Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON FEBRUARY 17, 2004

GRANTED IN PART; DISMISSED FOR LACK OF JURISDICTION IN PART:
February 4, 2004

GSBCA 15607

DATA ENTERPRISES OF THE NORTHWEST,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Marcia G. Madsen, David F. Dowd, and Michael J. Farley of Mayer Brown Rowe & Maw, LLP Washington, DC, counsel for Appellant.

Michael J. Noble and Robert T. Hoff, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **GOODMAN**.

GOODMAN, Board Judge.

This appeal was filed by Data Enterprises of the Northwest (DEN or appellant), on June 8, 2001, from the General Services Administration's (GSA or respondent) contracting officer's final decision dated May 18, 2001, denying appellant's certified claim dated December 15, 2000. On November 27, 2001, respondent filed a motion for summary relief seeking denial of the appeal. On February 25, 2002, appellant filed a motion for summary relief on the issue of entitlement. A ruling on the motions for summary relief was deferred pending further discovery and a hearing on the merits. A hearing on the merits was held in Norfolk, Virginia on July 22-24, 2002. On March 19, 2003, the hearing was reconvened in

Washington, D.C., and a witness who had testified previously was called as the Board's witness for additional testimony.[1]

As discussed below, we grant respondent's motion for summary relief in part and dismiss appellant's appeal to the extent that it asserts a taking under the Fifth Amendment of the United States Constitution and copyright infringement. We grant appellant's appeal in part and award damages as stated herein.

Findings of Fact

DEN and its Tool Management Software, ATICTS

DEN was founded in 1970. At the time of the hearing, DEN had eight employees. Transcript at 76. In 1980, DEN developed software that is used to manage valuable assets, primarily tools and consumable items. Transcript at 7, 11, 78; Answer ¶ 6. The name of this software is Automated Tool Inventory Control and Tracking System (ATICTS). ATICTS is appellant's primary product. It is a commercial off-the-shelf (COTS) product which is licensed for use by commercial and Government customers. Appeal File, Exhibit 18 at 1; Transcript at 7-8, 26, 39, 76. DEN has continually revised and refined its ATICTS software at its own expense in order to meet the needs of its commercial and Government customers. Appellant's Motion for Summary Relief, Exhibit A, Declaration of Dennis Michael Brown, Jr., Feb. 21, 2002, (Brown Declaration) ¶ 5; Answer ¶ 7; Transcript at 85.

DEN has licensed ATICTS to commercial customers, including Rockwell, Raytheon, Litton, General Dynamics, BDM, Westinghouse, Northwest Airlines, Delta Airlines, Textron Industries, and First Energy. In every case, DEN has vigorously protected its contract and license rights. Transcript at 7, 11; Brown Declaration ¶ 4.

ATICTS originally was DOS-based software. In 1998 appellant developed ATICTS 2000, which is a Windows-based version with a graphical user interface (GUI). Testimony was offered by appellant that DEN spent approximately two million dollars over a period of two years to develop the GUI for ATICTS 2000. Transcript at 160. Since then, DEN has produced numerous upgraded releases. Appellant's Motion for Summary Relief, Exhibit A, Brown Declaration ¶ 5. The software is copyrighted. The copyright legend and the version number appear upon installation of the software and thereafter on the screen when the "about" topic is selected under the Help function. Transcript at 72.

Licensed users receive a compact disc containing the software for installation and a hard (paper) copy of the ATICTS 2000 Training Workbook (ATICTS Workbook). Appellant's Motion for Summary Relief, Exhibit A, Brown Declaration ¶ 9. In addition to the hard copy, the ATICTS Workbook is provided to the licensed user in a soft (electronic) format on the compact disc which contains the software. Transcript at 82.

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[1] The pages of the hearing transcript of March 19, 2003 are not numbered sequentially from the previous transcript. Reference in this opinion to testimony on March 19, 2003, is specifically noted by date.

In 1998, DEN developed the current version of the ATICTS Workbook. Answer ¶ 8; Appellant's Motion for Summary Relief, Exhibit A, Brown Declaration ¶ 5; Transcript at 70, 78. The ATICTS Workbook is copyrighted and contains a legend that identifies the contents as confidential, proprietary information. The copy of the ATICTS Workbook submitted as an exhibit in this appeal contains the following language on the second page:

> Copyright, 1998, Data Enterprises of the Northwest, Inc.
> Workbook Version 11/06/99
> These materials contain confidential and proprietary information and may not be used, reproduced, distributed or disclosed except as specifically authorized under prior written agreement with Data Enterprises of the Northwest, Inc.

Appeal File, Exhibit 20[2] at 2; Transcript at 81.

The ATICTS Workbook is the primary documentation for the software. The only other documentation for the software is contained in the on-line help function in the software itself. Transcript at 71, 337-43. Unless one is a licensed user, one cannot obtain a copy of the ATICTS Workbook. Id. at 71, 331-32. The ATICTS Workbook was not created for the Government under a Government contract. Appellant's Supplementary Appeal File, Exhibit 23. The Government did not fund the development of the Workbook. Brown Declaration ¶ 5.

The copy of the ATICTS Workbook submitted as an exhibit in this appeal contains approximately 250 printed pages. The ATICTS Workbook is divided into twenty numbered chapters that contain a detailed description of the software, including how to use the software and the various functions performed by the software. The ATICTS Workbook details how to perform the functions of the software by step-by-step direction for the user (point, click-by-mouse, keyboard strokes) and illustrations of how the screen will appear during virtually every operation. Appeal File, Exhibit 20.

Formation of Appellant's Contract with Respondent

For more than a decade, DEN has licensed ATICTS software to various Government agencies. Answer ¶ 11; Transcript at 8-10.

In November 1994, GSA issued solicitation number GSC-KES-00051-12-14-94 (the solicitation), which stated:

> Offers are solicited for the latest official manufacturer's version of all microcomputer software products.

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[2] The copy of the ATICTS Workbook included in the record of this appeal is the one that was transmitted to Anteon Corporation, as described herein. It is not the most current workbook. DEN issues updated versions as the need arises, on the average of once a year. Transcript at 83.

> For the purpose of this solicitation, software products are defined to be licenses (including upgrades), documentation, and media.

Appeal File, Exhibit 2 at 10. This solicitation was a Request for Proposals (RFP) for a negotiated procurement. Id. at 1.

Section C of the solicitation, entitled "Description/Specifications/Work Statement," read in relevant part:

> C.1. DESCRIPTION/SPECIFICATIONS.
>
> FSC Group 70, Part I, Sections B&C, General Purpose Commercial Automated Data Processing Equipment and Software. NOTE: A commercial item is defined as an item that is regularly - 1) used for other than Government purposes; and 2) sold or traded to the general public in the course of normal business operations. . . .
>
> SOFTWARE: Offers are solicited for the latest official manufacturer's version of all microcomputer software products.
>
> For the purpose of this solicitation, software products are defined to be licenses (including upgrades), documentation, and media.

Appeal File, Exhibit 2 at 12.

Attachment IV of the solicitation was entitled "Glossary of Terms." The glossary read in relevant part:

> The purpose of this glossary is to provide offerors and GSA with common ground to facilitate contract negotiations. (This glossary is written for general business and not as a legal resource. It is not a substitute for a more comprehensive technical or legal definition and does not constitute legal advice.)
>
> SOFTWARE-LICENSE AGREEMENT - A contract between the software vendor (licensor) and the software user (licensee) granting the licensee permission to use a given software product subject to certain conditions and obligations. Synonym: License Agreement.
>
> DOCUMENTATION - Materials provided with, or available for, a software product for its implementation, operation, and maintenance, such as installation guides, tutorials, reference guides, technical and/or user manuals, and release notes.
>
> LICENSEE - The party in a software agreement receiving the license rights granted.

> LICENSOR - The party in a software agreement granting the license right.
>
> SOFTWARE PROGRAM - A set of sequential instructions that a computer can interpret and execute, logically assembled or compiled into one or more interrelated modules. Synonym: Program.
>
> SOURCE CODE - Software programming statements written in a programming language, which can be translated into machine readable language for execution.
>
> SUPPORT SERVICES - A defined level of vendor assistance for the licensed software, which may include such services as defect correction, telephone assistance, and program enhancements. Synonym: Maintenance.

Respondent's Motion for Summary Relief, Exhibit 17.

The solicitation incorporated by reference contract clauses from the Federal Acquisition Regulation (FAR), including clauses at FAR 52.227-14, Rights in Data—General (JUN 1987); FAR 52.227-19, Commercial Computer Software—Restricted Rights (JUN 1987); and FAR 52.215-33, Order of Precedence (JAN 1986).[3] Appeal File, Exhibit 2 at 39.

DEN submitted its initial offer in response to the solicitation on December 12, 1994. Included in that offer was a document entitled "Data Enterprises of the Northwest, Inc. Agreement for License of Computer Programs" (DEN License Agreement). Appeal File, Exhibit 5.

The DEN License Agreement states in relevant part:

> Customer agrees to purchase non-exclusive perpetual license rights to the program products listed on Schedule A, such license to be according to the terms and conditions set forth on this and the reverse side.
>
> Schedules
>
> A. Software (Licensed Programs)
>
> . . . Customer acknowledges that the license granted hereunder is limited to the Use of Licensed Programs as provided herein and that the Use thereof by an entity other than Customer is prohibited. Customer shall have no right to assign or sub-license any of the Licensed Programs or the Use thereof.

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[3] Relevant portions of these clauses are reproduced in the Discussion section of this decision.

> The Licensed Programs contain confidential and proprietary material. The original and any copies of the Licensed Programs, in whole or in part, whether provided to or made by the customer shall be and remain the property of Data Enterprises. Customer agrees not to provide or otherwise make available any Licensed Program or copy thereof, but not limited to, menus, screen formats, report formats and data dictionaries to any person.

Appeal File, Exhibit 5; Answer ¶ 9; Transcript at 10.

DEN's initial offer also contained a certification, as required in the solicitation, which stated that "the Government was not the principal developer of, nor did the Government either contract or grant funds specifically for the purpose of developing or substantially improving a specific item or items of hardware or software, or substantial portion thereof, proposed for inclusion in this contract." Appeal File, Exhibit 2 at 72.

In its May 8, 1995 best and final offer in response to GSA's solicitation, which GSA accepted, DEN stated that "the basis of negotiations and award" is how DEN "sells to its commercial end users" and that all of the products offered by DEN are "commercial items which are regularly used for other than Government purposes and are sold in the course of normal business operations." Appeal File, Exhibit 3 at 1.

On May 12, 1995, DEN and GSA entered into contract number GS00K95AGS, pursuant to which Government agencies could purchase a license to use ATICTS, maintenance of ATICTS, and training. Appeal File, Exhibit 6. The basis of negotiation and award, as indicated in the contracting officer's memorandum of award, was DEN's commercial license.[4] Respondent's Opposition to Appellant's Motion for Summary Relief, Exhibit 23.

The contract between GSA and DEN was a Federal Supply Schedule contract applicable to all departments or independent agencies of the executive branch of the Federal Government. Appeal File, Exhibits 2 at 7, 14; 6 at 5. Under its Federal Supply Schedule program, GSA makes commercial products available to federal agencies. 48 CFR 8.401(a) (1994).

The contract included special item number (SIN) 132-31, Purchase of Software; SIN 132-32, Maintenance of Software; and SIN 132-50, Classroom Training. Appeal File, Exhibits 3, 4. The item number for Purchase of Software was subsequently changed to 132-33 and the item number for Maintenance of Software was changed to 132-34. Id., Exhibits 6 at 36, 7 at 1.

The price schedule in the contract read in relevant part:

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[4] The contracting officer states in his final decision: "The applicable license agreement is the one that is attached to the contract under which the order was issued (i.e., GS-35F-30980D)." Appeal File, Exhibit 30 at 2. The contract number referenced is the contract number re-assigned to this contract after an extension in 1996. Id., Exhibit 6.

Mfr Part #	SIN	Description	Govt Price
AG-100	132-31	ATICTS-G Includes all modules and User Manual	8,000
AG-100A	132-31	User Ports 1-4, Each	4,000
AG-100B	132-31	User Ports 5-12, Each	3,000
AG-100C	132-31	User Ports 13-24, Each	2,000
AG-100D	132-31	User Ports 25-33, Each	1,600
AG-100E	132-31	User Ports 33+ Each	1,000
AG-103	132-31	Additional User Manual	170
G002	132-50	Training, 40 Hours On-site	3,800
G005	132-32	Technical Support, Per Hour	85
G006	132-32	Annual Maintenance Contract	8,000[5]

SIN 132-31 are CLIS [contract line items] - include media, license, documentation . . . An operable system must include at least item #AG-100 and two of the User Ports listed under item AG#100A.

Appeal File, Exhibit 4 at 17.

The contract included a section entitled "Terms and Conditions Applicable to Perpetual Software License (Special Item 132-33) and Maintenance (Special Item 132-34) of General Purpose Commercial Information Technology Software." These terms and conditions included the following language:

> Utilization Limitations
>
> The Government agrees to refrain from changing or removing any insignia or lettering from the software or documentation that is provided, or producing copies of manuals or disks, except one copy for backup purposes, as allowed by the manufacturer. The Government also agrees to comply with the following:
>
> > a. Title to and ownership of the software and documentation and any reproductions thereof, shall remain with the contractor.
> >
> > b. Use of the software and documentation shall be limited to the facility for which the software is acquired, and shall be further limited to use on one (1) computer system.
> >
> > c. FAR clauses 52.227-14 RIGHTS IN DATA—GENERAL (JUN 1987) and 52.227-19 COMMERCIAL COMPUTER

[5] The annual maintenance contract includes ten hours of support a month. Transcript at 337.

> SOFTWARE—RESTRICTED RIGHTS (JUN 1987) are incorporated by reference as part of this pricelist.

Appeal File, Exhibit 7 at 13.

