 6 (Year 3 (\$27,008,054) + Year 4 (9 mos.) (\$25,736,186 x .75) = \$46,310,194.

⁶ Line L \$12,821,450 ÷ \$46,310,194 = 27.7%.

The evidence further shows that between 1 November 1996 and 15 August 1997 Systore lost 11 FACNET VAN customers and gained 42 related software and bid sorting services customers (ex. G-29 at 7-12, ex. A-6 at 147). As measured by the number of vendors registered in the CCR, Systore's actual share of the existing market for its FACNET business was 9.4% on 31 October 1996 (376/4,000) and 3.1% on 15 August 1997 (407/13,236) (ex. A-6 at 140-47, ex. G-29 at 7-12, tr. 3/141-43; app. supp. R4, tab 72 at 1035-36). Systore's 16 May 1996 business plan called for, among other things, raising a capitalization of \$16 million from outside investors and hiring a sales force of 65 telemarketers to obtain "approximately" 30,000 customers "by the end of 1997" for its FACNET business (app. supp. R4, tab 41 at 337, 341, 355). Systore, however, was unable to raise any amount from outside investors and during the entire period from 1991 to 1998 it had no more than seven sales representatives (tr. 1/197, 199). Considering Systore's actual and declining share of the existing market for its FACNET business, the competitive nature of that market (finding 5), and Systore's failure to secure the outside investors and marketing staff required by its 16 May 1996 business plan, the claimed 13.5% anticipatory share of the alleged 198,884 potential customer market is not credible.⁷

20. Systore's claimed lost anticipatory gross revenues are derived by allocating its anticipated number of FACNET customers among its eight pricing plans and multiplying the allocated number by the standard fees for the plan (ex. A-6 at 88-93). Since Systore did not maintain a job cost accounting system showing its actual FACNET business gross revenue during the claimed damages period, we are unable to determine whether, on a per capita basis, its claimed projected gross revenue in the claimed projected market is consistent with its actual gross revenue in the existing market (ex. G-29 at 2; tr. 3/126, 157-58). Systore had at least one other VAN business in addition to the FACNET business during the period for which damages are claimed (tr. 3/137-38). For that reason, Systore's company-wide financial data (partially reconstructed from tax returns) is not a credible measure of its actual revenues, costs and profit or loss on its FACNET business (ex. A-6 at 100). Without that comparative benchmark, the projected revenue is entirely speculative and without credible factual support.

21. Systore's claimed lost anticipatory profit rate is 27.7% on its lost anticipated gross revenue of \$46,310,194 (finding 15). This profit rate is derived by averaging the five year and six year historic company-wide profit rates of two of its competitors, Harbinger Corp. and Sterling Commerce, Inc. (ex. A-6 at 22, 110-11, 115). For the comparable years 1994-1999, Systore's company-wide average annual profit rate was 2.1% on average annual gross revenue of \$678,748 (ex. A-6 at 100). To the extent historic company-wide profit rates are of any relevance to projecting the profitability of

⁷ Applying the ratio of salespersons to paying customers in Systore's business plan (65/30,000), the number of paying customers in the lost profits claim (26,849) would have required 58 salespersons to realize.

an increase in Systore's FACNET business, the relevant historic rate is that of Systore and not the rates of its competitors.

DECISION

Systore has proven by a preponderance of the evidence that the government breached its representation in the first sentence of the Contractor Use of VAN Services clause of Addendum A to the Technical Scope of Work by failing to require all contractors desiring to conduct small purchase electronic commerce with the government to do so only through a participating FACNET VAN (findings 4, 10, 11).

To recover its claimed lost anticipatory profit of \$12,821,450 for this breach, however, Systore must prove by a preponderance of the evidence that (i) the claimed lost profit was a reasonably foreseeable result of the breach at the time of contracting; (ii) the breach was either the proximate ("but for") cause, or, at the discretion of the trial court, a substantial cause of the loss; and (iii) there is reasonable certainty as to the amount of the damages. *Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268, 1272-73 (Fed. Cir. 2008).