DoD's Two Systems for Inventory Management of Equipment and Tools

Prior to 1998, the Joint Logistics Systems Command (JLSC) within the Department of Defense (DoD) was responsible for establishing a standard system for all services to minimize the cost for use of DoD computer applications. Transcript at 728. During the 1990s, the JLSC instituted two systems based on COTS software. One system was used to manage and track equipment, and was known as Facilities and Equipment Maintenance, referred to by the acronym FEM. The COTS software used for FEM was MAXIMO, which is currently developed and marketed by the Anteon Corporation (Anteon). Transcript, (Mar. 19, 2003) at 36.

The other system was used to track tools, and was known as the Tool Inventory Management Application, referred to by the acronym TIMA. The COTS software used for TIMA was ATICTS. Transcript at 86-87. The JLSC selected ATICTS as the core application for TIMA because the JLSC concluded that ATICTS was the best COTS software for use by the Army, Navy, Air Force, and Marine Corps depots. Answer ¶ 12; Appellant's Supplementary Appeal File, Exhibit 1; Transcript at 77, 86-87.

In day-to-day practice, personnel came to use the terms FEM and MAXIMO interchangeably when referring to either the equipment tracking system or the software used to track equipment, and they would use the terms TIMA and ATICTS interchangeably when referring to the tool tracking system or the software used to track tools. Transcript at 86.

DoD Requests Feasibility Study of Combining Inventory Management of Equipment and Tools into One System

In 1998, systems management of TIMA was transferred within the DoD from the JLSC to the Naval Systems Support Group (NSSG). NSSG currently has oversight responsibilities for both the TIMA and FEM systems. Answer ¶ 14.

The Navy's Automated Information Systems Advisory Board (AIS Board) distributes the budget for computer and network needs among the Navy's various shipyards. Transcript at 724. In 1999, the AIS Board directed NSSG to investigate the feasibility of combining the FEM and TIMA systems. The AIS Board directed that NSSG perform a cost estimate together with the feasibility study. Transcript at 725.

According to Lester Kramer, the Director of the NSSG, the reason for this study was that there were many difficulties in the shipyards and throughout the services with ATICTS after the transition from the DOS version of ATICTS to the Windows-compliant ATICTS 2000. The shipyards also had a goal of reducing costs by having all applications use Oracle as a database management system, while ATICTS and ATICTS 2000 used a PICK (D3) database management system. Transcript at 730.

NSSG Purchases a Four-User License for ATICTS

On February 17, 1999, order number N00104-99-F-Q155 was issued under the contract by Rodney L. Klinger, the contracting/ordering officer on behalf of the Navy Inventory Control Point (NAVICP), with shipment to NSSG at the Norfolk Naval Shipyard, to the attention of Mr. Ernest Crosby. The order read in relevant part:

> The purpose of this delivery order is to acquire support services for ATICTS 2000 and Pick D3 software upgrade. The services will support software implementation, training and other related services as described in the enclosed statement of work.

The items ordered under the delivery order were labor - technical support, initial software training, refresher software training, and travel. The price of the initial software training was $3800. The price of the refresher software training was also $3800. Included as a deliverable were training manuals.[6] Appeal File, Exhibit 18; Answer ¶ 17. The delivery order stated that it was subject to the terms and conditions of the contract. Appeal File, Exhibit 18 at 2; Answer ¶ 17. According to the contracting officer's final decision which is the subject of this appeal, the DEN License Agreement, which is included in the Appeal File as Exhibit 5 and was referenced previously in this opinion as the DEN License Agreement, is applicable to delivery order number N00104-99-F-Q155. Appeal File, Exhibit 30 at 2.

On April 15, 1999, contracting/ordering officer Klinger issued modification number P00001 to order number N00104-99-F-Q155. Appeal File, Exhibits 19, 30; Answer ¶ 17. The modification added item number 0003: "4-User ATICTS System for NSSG." Appeal File, Exhibit 19 at 2; Answer ¶ 17. A licensed copy of the ATICTS 2000 software for four users, including the ATICTS 2000 Workbook, was provided to NSSG under this modification on or about May 4, 1999. Appeal File, Exhibit 30 at 1; Transcript at 95.

The Four-User License Was Requested by American Management Systems

American Management Systems (AMS) is a contractor with a direct contract with DoD that provides technical support to the Norfolk Naval Shipyard's (NNSY) TIMA. Transcript at 364. Phillip Camacho, an AMS employee, is a security analyst and technical expert with regard to TIMA. Transcript at 441-42. He testified that he requested that NSSG purchase the ATICTS four-user license so that he could create security documentation for

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[6] As the statement of work referred to "classes" and included four weeks of initial training and four weeks of refresher training, it is assumed that more than one training manual was supplied.

the TIMA system because the version of the ATICTS Workbook which he had at that time was not sufficient to develop the security documentation. Transcript at 527.[7]

In December 1999, NNSY upgraded to ATICTS 2000 using the four-user licensed software. Respondent's Opposition to Appellant's Motion for Summary Relief, Exhibit 12, Declaration of Vicky Crittendon, Apr. 9, 2002, (Crittendon Declaration) ¶ 2. Mr. Camacho received training on the ATICTS 2000 software when it was implemented at the NNSY in 1999. Transcript at 449. In his support of ATICTS for the NSSG, he had access to the use of the ATICTS 2000 software. Transcript at 450.

AMS Prepares a Proposed Approach to Addressing Tool Management Functionality into Facility Equipment Maintenance

Nicholas Dahlkamp is an employee of AMS. He prepared a document dated January 12, 2000, entitled "Proposed Approach to Addressing TIMA Functionality into FEM" (Proposed Approach). Transcript at 692.

The Proposed Approach describes discussions between Mr. Dahlkamp and Ernest Crosby, the NSSG project manager for TIMA, and William Richter, the NSSG project manager for FEM. These discussions concerned an approach to a feasibility study to incorporate the functionality of tool management into the FEM system. The Proposed Approach stated that AMS would "complete the analysis of ATICTS functionality" and another third-party contractor, Anteon (the developer of MAXIMO), would "observe ATICTS functionality" and provide a cost estimate to integrate TIMA functionality into FEM. Anteon would then be tasked to "program" the functionality into FEM. Appellant's Supplementary Appeal File, Exhibit 65 at 2. The Proposed Approach stated that the benefit to Anteon would be that an "[u]p front analysis [would be] completed by [the] government resulting in cost savings to Anteon, [m]oney to be made in integrating the TIMA functionality with the rest of FEM, [Anteon] [c]ould market TIMA functionality to other commercial customers, [and there were] [c]urrent NSSG customers already in place for TIMA functionality." Id. Additionally, the Proposed Approach stated:

> define which documents will most effectively support Anteon's development of TIMA functionality and then testing [sic] Anteon's product:
>
> Software Requirement Specification (SRS) Requirements

Id.

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[7] According to NSSG Director Kramer, NSSG intended to use this four-user license to set up a "test ring" to test each new release of ATICTS before sending the new release of the software to the seventeen sites where ATICTS was installed. NSSG did not implement the test ring, once it determined that the various sites that were using ATICTS had different versions of ATICTS installed, and DEN was dealing directly with the problems as they arose. Transcript at 731-32.

By electronic mail message dated January 13, 2000, Mr. Dahlkamp transmitted the Proposed Approach to his supervisor, Steven Turner, an AMS project manager. His message stated that this file "should capture the discussions I've had with Bill [Richter] and Ernie [Crosby]." Appellant's Supplementary Appeal File, Exhibit 65 at 1.

AMS Prepares the Software Requirements Specification (SRS)

In December 1999, Mr. Camacho of AMS was involved in discussions concerning the preparation of a document to set forth ATICTS functionality. This document is mentioned in the Proposed Approach as the "Software Requirement Specification (SRS)" and ultimately became known as the "Draft Facilities and Equipment Maintenance Tool Management (FEM TM) Software Requirements Specification (SRS)." Transcript at 454. As will be discussed later, the enhanced version of MAXIMO that was developed by Anteon to incorporate tool management functionality came to be known as FEM TM.

Mr. Camacho worked with two individuals who did not testify at the hearing, Ken Dukarm of AMS and Deborah Williams of PricewaterhouseCoopers, to develop the SRS. Transcript at 455-56. He and these two individuals had equal responsibility for preparing the document. Id. at 457.

In January 2000, Mr. Camacho asked Vicky Crittendon, the NNSY functional administrator for ATICTS 2000, for a copy of the latest version of the ATICTS Workbook. Mr. Camacho did not tell Ms. Crittendon why he wanted the copy. Ms. Crittendon understood that AMS was a technical support contractor and had a license to use ATICTS. She gave Mr. Camacho a copy of the ATICTS Workbook.[8] Crittendon Declaration ¶¶ 7, 8; Transcript at 210-13.

Mr. Camacho testified that he did not use the ATICTS Workbook in his preparation of his portion of the SRS, but relied on his hands-on knowledge of and training in ATICTS. Transcript at 463. Mr. Camacho also had knowledge of ATICTS because he had spoken with DEN personnel numerous times about its functionality. Transcript at 463. He acknowledged that he had consulted the ATICTS Workbook to develop security standards for TIMA. Id. at 464-65.

Mr. Camacho only worked on the SRS from late December 1999 through the first week in January 2000. He saw a draft of the SRS several months later, but does not know

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[8] Prior to upgrading ATICTS to ATICTS 2000, Ms. Crittendon had scheduled refresher training for twenty-two shipyard employees during December 1999. Shelley Stark of DEN conducted the training and brought with her one copy of the ATICTS Workbook, Version 11/6/99. Copies of the ATICTS Workbook were made for trainees. Some received full copies, and others received only partial copies. At the conclusion of the class the attendees retained their copies of the ATICTS Workbook. Additional copies of the ATICTS Workbook remained after the training was concluded, and they were later distributed to other trainees. Crittendon Declaration ¶¶ 1-6.

when it was actually completed. Transcript at 459. After Mr. Camacho's initial involvement, the SRS was completed by Mr. Dukarm and other individuals. Id. at 459.

Ernest Crosby, the TIMA project manager for NSSG, testified that the purpose of the SRS was to provide functionality of the tool inventory application (ATICTS) to Anteon and to allow Anteon to develop a cost justification. Transcript at 376, 380. This was confirmed by Nicholas Dahlkamp of AMS, who stated that the SRS was to provide Anteon with the description of the functionality that would be necessary to provide tool management within FEM. Id. at 693-94.[9]

The Contents of the SRS

There are two versions of the SRS in the record of this appeal. Appellant's Supplementary Appeal File, Exhibits 5, 6. The first version of the SRS makes specific references to TIMA and ATICTS and contains extensive information copied directly from the ATICTS Workbook. This sixty four page document specifically lists the ATICTS Workbook as a reference and states further that it was prepared by AMS on April 18, 2000,[10] under contract number N00102-96-D-ZA02. It reads in relevant part:

> The Software Requirements Specification (SRS) specifies the requirements for the Tool Management (TM) module of Facilities and Equipment Maintenance (FEM) and the methods to ensure that each requirement has been met.
>
> The Requirements presented in this SRS will be used as the basis for the design and qualification testing of FEM TM.

Id., Exhibit 5 at 2.

This version of the SRS further states, at section 1.1, that it :

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[9] Mr. Camacho testified that he believed the SRS was developed "to document the system TIMA requirements and be able to use it for a qualification testing and make sure that the system met the customer's requirements." Transcript at 523. He testified further that an SRS is a document that is "standard for any system. It is just one of the many standard documents we developed for the systems at NSSG." Id. at 457. However, when questioned further, he stated that most of the systems for which he had produced an SRS were systems developed by AMS, rather than COTS systems. Id. at 535. Mr. Kramer, Director of the NSSG, testified that an SRS is not normally created for COTS software. Id. at 751. However, he said it was needed to develop the testing scenarios for the test ring that was never implemented. Id. at 733, 752-54.

[10] As described herein, an earlier version of the SRS with a preparation date of January 3, 2000, is substantially identical to this version and was transmitted to Kenneth Linna of Anteon via electronic mail on March 15, 2000. See Appellant's Supplementary Appeal File, Exhibit 67.

> identifies and describes all software requirements in the Tool Inventory Management Applications (TIMA). . . . TIMA is based on the Commercial Off-the-Shelf (COTS) product Automated Tool Inventory Control and Tracking System (ATICTS) 2000 developed by Data Enterprises of the Northwest (DEN) of Seattle, Washington. TIMA and ATICTS are sometimes used interchangeably by the user community to identify the Program or system name.

Appellant's Supplementary Appeal File, Exhibit 5 at 5.

The SRS provides at section 1.3 that "[t]he purpose of this document is to specify the software requirements for the Automated Tool Inventory Control and Tracking System (ATICTS)." Appellant's Supplementary Appeal File, Exhibit 5 at 6.

The SRS includes a list of "Referenced Documents" which includes "Automated Tool Inventory and Control Tracking System (ATICTS) Training Workbook, 01 April 1999." Appellant's Supplementary Appeal File, Exhibit 5 at 8.

The information from the ATICTS Workbook in the SRS is in the form of headers from the Table of Contents of the ATICTS Workbook and report numbers that are generated by ATICTS 2000 that appear in the ATICTS Workbook. The SRS includes information contained in the version of the ATICTS Workbook included in the record of this appeal at Appellant's Supplementary Appeal File, Exhibit 43.

It is apparent that persons preparing the SRS reviewed the ATICTS Workbook and copied headers from the Workbook's chapters and internal portions of chapters directly into the SRS. A comparison of information from the ATICTS Workbook and the SRS is set forth in detail in Appellant's Motion for Summary Relief, Statement of Uncontested Facts ¶ 35.

The SRS lists ATICTS features that are included in the Workbook but are not used by any Government ATICTS licensee, but are only used by DEN's commercial accounts. For example, the "M&TE Usage History Maintenance" menu is a feature of ATICTS that is not used by DEN's Department of Defense customers; rather, it is used in nuclear power plants. The "Regrind Item Transfer Listing" is not a report used by DEN's Government customers; rather, it is used in a manufacturing environment. The SRS also lists "Fire Permit Reports." This suite of reports was custom-written to meet the needs of one of DEN's commercial customers. Brown Declaration ¶ 8.

The second version of the SRS appears at Appellant's Supplementary Appeal File, Exhibit 6. While both versions in the record of this appeal have the same preparation date, April 18, 2000, the second version deletes all references to ATICTS and the ATICTS workbook, and states:

> This Software Requirements Specification (SRS) identifies and describes all software requirements for the Tool Management module of Facilities and Equipment Maintenance (FEM TM).

Despite deleting references to ATICTS, the second version of the SRS contains virtually all of the information from the ATICTS Workbook contained in the first version of the SRS. Appellant's Supplementary Appeal File, Exhibits 5, 6.

NSSG Issues a Task Order to Anteon to Perform a Feasibility Study of Incorporating the Functionality of Tool Management into FEM

As mentioned previously, MAXIMO is Anteon-developed COTS software which was being used by NSSG for management of equipment inventory in the FEM system. In October 1996, GSA entered into contract number GS-35F-4357D (the Anteon contract) with Anteon. The Anteon contract included purchase of general purpose automated data processing equipment and software. Respondent's Supplementary Appeal File, Exhibit 56. Various written task orders and modifications were issued under the Anteon contract. Id., Exhibits 65-81.

In February 2000, pursuant to verbal task order T0698BN0872, issued under the Anteon contract, the NSSG, through Lester Kramer, its director, orally requested that Anteon conduct a study to determine the feasibility of incorporating the functionality of tool management into the FEM system. Mr. Kramer directed the verbal task order to James Bent of Anteon. Respondent's Supplementary Appeal File, Exhibits 71, 78, 85-87.

NSSG, AMS, and Anteon Personnel Meet at the NNSY in February 2000

Mr. Kenneth Linna is a senior information engineer employed by Anteon. He was and is the lead developer for the incorporation of tool management into MAXIMO. Transcript at 585. Mr. Linna first became involved in February 2000 to determine if the functionality of tool management could be incorporated into MAXIMO. Transcript, (Mar. 19, 2003) at 48. He traveled to the Norfolk Naval Shipyard on February 24, 2000, to begin Anteon's feasibility study and meet with personnel from NSSG and AMS. He was the only individual from Anteon attending the meeting. Transcript at 585-86. He was not familiar with ATICTS when he arrived. He became aware of the existence of ATICTS during his visit to NNSY. Transcript, (Mar. 19, 2003) at 50.

Mr. Linna met with Vicky Crittendon, the TIMA functional administrator of the NNSY, and discussed how the shipyard tracked tools. Ms. Crittendon testified that she did not show Mr. Linna how ATICTS 2000 functioned, but discussed business practices. She had not been told of the decision to conduct the feasibility study concerning the incorporation of tool management into the FEM system, and she did not know why Mr. Linna was there. Crittendon Declaration ¶ 11; Transcript at 218-23.

Mr. Linna was escorted to the meeting with Ms. Crittendon by Phillip Camacho of AMS. Transcript at 481. According to Mr. Camacho, Ms. Crittendon and Mr. Linna "talked briefly about some of Ms. Crittendon's concerns about TIMA" and "what some of the problems she was having with . . . TIMA." Mr. Linna "wanted to see if there were any thing[s] that she would like to see as far as an improvement or enhancement in any type of Tool Management application." Ms. Crittendon "had the ATICTS screen on" during her

discussions with Mr. Linna. Mr. Camacho could not tell whether Mr. Linna was looking at or could see Ms. Crittendon's computer screen. Transcript at 481-82, 531.

Ms. Crittendon testified that during her meeting with Mr. Linna, she discussed NNSY's business practice of "kitting" tools, i.e., grouping tools into logical kits for specific repairs. During this discussion she turned her computer screen toward Mr. Linna so he could view a kit with its contents displayed. That is the only time Ms. Crittendon remembers showing her computer screen to Mr. Linna. Crittendon Declaration ¶ 11; Transcript at 223-25. Mr. Linna's questions were not ATICTS-2000 specific; rather, they were general questions pertaining to subjects such as the kinds of data NNSY tracks, items NNSY "kits," and types of kits NNSY makes. Transcript at 225-26.

Mr. Linna testified that during that meeting, he did view the ATICTS 2000 user interface, i.e., the screen display. He stated that Ms. Crittendon was merely trying to show what the application looked like. He was not given access to ATICTS 2000. Transcript at 634. He also testified that he discussed with Steven Turner of AMS the functions that the "community wanted to have incorporated." Id. at 586. Mr. Linna discussed requirements with Vicky Crittendon and other shipyard personnel. Id. at 601. Mr. Linna stated that "they had a vague idea of the functionality that they wanted included but not really the detail that I needed." Id. at 586-87.

During the same meeting, Mr. Linna discussed tool management with Mr. Camacho. Mr. Camacho showed Mr. Linna the ATICTS Workbook and logged onto ATICTS to show Mr. Linna the "look and feel" of the software -- the way the menus are set up and the standard "Windows" look. Transcript at 469-72. Mr. Camacho mentioned that he was developing the SRS for NSSG and asked Mr. Linna if he would like a copy. Mr. Linna said that he would. Mr. Camacho did not give Mr. Linna a copy of the SRS at that meeting. Id. at 587; Transcript (Mar. 19, 2003) at 52.

Anteon Receives the ATICTS Workbook

Steven Turner of AMS states that he was directed by Ernest Crosby of NSSG to give Mr. Linna "whatever he needed to facilitate Anteon's development of a cost estimate for enhancing the tool management capabilities of FEM,"[11] and that Mr. Linna specifically requested an "updated version of the TIMA training workbook, which Mr. Crosby requested that I copy and give to Mr. Linna."[12] Mr. Turner states that he photocopied the ATICTS Workbook and then gave a copy to Mr. Linna on February 24, 2000. Respondent's Supplementary Appeal File, Exhibit 30, ¶ 7. According to Mr. Camacho, Mr. Turner asked him to give Mr. Linna a copy of the ATICTS Workbook. Mr. Camacho had a copy of the ATICTS Workbook he had received from Ms. Crittendon, and he made a copy of that

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[11] Mr. Crosby does not recall asking Mr. Turner to give the ATICTS Workbook to Anteon. Transcript at 389-90.

[12] Mr. Linna does not remember requesting a copy of the ATICTS Workbook. Transcript at 588.

Workbook and gave it to Mr. Turner to give to Mr. Linna in January 2000. Transcript at 474-78. Apparently, Mr. Turner photocopied the Workbook he had received from Mr. Camacho.

Anteon Receives the SRS

Mr. Linna received a version of the SRS which contains the references to the ATICTS Workbook and the RPT (report) numbers from the Workbook and is substantially identical to the version with a preparation date of April 18, 2000 included in the record of this appeal as Appellant's Supplementary Appeal File, Exhibits 5, 6.[13] Mr. Linna testified that he received a copy of the SRS on March 15, 2000, briefly reviewed the document, and "threw it on a shelf," as it was of no use to him. Transcript at 594. Mr. Linna testified that he did not use the SRS to prepare the document referred to as the Anteon Analysis, as discussed below.

Mr. Linna's Knowledge of Tool Management

Mr. Linna testified that he developed his understanding of the requirements for tool management to be incorporated into the FEM system by his past knowledge of inventory management, meetings with current users of TIMA, and his knowledge of MAXIMO. FEM performed certain functions as to equipment management which were needed to be performed as to tool management. Mr. Linna stated he did not gain this understanding of tool management from the SRS or by reviewing the ATICTS Workbook. Transcript at 594-600.

Mr. Linna Authors the Anteon Analysis

After returning from his trip to the NNSY, Mr. Linna authored a document entitled "Incorporation of Tool Management into NAVSEA FEM" (Anteon Analysis).[14] Appellant's Supplementary Appeal File, Exhibit 74. He testified that the purpose of the Anteon Analysis was to determine which TIMA functions could be incorporated into the FEM system and which TIMA functions would require custom applications. Transcript at 605-06.[15]

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[13] The record is not clear as to when Mr. Linna first received a copy of the SRS. Steven Turner of AMS states that he sent the SRS as an attachment to an electronic mail message to Mr. Linna during the week of February 27, 2000. Respondent's Supplementary Appeal File, Exhibit 30 at 4-5. However, Deborah Williams of PricewaterhouseCoopers forwarded a version of the SRS to Mr. Linna as an attachment to an electronic mail message dated March 15, 2000.

[14] By e-mail message dated April 6, 2000, Mr. Linna of Anteon transmitted the finished version of the Anteon Analysis to James Bent of Anteon. Appellant's Supplementary Appeal File, Exhibit 74.

[15] Mr. Linna erroneously refers to the Anteon Analysis as the "White Paper." The "White Paper" is another document which was prepared by Anteon. Mr. Linna subsequently testified that he did not prepare the "White Paper." Transcript at 615.

Mr. Linna wrote the Anteon Analysis when he had a copy of the ATICTS Workbook at Anteon's corporate headquarters.[16] Initially, he testified that he "never read past the cover" of the ATICTS Workbook, because it was "not something he would want to use." Transcript at 588-89. He later testified that he "glanced at it somewhat, maybe" and did use the information in the ATICTS Workbook to extract "headers out of the Table of Contents" for use in the Anteon Analysis. Transcript at 590-91, 604-05, 635. Despite Mr. Linna's attempts to minimize his use of the ATICTS Workbook, the Anteon Analysis states:

> [t]he ATICTS 2000 Training Workbook, Version 11/06/99 was used as the primary requirement source document for this analysis.

Appellant's Supplementary Appeal File, Exhibit 74 at 2.

The Anteon Analysis contains a series of sections that "depict how major ATICTS functions described in the Training Workbook will be incorporated into NAVSEA FEM." Appellant's Supplementary Appeal File, Exhibit 74 at 2-3. This document also provides:

> The approach to incorporating Tool Management into NAVSEA FEM will utilize cloning of existing MAXIMO applications and the creation of custom applications. Clones will be used when MAXIMO functionality is similar to required ATICTS functions. Custom applications will be used for functionality not currently supported within the MAXIMO package. . . . Whenever possible, the inherent strengths of the MAXIMO package will be used to support basic functions supplied by the current ATICTS software.

Id.

The copy of the ATICTS Workbook included in the record of this appeal was identified as the copy that Mr. Linna had received from NSSG, and this copy contains Mr. Linna's handwritten notes throughout. Appellant's Supplementary Appeal File, Exhibit 97. At the hearing, Mr. Linna testified that he was marking various screens illustrated in the ATICTS Workbook as those which would require a custom application in MAXIMO. Transcript at 606.[17] Mr. Linna then stated that after preparation of the Anteon Analysis, he made no further use of the ATICTS Workbook. Id. at 635.

Mr. Linna asserts that he did not use the SRS prepared by AMS to prepare the Anteon Analysis. He testified that the SRS was useless to him. The SRS appeared to him as a list

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[16] Mr. Linna also had an electronic version of the ATICTS Workbook. Transcript at 618-19; Appellant's Motion for Summary Relief, Exhibit G at 2.

[17] On various pages of the copy of the ATICTS Workbook, Mr. Linna has written notes, many of which say "custom app," "exists," and "user defined." Some handwritten notes merely duplicate the subject matter of the screen which is illustrated on the page. In Chapter 14, Kitting, which consists of ten pages, there are two handwritten notes, one of which says "IAS" and the other "Custom." Appeal File, Exhibit 20.

of headers extracted from the Table of Contents of the ATICTS Workbook. Transcript at 635-36.

Mr. Linna's supervisor, James Bent, also testified concerning the Anteon Analysis. He stated that the ATICTS 2000 Workbook was used in the preparation of the Anteon Analysis to identify the "high-level functions performed within TIMA" to allow for a comparison with the capabilities in FEM. Transcript at 707.

James Bent Prepares the Anteon White Paper and Cost Estimate

Mr. Bent prepared a document entitled "White Paper, Integration of TIMA functionality into NavSea FEM" (White Paper) and another document entitled "GSA Schedule Contract Number GS-35F-4357D Cost Proposal, Integration of TIMA Functionality in NAVSEA FEM" (Anteon Cost Estimate). Appellant's Supplementary Appeal File, Exhibit 74. He testified that he relied upon the Anteon Analysis when preparing the White Paper and the Anteon Cost Estimate. Transcript at 715.

The Anteon Analysis, White Paper, and Cost Estimate are Transmitted to NSSG

By electronic mail message dated April 11, 2000, James Bent transmitted the Anteon Analysis, the Anteon Cost Estimate, and the White Paper to various NSSG employees (William Richter, Donald Newsome, Ernest Crosby, and Lester Kramer). Appellant's Supplementary Appeal File, Exhibit 74. Mr. Bent testified that after Anteon completed the White Paper and the Cost Estimate, the ATICTS Workbook was not used in Anteon's actual enhancement of FEM. Transcript at 709.

Recommendation to Contract with Anteon to Incorporate Tool Management into FEM

NSSG issued a document entitled "FEM TM Estimate and Investment Analysis" dated May 11, 2000, which reads in part:

> NSSG recommends Anteon be contracted to program tool management functionality into FEM as a new tool management module, DEN be contracted to provide only software maintenance for ATICTS 2000 and PICK through FY01, and that no future TIMA contracts be placed with DEN. . . .
>
> NSSG developed a Software Requirements Specification (SRS) and a Requirements Traceability Matrix (RTM) documenting the functionality required to support tool inventory and management at the NSSG customer sites. . . . These documents were provided to Anteon to support creating an estimate for development and implementation of a FEM Tool Management (FEM TM) module.

Appellant's Motion for Summary Relief, Exhibit Q at 3-4.

AIS Board Determines to Incorporate Tool Management into FEM

In June 2000, in response to the feasibility study performed by Anteon, which included the Anteon Analysis, White Paper, and cost estimate, the AIS Board made a determination to incorporate tool management into the FEM system. Appellant's Supplementary Appeal File, Exhibit 81; Transcript at 560, 725-26.

Anteon Receives a Task Order to Incorporate TIMA Functionality into FEM

On July 17, 2000, GSA issued Modification PS10 to the Anteon contract. The task order title of the modification was:

> Site Implementation of Facility and Equipment Maintenance (FEM) Software - Implementation of Tools Management Functionality into NAVSEA FEM. Also, follow-on system configuration management support.