We first consider causation. Systore's lost profit damages claim is based on its expectancy of a much larger market of FACNET users than actually occurred. A preponderance of the evidence in this appeal shows that during the claimed damages period of 1 April 1996 through 31 December 1997 there were a number of causes for the small size of the FACNET user market in general and for Systore's claimed lost profit in particular. The causes for the small size of the FACNET user market were described in the DoD IG audit reports of 24 May 1996, 4 October 1996, and 4 March 1997 and in the GAO report of January 1997. The availability of alternative means of electronic commerce was only one of the reported causes and was mentioned in only one of the reports. The other reported causes were (i) vendor ignorance of the existence of the FACNET, (ii) unreliability of the FACNET infrastructure, and (iii) the cost of doing business on the FACNET. (Findings 8, 10, 12) In addition to the reported causes, there were other causes of Systore's claimed lost profits that were specific to Systore. These were its small size and its failure to secure the marketing staff and outside investment required by its business plan for competing in the FACNET market. (Findings 2 and 19) Moreover, given the reliability and cost impediments of using the FACNET, and the desire of at least one major procurement agency to limit solicitations to pre-qualified vendors which was not possible on the FACNET (see finding 11), it was not inevitable that those vendors and agencies using alternative methods of small purchase electronic commerce would have used the FACNET if the government had enforced the stricture against those alternative methods. VLA 0015 expressly reserved the right for vendors to use non-electronic methods for their small purchase commerce (see finding 4). On this record, Systore has failed to prove by a preponderance of the evidence that the

government breach was either the proximate (“but for”) cause of the claimed lost profits or that it was a substantial cause of the claimed loss.

Systore has also failed to prove by a preponderance of the evidence the amount of its claimed lost profit with any reasonable certainty. The relevant market for the lost profit calculation was the market of vendors doing electronic commerce with the government by means other than the FACNET during the claimed damages period (1 April 1996—31 December 1997). The market of 198,884 potential FACNET VAN and related services customers on which Systore bases its lost profit calculation consists of both vendors doing electronic commerce and vendors doing non-electronic commerce with the government (findings 17, 18). The only credible evidence of the number of vendors doing electronic commerce with the government by means other than the FACNET during the claimed damages period is the report of the 927 vendors doing electronic commerce with the DLA DAASC system during one week of July 1996 (finding 11). The DLA operation of the DAASC system was clearly a breach of the government representation in VLA 0015 that all small purchase electronic commerce would be conducted through the FACNET. However, Systore had a VAN operating in the DAASC system so it was in a position to compete for the DAASC VAN business. There is also no credible evidence for Systore’s claimed market share (see finding 19), and if there were, the absence of any actual job revenue and job cost data for its FACNET business would preclude any determination of the reasonableness of its estimates and projections of the claimed gross revenue and lost net profit (finding 20). The lack of any actual job revenue and job cost data also precludes our making a fair and reasonable approximation for a jury verdict on anticipated lost profit damages. *See Simplix*, ASBCA No. 52570, 06-1 BCA ¶ 33,240 at 164,728, *recon. denied*, 06-2 BCA ¶ 33,318, *aff’d sub nom. Imagination & Information, Inc. v. Gates*, 216 Fed. Appx. 990 (Fed. Cir. 2007). Claims for lost profits on anticipated third party transactions, while not barred as a matter of law, generally fail on the ground of being too remote and uncertain. *See CACI International, Inc.*, ASBCA Nos. 53058, 54110, 05-1 BCA ¶ 32,948 at 163,252-53, *aff’d* 177 Fed. Appx. 83 (Fed. Cir. 2006). Systore’s claim here is no exception

Systore also claims that the government breached VLA 0015 by failing to enforce the provisions requiring registration of contractors in the CCR and “failure to deliver a functional CCR until 1998” (app. br. at 67-72, 75). We agree that the government breached the VLA 0015 provision requiring registration in the CCR “via a participating EDI VAN” before conducting electronic commerce with DoD when it allowed registration via the internet by-passing the VANs and the registration fees charged by the VAN operators (finding 9). Systore, however, registered every one of its FACNET VAN customers in the CCR, charged \$150 for each registration, and has otherwise failed to prove any damage resulting from that breach (finding 13). As to the alleged government breach in failing “to deliver a functional CCR until 1998,” there was no provision in VLA 0015 for the government to “deliver” a functional CCR to Systore. The CCR was for the benefit of the government, not the VANs or the vendors, and Systore has failed to show

that it incurred any increased cost, loss of revenue or other damage resulting from the lack of a functional CCR.

The appeal is denied.

Dated: 18 May 2009

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52592, Appeal of Systore Companies, Inc. d/b/a Advanced Communications Systems, rendered in conformance with the Board's Charter.

Dated:

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