Respondent's Supplementary Appeal File, Exhibit 55 at 2. The objective of Modification PS10 read in relevant part:

> NSSG requires the implementation of functionality in the FEM application that incorporates a generic, versatile, seamless structure that will provide support for all aspects of tool management in the naval shipyards.

Id. at 3.

Modification PS10 also read in relevant part:

> 10.0 Government Furnished Equipment (GFE)/Government Furnished Information (GFI)
>
> Government Furnished Equipment (GFE) will be provided to the contractor to support the development, maintenance and support of the software application specified in this contract. The inventory of hardware and software provided as GFE is specified in the Navy System Support Group letter Ser. 1190/00-039 dated, 7 July 2000.

Respondent's Supplementary Appeal File, Exhibit 55 at 12.

Navy System Support Group letter Ser. 1190/00-039, dated 7 July 2000, referred to in Modification PS10, reads in relevant part:

> Enclosures (1) and (2) reflect the hardware and software provided to Anteon in support of the FEM software applications for the services. As technological updates occur, and the need for the capacity or other technical specifications of the hardware/software change, DMS [Defense Maintenance Systems], NSSG will provide hardware and software and update this attachment to accurately reflect these changes. Anteon will maintain this equipment while in their possession and use in accordance with the provisions of the contracts requiring the use of the equipment. Upon termination of the configuration

> support of the services' FEM applications by Anteon, this equipment and software will be returned to NSSG.

Respondent's Supplementary Appeal File, Exhibit 85.

The two enclosures to the letter referred to above did not list the ATICTS Workbook or the ATICTS 2000 Data Dictionary. Respondent's Supplementary Appeal File, Exhibit 85.

Appellant Is Notified of the NSSG's Decision to Incorporate Tool Management into FEM and the Disclosure of the ATICTS Workbook to Anteon

In July 2000, NSSG personnel notified appellant by telephone that NSSG had made a decision to develop software that would incorporate tool management into FEM. Answer ¶ 20; Transcript at 87-89. Appellant became concerned that NSSG had shared with third parties proprietary information relating to ATICTS. By e-mail message dated July 28, 2000, appellant asked that NSSG certify in writing that it had not done so. Appellant's Supplementary Appeal File, Exhibit 87. Appellant received no response to this inquiry. Transcript at 97. Appellant then had its attorney write a letter to NSSG dated August 9, 2000. Id. at 96-97.

Anteon Identifies the Documents Supplied For the Feasibility Study

In an August 14, 2000, electronic mail message to Donald Newsome of NSSG, assistant project manager for FEM, Mr. Linna of Anteon attached a document which, it stated, "contains a list of tool management documentation that I have received to date." The attached document provides:

> The following is a list of documents Anteon has received to aid in the analysis of Tool Management requirements.
>
> SOFTCOPY DOCUMENTS
>
> ATICTS 2000.doc – ATICTS 2000 Training Workbook, Version 07/17/00 prepared by Data Enterprises of the Northwest, Inc. . . .
>
> DRAFT Software Requirements Specification- . . . – DRAFT Tool and Inventory Maintenance Application (TIMA) Software Requirements Specification (SRS). PREPARED FOR: Navy Systems Support Group, Norfolk Naval Shipyard, Portsmouth, VA 23709-5000. PREPARED BY: American Management Systems, Inc. . . .
>
> HARDCOPY DOCUMENTS
>
> > Hardcopy of DRAFT Facilities and Equipment Maintenance Tool Management (FEM TM) Software Requirements Specification (SRS). PREPARED FOR: Navy Systems Support

> Group, Norfolk Naval Shipyard, Portsmouth, VA 23709-5000. PREPARED BY: American Management Systems, Inc. . . .
>
> Hardcopy of ATICTS 2000 Training Workbook, Version 11/06/99 prepared by Data Enterprises of the Northwest, Inc. . . . Was used as the primary requirement source document for feasibility study of whether tool management requirements could be incorporated [into] the NAVSEA FEM Tool Management function. (Received during initial meeting, 02/22/2000 – 02/24/2000, with NSSG to gather requirements to determine FEM/TM feasibility).

Appellant's Motion for Summary Relief, Exhibit G at 2.

NSSG Identifies the Documents Supplied to Anteon

An August 14, 2000 electronic mail message from Lester Kramer, the Director of the NSSG, to the contracting officer, stated:

> TIMA is the government name for the tool management application. The COTS products are ATICTS 2000 (application) and PICK (database [management system]). The owner of the software, development and implementation contractor is Data Enterprises of the Northwest. NSSG was told by the Automated Information Systems (AIS) Board to move the tool management functionality into Facilities and Equipment Management application (FEM). . . .
>
> There have been three documents provided to Anteon:
>
> > 1. Software Requirements Specification—This document describes the functionality of the ATICTS 2000 product (Client). It was developed by NSSG and is a government document.
>
> 2. ATICTS 2000 Training Workbook—This document provides the user with screen shots and steps them through the functionality provided by ATICTS. It does contain the following statement on the second page: "These materials contain confidential and proprietary information and may not be used, reproduced, distributed or disclosed except as specifically authorized under prior written agreement with Data Enterprises of the North west, [sic] Inc."
>
> > 3. A PNSY [Portsmouth Naval Shipyard] employee provided a Lockheed Martin training CD to a representative of Anteon. . . .
> >
> > We have allowed an Anteon representative to view a NNSY [Norfolk Naval Shipyard] employee using the ATICTS 2000 product and ask them questions about their job.

Appellant's Motion for Summary Relief, Exhibit R.

Anteon Develops a Document Beyond the White Paper

Under the Anteon Contract, Anteon prepared at least two versions of a detailed document entitled "FEM Tool Management Requirements Document for the Navy Systems Support Group (NSSG) Facilities and Equipment Maintenance System (FEM)" (FEM TM Requirements Document), one dated September 5, 2000, and the other dated February 1, 2001. Appellant's Supplementary Appeal File, Exhibits 38, 44.

Michael Brown, President and Chief Executive Officer of DEN, testified that he received a copy of the first version of this document by mail without a return address and subsequently received a copy of the second version in response to a Freedom of Information Act request. Transcript at 134-37. He had various technical employees of DEN review the documents and concluded that the document contained programming notes to incorporate ATICTS functions into MAXIMO using the Oracle database management system used by MAXIMO. Id. at 138. For example, on page 116 of the second version of the document, the "Tool Kit Application" showed a screen very similar to the same screen in ATICTS with notes indicating how the functions of the ATICTS screen would be programed into MAXIMO using Oracle. Id. at 139-41; Appellant's Supplementary Appeal File, Exhibit 141.

The Proprietary Statement Was Removed from the ATICTS 2000 Workbook

In an electronic mail message dated September 21, 2000, Ernest Crosby of NSSG stated: "I talked to PNSY personnel today and they said they did receive an original [ATICTS 2000 Workbook] with the proprietary statement in the training manual. They also said they ran copies of the document and left the statement out of the document." Appellant's Motion for Summary Relief, Exhibit T.

Another electronic mail message dated September 21, 2000, from Mr. Crosby to the contracting officer, Rodney Klinger, indicated that "[a]ll but one" of "15 sites" reported that their copy or copies of the Training Workbook "had the [proprietary] statement." This message forwarded an electronic mail message from Phillip Camacho of AMS to Mr. Crosby in which Mr. Camacho stated:

> I spoke to Portsmouth too, however, Rene Bonnin couldn't find a manual with the statement. Even his manual didn't have the "proprietary" statement page. Rene could only guess that copies were made from an original with the page removed purposely.

Appellant's Motion for Summary Relief, Exhibit U.

DEN is Notified that the Government Has Disclosed the ATICTS Workbook to Anteon

Mr. Klinger, the contracting officer, wrote a letter dated September 27, 2000 to DEN, which reads in relevant part:

We have received your letter of August 9 to Mr. Les Kramer of the Navy Systems Support Group (NSSG) at Norfolk Naval Shipyard, and your follow-up letter to me dated September 6, 2000. As the contracting office for the actions referenced in your inquiry, we are providing the response.

After several discussions with NSSG personnel, and obtaining and reviewing the pertinent portions of the GSA Schedule, the Software License Agreement, the notice accompanying all software shipped, and the copyright warning which presumably appears when one utilizes the ATICTS software, as well as other contract vehicles under which contractor support services are being provided to NSSG, we feel we are now ready to address your questions.

Our investigation elicited input from Mr. Les Kramer, who provided information obtained from personnel at all Naval Shipyards. By Mr. Kramer's account, the only DEN document that has been shared with Anteon is an ATICTS 2000 Training Workbook.

In responding to your allegations, a discussion of the shipyard community's intent with regard to tool management is considered necessary, and may help to resolve any misconceptions that exist. The facts are that the shipyard community's Automated Information Systems Advisory Board has decided to eliminate TIMA and replace it with the broader Facilities and Equipment Maintenance (FEM) application. This replacement will be a cost-saving measure, in part because it eliminates the need to run a separate database system, PICK, as is required for TIMA. This decision is purely the Government's to make. If DEN believes that the Navy intends to duplicate DEN's software application, this is, in fact, not the case. What the Navy intends to do is to replace TIMA with a commercially available product. In essence, the functionality that already exists in FEM will be further developed through business process reviews, and requirement definitions with the customer. The ATICTS software has not and will not be used inappropriately, nor will the ATICTS software be "reverse engineered." In truth, the Navy does not have the ability to reverse-engineer the ATICTS software, as we have neither the code nor the documentation to accomplish this.

Under the terms of their contractual arrangement with NSSG, Anteon has agreed not to divulge any "live data" and/or highly sensitive information or records to anyone who is not authorized access to such information. In addition, all Anteon employees are required to certify, on an annual basis, to a Code of Business Ethics and Conduct. Employees certify that they will not disclose confidential information. The term "confidential information" not only applies to the Company's information, but also includes third party information provided by Anteon's customers.

Anteon has advised that their review of the training workbook was limited to only a few people for a short period of time, and upon receipt of your August 9 letter, they ceased any review of the workbook altogether. They have further

> assured us that they have made no copies of the workbook, and have since returned their only copy to us.
>
> In summary, I wish to stress that no one outside the Government was given access to or use of ATICTS software, or to DEN software code or software code documents. No other "third parties" have been provided any materials related to DEN software.

Appeal File, Exhibit 26.

The contracting officer's letter did not mention that NSSG had supplied Anteon with various versions of the SRS and versions of the ATICTS 2000 data dictionary as described below.[18]

Various Versions of the ATICTS Data Dictionary Are Disclosed to Anteon

More than a month before the contracting officer's letter to DEN addressing the disclosure of the ATICTS Workbook to Anteon, on or about August 17, 2000, Mr. Linna requested and received a hard copy [19] of the ATICTS data dictionary from NAVSEA and also from the United States Air Force. Transcript at 623-29; Transcript (Mar. 19, 2003) at 57, 111. Phillip Camacho of AMS testified that he supplied a hard copy of the NAVSEA ATICTS data dictionary to William Richter, NSSG FEM Project Manager, who delivered it to a person he believed to be Mr. Linna. Transcript at 518-19. Mr. Linna confirmed that he received the hard copy version of the ATICTS data dictionary from Mr. Richter. Transcript (Mar. 19, 2003) at 56. Mr. Linna did not question whether there was any restriction to receiving copies of the ATICTS data dictionaries. Id. at 59.

At an unspecified time, Mr. Linna also received electronic versions of the ATICTS Air Force data dictionary formatted as Excel spreadsheets. Mr. Linna additionally received from the Air Force copies of ATICTS data dictionaries in the format of Excel spreadsheets that he used to map data for migration from ATICTS 2000 to MAXIMO at Air Force sites. Transcript (Mar. 19, 2003) at 98; Respondent's Supplementary Appeal File, Exhibits 59-61. Mr. Linna found some differences between the Navy and Air Force ATICTS 2000 data dictionaries, but much duplication. If he found information in one that did not appear in the

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[18] After appellant filed a claim alleging that the Government had revealed its proprietary information to Anteon, the contracting officer's final decision denying appellant's claim also did not mention that Anteon had requested and received various versions of the ATICTS 2000 data dictionary.

[19] Donald Newsome, NSSG assistant project manager for FEM, transmitted to Mr. Linna via electronic mail on June 4, 2001 an electronic copy of the Portsmouth Naval Shipyard ATICTS data dictionary. Respondent's Supplementary Appeal File, Exhibits 57, 83. Mr. Linna has no recollection of using the electronic version. He believes he requested it because the Portsmouth Shipyard was using a different version of ATICTS 2000, and he would have compared this data dictionary to the hard copy version and determined there was no significant difference between them. Transcript (Mar. 19, 2003) at 101-02.

other, he had to determine whether the information was actually needed. Transcript (Mar. 19, 2003) at 99-101. The original hardcopy version of the ATICTS data dictionary was returned by Anteon to NSSG in January 2003. Respondent's Supplementary Appeal File, Exhibit 63, Declaration of Kenneth W. Linna, Mar. 10, 2003 (Linna Declaration) ¶ 3.

Nature of the ATICTS 2000 Data Dictionary

Phillip Camacho of AMS testified concerning the hard copy of the ATICTS data dictionary which he sent to Mr. Linna through Mr. Richter. Mr. Camacho testified that he believed the data dictionary was not an ATICTS product, but was inherent in the D3 database management system of ATICTS. Transcript at 520-21, 533-34. Mr. Brown of DEN offered rebuttal testimony that the data dictionary is inherent in the ATICTS database application. If ATICTS were not loaded on the computer, he explained, the data dictionary would not be accessible through D3, the database management system. Transcript at 757-61.

Both Mr. Linna and Ms. Shelley Stark of DEN confirmed Mr. Brown's testimony that the ATICTS data dictionary resides in the ATICTS 2000 application and not in its D3 database management system. Transcript (Mar. 19, 2003) at 26, 161-63. Mr. Linna offered additional testimony as to the nature of a data dictionary. He first discussed the development of a data dictionary within the context of the creation of a database:

> [Y]ou develop a table that is going to be used, and get all the data elements within that table. From there you develop the strings and so forth for the applications that are going to interface with the tables. That is when it actually becomes a data dictionary. Up until that point, Oracle doesn't know what your table structure is going to be -- it's just a database management tool to be able to help you develop all of your different table structures and the relationships and so forth. . . . You develop the tables with the elements, and that in turn creates the data dictionary.

Id. at 24-25, 38.

Mr. Linna offered the following definition of a data dictionary:

> [The data dictionary defines] the relationship of the tables, the data elements within the tables, the size of the data element, and the description of the data element. And also the type of data, whether it's alphanumeric, numeric data, date, time, anything out there, whatever the format of the data.

Transcript (Mar. 19, 2003) at 21.

Mr. Linna confirmed that in the development of a database, the data dictionary does not reside in the database management system but is created by the characteristics of the data elements in the tables of the database. The data dictionary does not determine the characteristics of the data elements; rather, the characteristics of the data elements must first be determined by the software developer, and the data dictionary contains the characteristics

of the data elements. "Data" is the value of a specific element of a database table. Transcript (Mar. 19, 2003) at 26.

Mr. Linna testified that the data dictionary does not contain "data" -- it contains the characteristics of the data elements. For example, the data dictionary may contain the name of a data element entitled "Social Security Number," with the parameters that it be nine characters, alphanumeric. The actual social security number of a particular person is data and is not found in the data dictionary. The data dictionary gives direction as to the type of data that can be used to fill the data element field. Transcript (Mar. 19, 2003) at 28-29.

Mr. Linna testified that the best way to view the structure of a database is to access the data dictionary, which shows the structure of the data. If one were to view a printout of the actual data, one could only guess at the structure of the data, as the structure of the data is not self-evident from the data itself. For example, if one views numerical data, one would not necessarily know whether the numbers were the result of a mathematical computation or an identification number such as a social security number. Transcript (Mar. 19, 2003) at 30. The data dictionary does not contain the structure of the individual tables in the database, but rather, the structure of the data is contained in the tables of a database. Id. at 44.

Shelley Stark, director of software development for appellant for the past twenty five years, testified that a data dictionary is a document that describes the data and the layout of the files or tables for a particular database application. She authored the ATICTS data dictionary. The data dictionary shows the structure of data, while a flat file is the data itself, without an explanation as to the use of the data. Transcript (Mar. 19, 2003) at 161-63. Every time a new data element is added, the parameters of that data element are added to the data dictionary. Id. at 168.

Ms. Stark testified that the ATICTS 2000 data dictionary consists of two files that are unpacked from the installation compact disk that contains the software. The two files contain a description of each table, the column or fields that make up the table, an English description of the table, a designation of the type of data (whether it is alphanumeric, a date, a time, an integer, or otherwise), the maximum length of the field, and validation criteria. There are also correlation data that link various data fields to other tables. Transcript (Mar. 19, 2003) at 170-71.

Ms. Stark demonstrated to the Board, using a laptop computer, how a user could access the ATICTS 2000 data dictionary and print out a copy. Transcript (Mar. 19, 2003) at 171-86. Ms. Stark demonstrated that it was not possible to generate an ATICTS 2000 data dictionary for printing a copy without accessing ATICTS. Id. at 206.

Ms. Stark reviewed the MAXIMO data dictionaries and noted similarities between the various data elements in those data dictionaries and data elements in the ATICTS 2000 data dictionary. In many instances, ATICTS terminology was used to name the data elements. Examples were discussed, including the "issue grid," kit templates, and tool checkout. Respondent's Supplementary Appeal File, Exhibits 51-B, 52; Transcript (Mar. 19, 2003) at 219-30.

Anteon's Use of the ATICTS Data Dictionary

Mr. Linna testified that Anteon needed information contained in the ATICTS data dictionary to facilitate data mapping, a procedural step in the data migration process of copying existing data from the ATICTS database to the new database of FEM TM. Transcript at 624-25. Anteon needed the table name and the column name within the table to know where to obtain the data elements to fill the various, required fields. Mr. Linna said that he had no interest in the table structure. Id. at 640, 642. He explained further that the purpose of data mapping was to take a specific data element from ATICTS and relate it to a specific data element in MAXIMO, so that the data in ATICTS could be migrated to the proper place in MAXIMO. Transcript (Mar. 19, 2003) at 65.

Mr. Linna testified that no one at Anteon other than himself used the ATICTS data dictionary. Transcript (Mar. 19, 2003) at 60. He described the process of data mapping as follows:

> I would create a data map document where I put in the table names and the column name, the description, the size of the field, and the data type.

Transcript (Mar. 19, 2003) at 61.

Mr. Linna used Microsoft Access software to perform the data mapping. Transcript (Mar. 19, 2003) at 62-63. The Microsoft Access files that Mr. Linna created during the data mapping process were supplied to the Board. Respondent's Supplementary File, Exhibits 83, 84. He designated the data elements of ATICTS from the ATICTS data dictionary[20] as "source data" and mapped these data elements to those elements in MAXIMO which he believed corresponded to the elements in ATICTS. Transcript (Mar. 19, 2003) at 66-70. As he performed the data mapping process, which he described as time-consuming, Mr. Linna made a list of data elements in ATICTS for which he could not identify a connection with an existing data element in MAXIMO. Id. at 74. He would then consult NSSG users to ascertain if they actually used that data element and if it should be migrated into MAXIMO. Id. at 70-71. He said that he was not interested in the table structure of ATICTS or the interrelationship of the data designated by keys. Id. at 72-73, 98. Of the 1524 data elements in ATICTS, Mr. Linna mapped approximately four hundred data elements to MAXIMO. Id. at 81. He testified further that his efforts to perform the data mapping were ongoing throughout the development phase of FEM TM. Id. at 74.

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[20] The document that appears as Respondent's Supplementary Appeal File, Exhibit 49-B, is the hard-copy version of the data dictionary that Mr. Linna received from NSSG and that he used to perform the data mapping that is subsequently described. Transcript (Mar. 19, 2003) at 94-95. The document received by Anteon appears to be an incomplete version of the ATICTS 2000 data dictionary. Testimony by Shelley Stark, Director of Software Development for appellant, suggests that the document contains portions of print-outs of the two documents that make up the data dictionary. Id. at 187-89.

Mr. Linna testified that he could not determine the functionality of ATICTS 2000 by looking at the data dictionary. Transcript (Mar. 19, 2003) at 105-06.

Mr. Linna testified that using the ATICTS data dictionary reduced the cost and the effort of data mapping and that in order to perform data mapping, he needed either the data dictionary or information relatively close to that contained in a data dictionary. Transcript (Mar. 19, 2003) at 134, 137. This was confirmed by Shelley Stark of DEN, who stated that she had migrated data from other databases into an ATICTS database by using information about the specific data elements to be migrated to create additional elements in the ATICTS data dictionary, instead of using the information from the data dictionary of the other application. Id. at 207-13.

Mr. Linna said that instead of using the ATICTS data dictionary, he could have informed NSSG what data fields were available in MAXIMO and NSSG could have then hired a contractor to supply the data about the corresponding data elements in ATICTS. Transcript (Mar. 19, 2003) at 135.

He testified that if the ATICTS data dictionary had an element in it that was not in FEM, he would have to add that element into an existing screen or into an existing field that was not being used. Transcript (Mar. 19, 2003) at 137. Mr. Linna said that he created a kit template and issue grid in MAXIMO because the users wanted it. He could see that these elements existed in ATICTS because their existence was apparent from the data dictionary. Id. at 139-41.

NSSG Concern that DEN Would Take Legal Action

An electronic mail message dated November 17, 2000, from Ernest Crosby of NSSG to other NSSG personnel regarding "TIMA E-Mail Traffic" stated that "[t]here is a possibility DEN may take legal action against the government" and that "[u]ntil further notice do not include any contract support personnel at NSSG as copy to on any e-mails associated with the TIMA project." Appellant's Motion for Summary Relief, Exhibit V.

In response to this message, NSSG Director Lester Kramer stated:

> Just to clarify why not to put support contractors on copy of email dealing with TIMA. There is a potential that DEN may take legal action against the government but that is not the reason for not putting contract support personnel on copy to email associated with TIMA. The reason is very simple, when we started to develop Tool Management in FEM for NAVSEA NSSG became a competitor of DEN. As a competitor DEN requires any contractor working for NSSG on TIMA to sign a Non disclosure/Non compete agreement as they have access to proprietary information. NSSG is working on getting that done or resolved. Once resolved, you can once again put all TIMA support personnel on copy to email as necessary. NSSG will let you know when this occurs.

Appellant's Motion for Summary Relief, Exhibit V.

The non-disclosure/non-compete agreements referenced in this e-mail message were never agreed upon or executed. Brown Declaration ¶ 9.

Anteon's Discussions with TIMA Users in the Software Development Process

After meeting with Mr. Linna in February 2000 at the NNSY, Vicky Crittendon did not speak with him again until August 2000. From then until the summer of 2002, Ms. Crittendon had regular discussions with Mr. Linna as to NNSY's business practices for tracking tools. Transcript at 231-33.

Testimony was offered by Mr. Linna and various individuals at NSSG concerning the methodology used to add tool management functionality to MAXIMO to develop FEM TM. Transcript (Mar. 19, 2003) at 86; Transcript at 567. User conferences were held during which Anteon personnel interviewed users in order to determine the functionality of tool management to be incorporated. Id. at 86. Users were cautioned by NSSG e-mail messages not to bring any ATICTS-related material to the user conferences. Respondent's Supplementary Appeal File, Exhibit 44. Electronic mail messages from Ernest Crosby to Phillip Camacho of AMS, who arranged the user conferences, cautioned that the tool management functionality module for FEM "will be built essentially from the ground up, without using any software code, documentation, training materials, system design specifications, or other proprietary DEN property." Appellant's Motion for Summary Relief, Exhibit P. Mr. Camacho testified that Mr. Crosby told him that he did not want any users to bring anything that could be construed as proprietary information from DEN. They wanted to develop a system "from scratch." Transcript at 515-16. This was also confirmed by Lester Kramer's testimony during the hearing. Id. at 735-37.

Donald Newsome, NSSG assistant FEM project manager, testified that he believed the functionality and requirements for tool management did not come from ATICTS software, but from the users themselves. Transcript at 551, 555. Mr. Newsome testified as to the meeting with the users to determine requirements for FEM TM: "Our focus was the business process, and we sat down and spent many excruciating hours with the users talking about what abilities they needed to do their business process." Id. at 567. Mr. Newsome did not know whether Anteon relied on the SRS or the ATICTS Workbook in developing the new software. Id. at 552-53. He stated that screens that were cloned to create FEM TM were MAXIMO, not ATICTS screens. Id. at 554. After several user meetings, Anteon personnel coded the software to support user requirements, and they returned four or five times to show the results of the software development to the users. Transcript (Mar. 19, 2003) at 86. Lester Kramer of NSSG stated that Anteon was never provided the source code of the ATICTS 2000 software or access to the software. Transcript at 737.

Data Migration from ATICTS 2000 to FEM TM Software

Once FEM TM was developed and functional, the existing data in the ATICTS 2000 data base was migrated into the FEM TM database. Data migration occurs after the software is developed and tested by the users using sample data inputted by the users. Transcript (Mar. 19, 2003) at 86-87. Mr. Linna testified, based upon his twenty years of experience as a software engineer and familiarity with MAXIMO, that if Anteon had not received the

ATICTS data dictionary, it could not have accomplished the data migration from ATICTS 2000 in the way that it did. He stated that he would have been able to design the new database without the data dictionary, but data migration would not have been accomplished electronically. He testified that if he was not able to use the data dictionary, he would have "gone to [his] boss and told him [Anteon] could not do the job." This was a specific reference to the requirement that Anteon migrate the data from ATICTS 2000 to FEM TM. If Anteon could not migrate the data electronically, the users would have had to manually input all the data, which would have been a long process. Id. at 16, 77-79.

The Board questioned Mr. Linna on the impact of using the data dictionary to facilitate data migration.

> Judge Goodman: So you're saying that [if you had not been] given . . . the data dictionary, then you could have developed a system but there would have been a real pause between the development of the system and getting it running because it would have taken a lot of time to get the data from the old system to the new?
>
> Mr. Linna: Yes sir. . . .
>
> Judge Goodman: Do you have any feel for the amount of time it would have taken to key in this amount of data . . .?
>
> Mr. Linna: They'd probably still be working on it. I don't - I don't really know. . . .

Transcript (Mar. 19, 2003) at 83-84.

> Judge Goodman: . . . [O]ne of the [Anteon] contract tasks was to initialize the FEM database with the Legacy [ATICTS 2000] system data[. W]ould you say you could have done that without the ATICTS data dictionary?
>
> Mr. Linna: As I said before, manually. . . . [B]ased on the [Anteon] contract saying . . . that [Anteon] would put that data in there, then we would be the ones that would have to do so. That's why I said earlier, I'd tell my boss we couldn't do it. . . .
>
> Judge Goodman: . . . But as far as you are concerned without the ATICTS data dictionary, there was going to be a significant delay in getting that information into the system.
>
> Mr. Linna: Yes, sir.

Transcript (Mar. 19, 2003) at 104-05.

As the result of Mr. Linna's efforts to data-map the existing data elements in the ATICTS 2000 data base using the ATICTS 2000 data dictionary, Anteon was able to supervise NSSG personnel when they migrated the existing data in the ATICTS 2000 database

into the FEM TM software. Mr. Linna testified that when the data migration at the Naval shipyards actually occurred, the shipyard representative exported a text file with data. Transcript at 642. Anteon was not given access to the ATICTS 2000 software during data migration. Id. at 643; Transcript (Mar. 19, 2003) at 89.

Donald Newsome of NSSG personally observed the data migration at the NNSY. He testified that Anteon personnel were present, but did not have access to ATICTS. The TIMA administrator at each shipyard -- a Government employee -- logged on to ATICTS, logged on to FEM, and kept going back and forth to make sure that the data that moved from one system actually moved correctly and reflected correctly in the new system. Transcript at 565. Anteon personnel might have been able to see what was happening, but they were not involved in the process. The migration process was to assure that data from one system was transferred to the proper field in the new system. Id. at 567-70.

Mr. Linna also described the data migration process. Once the shipyard employee exported the data from ATICTS 2000 as a text file, Anteon took it and put it into another Microsoft Access data basefile, and from there it was moved, using a COTS program called Data Junction, to temporary tables in Oracle, the database management system for MAXIMO. The temporary tables were designated as DL (Data Load). At this point various validation checks were made to the data, and then the data was migrated from the DL tables into permanent Oracle tables. Transcript (Mar. 19, 2003) at 76, 90-91.

Systems Acceptance Testing of the FEM TM Was Conducted in June 2001

A systems acceptance test team of end users was created to test the FEM TM software developed by Anteon. Transcript at 244. The first system acceptance test for FEM TM occurred on June 11-15, 2001. Transcript at 561. On June 28, 2001, James Bent of Anteon visited NNSY and spent time with Ms. Crittendon discussing concerns that the shipyard test/development team had about Anteon's understanding of shipyard requirements, i.e., functionalities in ATICTS that did not appear in MAXIMO. Id. at 235-36; Crittendon Declaration ¶ 12.

During the meeting of June 28, 2001, Ms. Crittendon described to Mr. Bent ATICTS functionalities such as global viewing, query-by-word, tool-in-transit, and badge inquiries. Mr. Bent viewed an employee performing these procedures using ATICTS 2000. Transcript at 236-37; Crittendon Declaration ¶¶ 12-13. At that time, Mr. Bent also observed toolroom personnel performing check-in/check-out of tools using ATICTS 2000, as well as procedures for transferring tools between toolrooms. Mr. Bent viewed the ATICTS 2000 screen during the check-in/check-out procedure. Transcript at 247, 561. Mr. Bent was shown an ATICTS 2000 screen by Ms. Crittendon in order to see how Navy personnel were used to receiving reports, i.e., by a list with radial buttons next to it. Id. at 213.

Ms. Crittendon testified that various functionalities of ATICTS which she requested to be incorporated into FEM TM, such as global query and a custom application for the master tool inventory, were not incorporated. Transcript at 246-49, 254, 264.

The Government's Use of FEM TM

As of the date of the first hearing in this appeal in July 2002, several shipyards were using FEM TM instead of ATICTS 2000 for tool management. Transcript at 563. According to the respondent, as of August 5, 2003, seven military facilities were using FEM TM -- the Norfolk Naval Shipyard, Pearl Harbor Naval Shipyard, Portsmouth Naval Shipyard, Puget Sound Naval Shipyard, Ogden Air Logistics Center, Oklahoma City Air Logistics Center, and Robins Air Logistics Center. All seven had replaced ATICTS with FEM TM. The Government does not pay a separate license fee for FEM TM. Rather, the Government continues to pay a site license fee for MAXIMO to MAXIMO's current supplier. The Government asserts that it acquired unlimited rights to the FEM TM enhancement by funding the development of this enhancement by Anteon. According to respondent, there were in July 2002 no additional military facilities that were planning to begin using FEM TM or to replace ATICTS with FEM TM. NSSG has not specifically prohibited Anteon's marketing of FEM TM to non-governmental customers. Respondent's Supplementary Appeal File, Exhibit 86.

Alleged Impact of NSSG's Actions on DEN

Lost Revenue

DEN's annual billings to all customers were approximately $1.65 million in 1999, $1.456 million in 2000, and $1.272 million in 2001. Brown Declaration ¶ 6. As of February 2002, DEN alleges that it was experiencing a reduction of approximately $500,000 in annual revenue from NSSG. This is based upon the fact that in federal fiscal year 2000, DEN received $605,000 in revenue under contract with NSSG, while in federal fiscal year 2002 DEN had less than $100,000 in anticipated revenue under contract from NSSG. NSSG has reduced orders relating to the expansion and upgrade of DEN's software at various DoD sites. Id. ¶ 10; Transcript at 173-76. DEN's President and CEO testified that approximately 30% of its revenue is attributable to cost. Transcript at 177-78. The Government did not rebut this testimony.

Alleged Diminished Value of the Company

DEN has alleged that immediately prior to NSSG's informing DEN that it had transmitted DEN's proprietary information to Anteon, DEN was conducting negotiations with prospective purchasers of the company. One prospective purchaser submitted an affidavit which read in relevant part:

> I am an attorney licensed to practice in the State of Washington since 1972. In conjunction with my legal practice, I have been contacted by a group of people whom I have represented individually in the past and collectively have asked that I both represent them in negotiations with Data Enterprises of the Northwest, Inc. and invest personally in that venture. . . .
>
> This prospective purchase was attractive to our group based largely on the opinions of [individuals] who are intimately familiar with the business affairs of Data Enterprises of the Northwest, Inc. after devoting several weeks of their time accumulating due diligence material background. The professional background of both of these men involves high level business consulting in the

> high tech field. [They] spent a fair amount of time analyzing the claims being asserted in the matter entitled Data Enterprises of the Northwest, Inc. v. General Services Administration and I personally discussed those claims with counsel for Data Enterprises of the Northwest, Inc.
>
> At the time this investigation took place, the current shareholders, Michael Brown and Dennis Brown, were asking $5,000,000.00 for their business which valuation was predicated almost entirely upon the value of its sole software asset. It was our opinion that the business was worth $5,000,000.00 provided that we would have the unrestricted right to market the software to, among others, the military and all agencies of the federal government. However, we determined in analyzing the claims being asserted in the above-entitled matter involving the General Services Administration that the proprietary information contained in the Company's software had been disclosed to a third party. Until the learning of the nature of the claims pending in the above-entitled matter, it was our opinion that the business was in fact worth the $5,000,000.00 purchase price being asked by the current shareholders. After learning of the fact of this disclosure and the position taken by the government, it was and currently is our position that the business has little or no value and we would not be interested in purchasing it. This opinion of the Company's present value is based solely upon the underlying assumption that a significant portion of the market for new sales of the subject software would be either prejudiced or entirely eliminated in the event the position of the General Services Administration is sustained.

Appellant's Supplementary Appeal File, Exhibit 129.

Testimony Concerning Possible Royalties for Development and Use

Michael Brown of DEN also offered testimony concerning the structure and amount of the agreement he would have attempted to negotiate had the Government requested permission to use ATICTS 2000 to develop similar software. He stated that he would have asked for an "up front" fee of $1,000,000 plus a royalty for sales of licenses of the software developed from ATICTS. He estimated this royalty as approximately $35,000 per year per license. He calculated this royalty by dividing his total revenue from the Government sites by the number of Government sites. Transcript at 92-93.

Appellant's Claim and the Contracting Officer's Denial

On or about December 15, 2000, DEN filed a certified claim with the GSA contracting officer. The claim alleged, in relevant part:

> DEN believes that NSSG has improperly disclosed proprietary information pertaining to ATICTS to third parties in violation of GSA contracts. Among other reasons, NSSG has made such disclosures for the purpose of developing a software solution that would replicate ATICTS's functionality and replace ATICTS. These improper disclosures breached DEN's contracts with the Government and will cause substantial harm to the Company.

> Alternatively, the Government's attempts to copy and replicate ATICTS and to disclose ATICTS proprietary and copyrighted software and documentation in a manner that is not permitted by the contracts between the parties constitutes a taking under the Fifth Amendment to the U.S. Constitution. . . .
>
> DEN does not yet know the full nature and extent of the Government's disclosures of DEN's protected proprietary software and documentation to third parties . . . .

Appeal File, Exhibit 27 at 2, 10.

At the time appellant filed its claim, it knew that the ATICTS Workbook had been disclosed to Anteon, but did not know that NSSG had transmitted the SRS and the various ATICTS 2000 data dictionaries to Anteon.

By letter dated May 18, 2001, the GSA contracting officer issued his final decision, denying DEN's claim. The final decision reads in relevant part:

> GSA awarded contract GS-35F-3080D to DEN for the Purchase of Software, Maintenance of Software, and Classroom Training on 01 Apr 1996. Through the issuance of modifications performance of the above referenced contract was extended to 31 Mar 1999.
>
> On February 17, 1999, R. Klinger, on behalf of NAVICP, issued Order N00104-99-F-Q-155. The delivery order was placed under and subject to the terms and conditions of GSA schedule [contract] GS-35-F-3080D. The order included shipment to NSSG at the Norfolk Naval Shipyard (NNSY). Included in this order were the purchase of technical support, initial and refresher software training, and travel to the shipyards. Under the SOW [Statement of Work], a training manual was listed as a deliverable under the refresher training. On April 15, 1999, R. Klinger issued Modification P00001. The modification added Item Number 0003: "4-User ATICTS System for NSSG." All other terms and conditions remained unchanged. The training manual and the software were delivered to NNSY at or around 04 May 99 (i.e, more than 3 years after GSA entered into the prior written agreement with DEN as expressed in contract number GS-35F-3080D). The training manual was given to a contractor (Anteon), reviewed and returned to the Navy.
>
> Based on the above actions, DEN has filed a claim alleging breach of contract, or in the alternative a "Taking" under the 5th Amendment. Specifically, DEN claims the Government breached the following:
>
> 1. FAR clause 52.227-19-Commercial Computer Software-Restricted Rights
> 2. FAR clause 52.227-14-Rights in Data
> 3. License Agreement/Shrink-wrap License
> 4. Utilization Limitations-contained in the contract
> 5. Copyright Infringement

> The above referenced claim is hereby denied based on the following grounds. The Computer Software-Restricted Rights clause applies to "computer programs, computer data bases, or documentation thereof." The ATICTS 2000 training workbook is not computer software. Nor is it considered software documentation. The training workbook constitutes data under FAR clause 52.227-14, Rights in Data-General. Since the workbook is data, the Government has unlimited rights to said data, as defined at FAR 52.227-14. Additionally, the unlimited rights in this data include the right to reproduce the data and an entitlement to a paid up, nonexclusive, irrevocable worldwide license in any copyrighted data.
>
> The applicable licensing-agreement is the one that is attached to the contract under which the order was issued (i.e., GS-35F-3080D) . . . .[21] More importantly, the cover page to this licensing agreement states that Licensed Programs is defined as Software. The training workbook is not software, nor a software program. Clearly a training workbook cannot be considered a software program, as the workbook cannot be run or used on a "single central processing unit." With this being the case, this licensing agreement only applies to software programs and not to a training workbook which is "data" as described in the clause at FAR 52.227-14 (i.e., "manuals or instructional and training materials for installation, operation, or routine maintenance and repair of items, components, or processes delivered for use under this contract.")
>
> DEN has asserted that the shrink-wrap license attached to the software effectively bound the Government to the terms attached to said license. However, a contractor cannot frustrate the contractual obligation they agreed to perform based on the terms and conditions set forth in the contract (i.e., conferring unlimited rights in data to the Government pursuant to the clause at FAR 52.227-14). Once the contract was in effect, even if the training workbook had been delivered in shrink-wrap (which it was not), DEN could not have required the Navy to return the Workbook or agree to new terms and conditions (i.e., the shrink-wrap license) or proprietary statements that were contrary to DEN's contract requirement to deliver the item with unlimited rights.
>
> Under the contract, the utilization limitations applicable to the software and the maintenance of the software SIN numbers only apply to those SIN numbers. As such, these foregoing utilization Limitations are not applicable to the classroom training SIN [special item number] numbers (training, manual, workbook). The utilization limitations pertaining to SIN #132-33 and 132-34 apply only to those special item numbers, to include the reference to "software,

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21 The final decision contains an extensive footnote that asserts that by operation of the Order of Precedence clause of the contract, the Government's unlimited rights acquired by virtue of the clauses incorporated into the contract prevail over the language in the licensing agreement.

> software documentation, manuals or disks" contained within the utilization limits pertaining to special item numbers 132-33 and 132-34. As such, the utilization limitations for SIN #132-33 and 132-34 do not, by the terms of the contract, extend to SIN #132-50 which describes the classroom training requirement and manuals (para. 9(a)) used for training material such as handbooks, texts, workbooks, and the like, clearly not computer software manuals or disks as contemplated by the utilization limitations associated with SIN #132-33 and 132-34.
>
> For the same reasons stated above, the copyright and "Taking" claims have been considered and are also denied.
>
> Finally, in respect to DEN's express or implied allegations of Government disclosure of source code or other proprietary material, the Government knows of no such disclosures.

Appeal File, Exhibit 30.

The contracting officer's final decision made no mention of the disclosure of the ATICTS data dictionaries to Anteon or the preparation and transmission of the SRS to Anteon.

DEN's Appeal and the Respondent's Answer

On June 8, 2001, DEN filed its notice of appeal of the contracting officer's May 18, 2001 final decision. Appeal File, Exhibit 31. DEN filed its complaint on July 9, 2001. In its answer filed on August 10, 2001, GSA affirmatively avers that, because the Workbook was "data," "there was [sic] no proprietary restrictions on release of the Workbook to third parties." Answer ¶ 8. GSA also "affirmatively avers that because the contract did not give Data Enterprises a proprietary interest in the Workbook, Data Enterprises' prior knowledge and consent [regarding providing the Workbook to Anteon] was not required." Answer ¶ 33.

Motions Prior to the Hearing and the Hearing on the Merits

On November 17, 2001, respondent filed a motion for summary relief seeking dismissal of the appeal. On February 25, 2002, appellant filed a motion for summary relief on entitlement. The Board deferred ruling on the respondent's motion for summary relief pending a resolution of the appellant's motion for summary relief on entitlement. As appellant required additional discovery in order for the Board to rule on its motion for summary relief, and a hearing on the motion was necessary thereafter, the Board held a hearing on the merits once discovery was completed.

A hearing on the merits was held in Norfolk, Virginia on July 22-24, 2002. The parties filed post-hearing briefs in late September 2002. In January 2003, the Board directed the parties to supplement the record with additional information, including the ATICTS 2000 data dictionaries, and called Mr. Linna to testify as the Board's witness on March 19, 2003. During the July 2002 hearing, Michael Brown of DEN demonstrated the use of ATICTS 2000 using

a laptop computer. Transcript at 32-55. During the hearing in March 2003, a demonstration was given as to how a user would access the data dictionary from ATICTS 2000. Transcript (Mar. 19, 2003) at 160 et seq.

Discussion

This is an appeal of the contracting officer's denial of appellant's claim which alleged that the Government's actions with regard to the use and disclosure of appellant's proprietary information amounted to breaches of contract, copyright infringement, and a taking of appellant's property without just compensation pursuant to the Fifth Amendment to the United States Constitution.

Respondent's Motion for Summary Relief

On November 27, 2001, respondent filed a motion for summary relief which sought dismissal of the appeal on the grounds that this Board lacked jurisdiction as to the claim for copyright infringement and taking of property. Additionally, respondent alleged that appellant's claim that the breach of contract resulted in the diminished value of the company was speculative and consequential damages, not compensable, and therefore not a basis of recovery. Additional evidence on the last issue was presented during the hearing on the merits, and we address this issue later in this decision.

The Board Lacks Jurisdiction to Determine a Taking Under the Fifth Amendment to the United States Constitution and Copyright Infringement

The boards of contract appeals do not have jurisdiction to grant relief with regard to appellant's assertions of a taking under the Fifth Amendment to the United States Constitution. See, e.g., United Technologies Corp., Pratt & Whitney Group, ASBCA 46880; et al., 95-1 BCA ¶ 27,456, at 136,770; BAE Systems Information & Electronic Systems Integration, Inc., ASBCA 44832, 01-2 BCA ¶ 31,495, at 155,527. Accordingly, we dismiss the appeal as to allegations that respondent's actions constituted a taking under the Fifth Amendment.

We also grant respondent's motion and dismiss the appeal with regard to allegations of copyright infringement. Boards of contract appeals do not have jurisdiction over claims that a contractor's rights were violated under the Copyright Act and various statutes barring disclosure of trade secrets. See McKirchy and Co., ASBCA 51824, 99-2 BCA ¶ 30,468, at 150,516 ; People Management, Inc., EBCA 390-5-87, 91-1 BCA ¶ 23,288 (1990), at 116,787.

To the extent appellant seeks remedies that are not provided by the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, (CDA) and its implementing regulations, appellant must initiate separate proceedings in the appropriate tribunals. Dan Parish v. General Services Administration, GSBCA 16025, 03-01 BCA ¶ 32,211, at 159,304.

The Board Has Jurisdiction over Appellant's Claim for Breach of Contract

Appellant's claim was submitted pursuant to the CDA and appellant received an appealable contracting officer's final decision in response to the claim. In addition to allegations of taking and copyright infringement, appellant in its claim alleged breach of contract and entitlement to all reasonable damages resulting from the breach. Such allegations are sufficient to invoke our jurisdiction under the CDA. People Management, Inc.; see also Ship Analytics International, Inc., ASBCA 50914, 01-1 BCA ¶ 31,253 (board of contract appeals had jurisdiction to resolve a breach of contract dispute arising from a Government contract in which the Government alleged unlimited rights to computer software). We therefore deny respondent's motion as to the breach claim.

The Merits

Summary of Events Leading to Appellant's Claim

Appellant's software, ATICTS, is used for tool inventory management. Appellant has developed, continuously improved, and licensed its software to commercial and Government customers since 1970. ATICTS is a COTS product and was originally DOS-based software. In 1995, appellant negotiated and was awarded by GSA a Multiple Award Schedule (MAS) contract, pursuant to which federal agencies could enter into a license to use ATICTS software and also receive support and training. The contracting officer's memorandum of negotiation and award emphasizes that the basis of negotiation was the terms of DEN's commercial license. As will be discussed in this decision, by purchasing a license to use ATICTS software, Government agencies gain restricted rights to use the software. The license to use ATICTS allows the Government agency to use the software for its intended purpose, to track tools, and does not include the right to use ATICTS as a basis for developing tool management software which would compete with ATICTS in the public and private marketplace. The Government breached its contract with DEN by using DEN's proprietary information to develop competing tool management software, by allowing a third-party contractor to analyze DEN's proprietary information for the purposes of disclosing same to a third-party developer, and disclosing this information to a third-party developer.

In the years prior to 1998, appellant spent approximately two million dollars to enhance the DOS-based version of ATICTS by creating ATICTS 2000, the Windows-based version of its software. The primary documentation for ATICTS 2000 is the ATICTS Workbook, which is approximately 250 pages in length and contains a legend stating that it is copyrighted and contains proprietary information. The ATICTS Workbook contains a detailed description of the functions performed by ATICTS 2000, including representations of computer screens and step-by-step direction for the user. An integral part of ATICTS 2000 is its data dictionary, which is resident on the CD-ROM media of the software and contains the structure of every element of the ATICTS 2000 database application. The ATICTS Workbook is only available to licensed users of ATICTS.

Since 1998, the Naval Systems Support Group (NSSG) has been responsible for the Department of Defense's management of tool management applications. In early 1999, NSSG issued a purchase order for a four-user license for ATICTS 2000 to upgrade the current license for ATICTS at the Norfolk Naval Shipyard (NNSY).

At that time, NSSG had two separate systems to track tools and equipment. The Tool Inventory Management Application (TIMA) system, using ATICTS, was used to track tools. ATICTS and ATICTS 2000 both operated using a database management system known as Pick (D3). The Facility Equipment Management (FEM) system, using software by the name of MAXIMO, developed by Anteon, was used to track equipment. MAXIMO uses Oracle as a database management system.

The Government made a determination that it would benefit from the development of software that would manage both equipment and tools. Generally, the Government or any private entity is not prohibited from developing software that has functionality similar to or even the same as existing software. The Government was certainly free to develop tool tracking software to replace ATICTS without violating its contract with appellant. Various Government personnel testified during the hearing in this appeal that the Government's goal was to have a third party determine if the development of such software was feasible, and if it was, to develop such software by determining the needs of the Government end users, without using ATICTS-related information, since tool inventory management was a business function whose processes were not specific to particular software. Internal Government correspondence indicates that the Government was aware that by attempting to develop such software NSSG became a direct competitor to appellant. There was nothing wrong with this approach, had the Government actually followed it and not used appellant's proprietary information.

Instead, it is clear that the Government embarked on a different route. In early 2000, AMS, NSSG's support contractor for tool management, issued a written proposal to NSSG known as the Proposed Approach. This proposal suggested that NSSG, through AMS, should analyze the functionality of ATICTS 2000 by creating a document known as a Software Requirements Specification (SRS), which would then be used by a third-party developer, Anteon, to determine the feasibility of incorporating the functionality of tool management into Anteon's MAXIMO software. If incorporation of ATICTS' functionality into MAXIMO was determined to be feasible, Anteon would then enhance MAXIMO so that it could be used to track both tools and equipment. NSSG would experience cost savings and efficiency by using only one software program which operated using Oracle as a database management system.

It is clear from the record in this appeal that the Government, based upon AMS's Proposed Approach, allowed AMS to analyze appellant's software, ATICTS 2000, for the purpose of providing information directly to Anteon. Anteon was then tasked under a separate contract with the Government to develop tool management software to replace ATICTS 2000 at Government facilities. Anteon did this by enhancing MAXIMO, and the enhanced portion of MAXIMO came to be known as FEM TM.

Even though the terms ATICTS and TIMA are often used interchangeably by those who are involved in tool management, AMS's Proposed Approach was a proposal to analyze ATICTS 2000 software, and the uses of the term "ATICTS" in that Proposed Approach were not generic references to TIMA or tool management. This became evident when AMS, at the direction of the Government, transmitted appellant's proprietary and copyrighted information -- the entire ATICTS Workbook and portions of the ATICTS Workbook in the document known as the SRS -- to Anteon's senior information engineer, Kenneth Linna, to use in

Anteon's feasibility study. AMS later transmitted additional proprietary information -- various versions of the ATICTS 2000 data dictionary -- to Mr. Linna, who used them in the development of the Anteon product FEM TM.

In late 1999 and early 2000, AMS employees began creating a document mentioned in AMS's Proposed Approach -- the SRS. This document is nothing more than information copied from the ATICTS Workbook. Two versions of the SRS appear in the record of this appeal. One acknowledges that its source was the ATICTS Workbook; the other does not. While it appears that the initial intent for the creation of the SRS may have been the creation of internal security documentation for use in testing ATICTS 2000, the ultimate intent was to use the document as outlined in AMS's Proposed Approach, i.e., to aid Anteon in developing tool management software.

In February 2000, NSSG issued a verbal task order to Anteon to perform the feasibility study discussed above. Anteon's Mr. Linna traveled to the NNSY on February 24, 2000, and met with shipyard and AMS employees. These personnel stated that they were not sure why Mr. Linna was there. While Mr. Linna had been directed to perform a feasibility study of incorporating tool management into Anteon's software, he did not know of the existence of ATICTS software when he arrived at the NNSY. He discussed tool management with the AMS and shipyard personnel, and for the first time became aware that ATICTS 2000 was being used for tool management there.

Mr. Linna testified that the people with whom he met had a vague idea of the functionality of tool management that they wanted, "but not really the detail" that he needed to perform Anteon's feasibility study. The first disclosure to Anteon of appellant's proprietary information occurred during this meeting when Mr. Linna received a hard copy of the ATICTS Workbook. NSSG personnel directed AMS to give Mr. Linna whatever he needed to aid Anteon in its feasibility study. Before Mr. Linna left NNSY, he was given a hard copy of the ATICTS Workbook by AMS at the direction of NSSG. He also received an electronic version of the ATICTS Workbook at an unspecified later date.

Mr. Linna used the ATICTS Workbooks to prepare the Anteon Analysis, a component of Anteon's feasibility study. Despite his testimony that he did not read past the cover of the ATICTS Workbook, the document states that the ATICTS Workbook was used as the primary reference for the Anteon Analysis, which demonstrated the feasibility of incorporating tool management into the FEM system. In fact, Mr. Linna's handwritten notes appear throughout the copy of the ATICTS Workbook which he received before beginning to prepare the Anteon Analysis. Mr. Linna's supervisor testified that the ATICTS Workbook was used in the preparation of the Anteon Analysis to identify the "high level" functionality of tool management. Thereafter, Mr. Linna's supervisor relied upon the Anteon Analysis to prepare a cost estimate and another document, the White Paper, which together with the Anteon Analysis comprised Anteon's feasibility study.

The second disclosure of appellant's proprietary information occurred when Anteon received the SRS prepared by AMS. As described below, Mr. Linna offered credible testimony that he did not use this information contained in the SRS.

After reviewing Anteon's feasibility study, which relied heavily on the ATICTS Workbook, NSSG issued Anteon a written task order to enhance MAXIMO's capability to incorporate tool management functionality. The written task order contained a list of Government-furnished information to be given to Anteon in the development process. This list did not contain any information relating to ATICTS. Anteon retained the ATICTS Workbook after it concluded the feasibility study.

In July 2000, NSSG notified DEN that it was developing software that it would use for tool tracking to replace ATICTS 2000. When appellant complained to the Government that it believed the Government had wrongfully disclosed its proprietary information to third parties, the Government investigated and was informed by Anteon that it had received the SRS and the ATICTS Workbook. In fact, Anteon had informed the Government that it had used the ATICTS Workbook as the primary source of the Anteon Analysis. Responding to appellant's concerns, the contracting officer revealed to appellant that Anteon had "reviewed" the ATICTS Workbook. The contracting officer then directed Anteon to return the ATICTS Workbook to the Government at the Government's request.

At about the same time that the Government directed Anteon to return the ATICTS Workbook, AMS made a third disclosure of DEN's proprietary information to Anteon. Anteon's Kenneth Linna, the same person who relied heavily upon the ATICTS Workbook to perform the feasibility study, requested and received from AMS various versions of the ATICTS 2000 data dictionary, which he used during the development phase of FEM TM. As will be discussed in this opinion, the data dictionary is an integral component of ATICTS 2000 and contains information which defines the structure of every element in the ATICTS 2000 database.

The contracting officer, in denying appellant's claim for breach of contract, asserted that the Government had acquired unlimited rights to the ATICTS Workbook and did not reveal that the Government had disclosed the data dictionaries to Anteon. Anteon used the ATICTS Workbook and the various data dictionaries to develop FEM TM.

The Government cautioned its users before the first user conference that incorporation of tool management into its FEM system as the result of Anteon's enhancing MAXIMO with tool management functionality was to be accomplished without using any ATICTS-related information. By that time, Anteon had already received the ATICTS Workbook, the SRS, and the ATICTS data dictionaries. These disclosures of proprietary and copyrighted information by AMS were intentional and in response to Anteon's requests. The transfer of the proprietary information was condoned by the Government, even though the contract between appellant and respondent clearly prohibited such transfer, and the contract between Anteon and respondent for the development for FEM TM gave Anteon no right to such information or any expectation that the information would be supplied by respondent.

Appellant filed a claim with the contracting officer alleging breach of contract, copyright infringement, and a taking of its property without just compensation pursuant to Fifth Amendment to the United States Constitution. When it filed its claim, appellant had been told that NSSG had given Anteon the ATICTS Workbook but did not know that Anteon had requested and received various versions of the ATICTS 2000 data dictionary. The

contracting officer denied appellant's claim, asserting that the ATICTS Workbook was "data" to which the Government had received unlimited rights and a copyright license. The contracting officer did not mention the ATICTS data dictionaries or the SRS in his final decision.

The Contract Between Appellant and Respondent Contains Negotiated Rights

This dispute arises from the parties' differing views of the Government's right to use appellant's proprietary information, the ATICTS Workbook and the ATICTS 2000 data dictionaries. The Government asserts that pursuant to its contract with appellant it acquired unlimited rights, which included the right to use appellant's proprietary information for development of competing software and to disclose the ATICTS Workbook and the ATICTS data dictionaries to anyone, including a third-party software developer who would use this information to develop software with the same functionality as ATICTS. In denying appellant's claim, the contracting officer states that "the [ATICTS Workbook] was given to a contractor (Anteon), reviewed, and returned to the Navy." The contracting officer characterized the Workbook as "data," and concluded that the Government acquired unlimited rights to such data under FAR clause 52.227-14, Rights in Data, and that such rights include the right to reproduce the data and a paid up, nonexclusive, irrevocable worldwide license in any copyrighted data. The final decision does not mention the data dictionaries.

Appellant asserts that the Government did not have the right to use the ATICTS Workbook or the data dictionaries to develop competing software, that this information was proprietary, and that disclosure was prohibited by its licensing agreement and the specific language of the contract. Accordingly, the use of the information to develop competing software and the disclosure to a third-party developer were breaches of contract which entitle appellant to damages.

In order to understand the rights acquired by the Government with respect to the ATICTS Workbook, the information contained in the Workbook which was included in the SRS, and ATICTS data dictionaries, we must first review the applicable regulatory structure and contract language.

The contract between GSA and DEN was a Federal Supply Schedule, Multiple Award Schedule contract applicable to all departments or independent agencies of the executive branch of the Federal Government. 48 CFR 8.401(a), 8.403-2 (1994). The contract was for the acquisition of licenses to use existing commercial software which was not developed at Government expense.

Generally, when computer software has been designed, developed, or generated under a Government contract, the Government has "unlimited rights" to the delivered software and may use the software for any purpose. 48 CFR 27.404(a). On the other hand, when the Government enters into a contract to acquire a license to use computer software developed at private expense, the Government enters into an agreement with the contractor that restricts the use of the software to specific purposes. This software is referred to as "restricted software," and the Government acquires a license to use such software with "restricted rights."

48 CFR 27.405(b)(2). If the Government uses restricted software for any purpose that is not permitted by the contract, the Government has breached the contract.

ATICTS 2000 was developed at private expense and is therefore restricted software. When existing commercial software such as ATICTS 2000 is acquired under the MAS, the FAR does not mandate the use of any specific contract clause, but, rather, allows negotiation of rights. 48 CFR27.405(b)(2), 27.409(k). Specific rights were negotiated and included in the contract, commensurate with DEN's commercial license, which was used as the basis of negotiation and award, and these rights were expressly set forth in the clause of the contract entitled "Utilization Limitations."[22]

As discussed below, the Utilizations Limitations clause did not give the Government unlimited rights to the software. In that clause, the Government clearly promised not to copy or otherwise disclose the software and the documentation and restricted the use of the software consistent with DEN's commercial license. The provisions of two additional clauses incorporated by reference into the contract, FAR clause 52.227-14, Rights in Data (Jun 1987), and FAR clause 52.227-19, Commercial Computer Software - Restricted Rights (Jun 1987), as applied to DEN's software, do not conflict with the rights in the Utilization Limitations clause or DEN's commercial license. The Government did not, as it asserts, acquire unlimited rights to use appellant's proprietary information to develop competing software, either by itself or by disclosing the ATICTS Workbook or the ATICTS data dictionaries to a third-party developer. Accordingly, the use of appellant's proprietary information by the Government to develop competing software and the disclosures of this proprietary information to a third-party developer for such purpose were breaches of contract.

The nature of the ATICTS Workbook and the data dictionary will be analyzed below in order to demonstrate that the Government did not have unlimited rights to this information, and therefore could not use it to develop competing software.

The Nature of the ATICTS Workbook and the ATICTS 2000 Data Dictionary

An understanding of the nature of the ATICTS Workbook and the ATICTS 2000 data dictionary is necessary before we analyze the parties' allegations as to their legal rights concerning the use of this information.

The ATICTS Workbook is the primary documentation for the software. It is only available to licensed users. The only other documentation for the software is contained in the on-line help function in the software itself. The ATICTS Workbook was not created for the Government under a Government contract. The Government did not fund the development of the Workbook.

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[22] The Government may negotiate uniquely tailored rights for software obtained under a MAS contract. See Matthew Simchak and David Vogel, Licensing Software and Technology to the U.S. Government 287-88 (2000).

The ATICTS Workbook contains approximately 250 printed pages and is divided into twenty numbered chapters that contain a detailed description of the software, including how to use the software and the various functions performed by the software. The ATICTS Workbook details how to perform the functions of the software by step-by-step direction for the user (point, click-by-mouse, keyboard strokes) and illustrations of how the screen will appear during virtually every operation. The ATICTS Workbook is copyrighted and contains a legend that identifies the contents as confidential, proprietary information.

The data dictionary is resident in the software installation compact disk, the medium of the software. It is an integral part of the ATICTS 2000 program itself. A leading authority on the subject of database design states:

> The structure of a relational data base is stored in the data base's data dictionary or catalog. The data dictionary is made up of a set of relations, identical in properties to the relations used to hold the data. . . . You will typically find the following types of information in a data dictionary:
>
> > Definitions of the columns that make up each table
> > Integrity constraints placed on relations
> > Security information (which user has the right to perform operations in each table)
> > Definitions of other database structural elements . . . .
>
> The data stored in a dictionary is known as metadata, or data about data.

Jan L. Harrington, Relational Database Design 88-89, 381 (2002).

The creation of a data dictionary is an initial step in the designing of a database. The following describes the process:

> In the process of building a database, you define elements such as tables, fields, indexes and so on. The names of tables, fields, indexes and so on are data that describes the data the database contains. Because it is literally data about data, it is known as metadata. In the database world, metadata is also known as the data dictionary. The data dictionary for a truly relational database is stored in tables that are similar to the data tables you define.

John V. Peterson, Absolute Beginner's Guide to Databases 14 (2002).

The data dictionary contains the overall structure of a database. Two leading authorities on databases have described the data dictionary this way:

> You design tables, you give the tables fields, you create joins between tables, you build queries, etc. Have you ever stopped to think where that information is stored? Where does the database store the information about which tables have which fields, which tables are joined and so on?

> In a relational database, this information . . . must be stored in a "data dictionary."
>
> A "data dictionary," known as a "system catalog," is a centralized store of information about the database. It contains information about the tables -- their number, names, the fields they contain, data types, primary keys, indexes, the joins which have been established between those tables (foreign keys), [and] referential integrity. . . . This information, stored in the data dictionary, is called "meta-data."

Mark Horn and Bill Marklyn, Inside Relational Databases 254 (2d ed. 2001).

Thus, a data dictionary is that portion of the database application which specifies the structure of the data elements in the database. It does not contain the data itself, but information about the various data elements. The term used for this type of information is metadata, or "data about data." Mr. Linna of Anteon and Ms. Stark of DEN both confirmed this concept, that the data dictionary was data about data, from their personal experience.

As all access to data in a database is achieved through the data dictionary, relational databases are said to be "data dictionary driven." Harrington, Relational Database Design at 89. In essence, the data dictionary is the heart of the database application. Without a data dictionary, one would not have a database, and the database would not function. Anteon's Mr. Linna said that the best way to view the structure of data in a database is to view the data dictionary.

The Scope of the Solicitation and the Contract

The solicitation stated that the procurement was for "software products" and further stated that "for purposes of the solicitation, software products are defined to be licenses (including upgrades), documentation, and media." The term "license" was defined in the contract's glossary, whose purpose was "to provide offerors and GSA with common ground to facilitate negotiations."

> SOFTWARE-LICENSE AGREEMENT - A contract between the software vendor (licensor) and the software user (licensee) granting the licensee permission to use a given software product subject to certain conditions and obligations. Synonym: License Agreement.[23]

DEN's commercial software license agreement that was applicable to ATICTS 2000 and the basis of negotiation of the contract reads in pertinent part:

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23 This definition reflects trade practice in the software industry. Typically, software vendors claim that their wares are licensed rather than sold, i.e, the user acquires rights to use the software only for stated purposes, while the title and ownership remain with the vendor. Mark A. Lemley, et al., Software and Internet Law 299 (2d ed. 2003).

> Customer acknowledges that the license granted hereunder is limited to the Use of Licensed Programs as provided herein and that the Use thereof by an entity other than Customer is prohibited. Customer shall have no right to assign or sub-license any of the Licensed Programs or the Use thereof.
>
> The Licensed Programs[24] contain confidential and proprietary material. The original and any copies of the Licensed Programs, in whole or in part, whether provided to or made by the customer shall be and remain the property of Data Enterprises. Customer agrees not to provide or otherwise make available any Licensed Program or copy thereof, but not limited to, menus, screen formats, report formats and data dictionaries to any person.
>
> The contract's glossary contained the following definition of the term "documentation":
>
> DOCUMENTATION - Materials provided with, or available for, a software product for its implementation, operation, and maintenance, such as installation guides, tutorials, reference guides, technical and/or user manuals, and release notes.

While there is no definition of the term "media" included in the contract, the use of the term in this context refers to "the physical material such as paper, disc, and tape used for storing computer-based information." Microsoft Computer Dictionary 332 (5th ed. 2002).

Thus, the scope of the contract was for the acquisition of a license to use software, the documentation of the software, and the media on which the software was stored.

The Utilization Limitations Clause of the Contract Set Forth Conditions of the License Acquired by the Government

The Utilization Limitations clause of the contract, contained in a section of the contract entitled "Terms and Conditions Applicable to Perpetual Software License (Special Item 132-33) and Maintenance (Special Item 132-34) of General Purpose Commercial Information Technology Software," established the conditions under which the Government as licensee could use the software which it licensed under the contract, and it placed restrictions on the use of the documentation and media. This clause reads:

> The Government agrees to refrain from changing or removing any insignia or lettering from the software or documentation that is provided, or producing copies of manuals or disks, except one copy for backup purposes, as allowed

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24 The glossary of the contract defined the term "program" as follows:

> SOFTWARE PROGRAM - A set of sequential instructions that a computer can interpret and execute, logically assembled or compiled into one or more interrelated modules. Synonym: Program.

> by the manufacturer. The government also agrees to comply with the following:
>
> > a. Title to and ownership of the software and documentation and any reproductions thereof, shall remain with the contractor.
> >
> > b. Use of the software and documentation shall be limited to the facility for which the software is acquired, and shall be further limited to use on one (1) computer system.
> >
> > c. FAR clauses 52.227-14 RIGHTS IN DATA—GENERAL (JUN 1987) and 52.227-19 COMMERCIAL COMPUTER SOFTWARE—RESTRICTED RIGHTS (JUN 1987) are incorporated by reference as part of this pricelist.

It should be noted that the Utilization Limitations clause refers to SIN 132-33, which originally was SIN 132-31, which, according to the price schedule, contained the license, documentation, and media. The clause references license, documentation, and media (disks) and clearly does not grant the Government unlimited rights to any of these. Rather, the Government must refrain from changing or removing any insignia or lettering from the software or documentation, cannot produce copies of the documentation or the media, and the title and ownership of the software and documentation remain with the contractor. Use of the documentation is limited to the facility for which the software is acquired. There is nothing in this clause, or in DEN's commercial license, that would allow the Government as licensee to use the software to develop competing software or disclose proprietary information to a third party to use to develop competing software. The license grants to the licensee the right only to use the software for its intended purpose – to track tools.

The ATICTS Workbook is proprietary information as defined in DEN's commercial license and "documentation" as defined in the contract. The ATICTS Workbook exists in hardcopy and in electronic form on the CD-ROM media of the software. As noted previously, the ATICTS Workbook, which was marked as proprietary information, contains a detailed description of the functionality of ATICTS 2000, including menus, screen formats, and report formats which were explicitly prohibited from disclosure by DEN's commercial license agreement and by the Utilization Limitations clause.

The data dictionary is part of the program itself, resident on the CD-ROM media, and the licensee is specifically prohibited from disclosing the data dictionary in DEN commercial license and further prohibited from copying media in the Utilization Limitations clause.

The Government Did Not Acquire Unlimited Rights to the ATICTS Workbook Dictionary of the ATICTS 2000 Data Dictionary Pursuant to FAR Clause 52.227-14 - Rights in Data

The contracting officer asserts in his final decision that the Government acquired unlimited rights to the ATICTS Workbook pursuant to the FAR clause 52.227-14, Rights in Data—General (JUN 1987). The regulatory requirements for the use of the Rights in Data

clause and language of the clause itself do not support the contracting officer's conclusion.

FAR subpart 27.4 explains the use of the Rights in Data clause and contains the following definitions:

> ***Computer software***, as used in this subpart, means computer programs, computer data bases, and documentation thereof.
>
> ***Data***, as used in this subpart, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.
>
> ***Restricted computer software,*** as used in this subpart, means computer software developed at private expense and that is a trade secret; is commercial or financial and confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.

48 CFR 27.401.

ATICTS 2000 is restricted computer software based on the above definition -- it was developed at private expense, is commercial, contains explicitly marked proprietary information, and is published and copyrighted. The ATICTS Workbook is "documentation" under the contractually supplied definition of "documentation." Documentation is included in the definition of "computer software," and computer software is also included in the definition of "data." The ATICTS Workbook is therefore "data" included in restricted computer software. The Government does not acquire unlimited rights to such data that is included in restricted commercial software, pursuant to FAR 27.404(a) set forth below:

> (a) Unlimited Rights Data. Under the clause at 52.227-14, Rights in Data-General, the Government acquires unlimited rights in the following data (except as provided in paragraph (f) of this section for copyrighted data): . . .
>
> > (3) data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract.

48 CFR 27.404(a)(emphasis added)

The Rights in Data clause itself reads in pertinent part:

> (b) *Allocation of rights*. (1) Except as provided in paragraph (c) of this clause regarding copyright,[25] the Government shall have unlimited rights in-
>
> (i) Data first produced in the performance of this contract;
> (ii) Form, fit, and function data delivered under this contract;[26]
> (iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract.

48 CFR 52.227-14(b) (emphasis added).

The ATICTS Workbook, because it is included with restricted computer software, comes within the above exception in FAR 27.404(a)(3) and in Rights in Data clause subparagraph (b)(iii). The Government's argument as to the ATICTS Workbook ignores this exception, and is based on the theory that because the Workbook is used in training end users, it is data pursuant to subparagraph (b)(iii) above. In his final decision, the contracting officer states that the ATICTS Workbook was a deliverable under the delivery order when training was ordered. The fact that the Workbook may have been received during training does not change the fact that the Workbook is 1) proprietary information and "documentation" as defined in the contract, 2) included electronically with the software itself and in hard copy, and 3) therefore data included with restrictive software to which the Government does not acquire unlimited rights.

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[25] In his final decision, the contracting officer asserts that pursuant to the Rights In Data clause, "the Government acquired the right to reproduce the [Workbook] and an entitlement to a paid up, non-exclusive, irrevocable worldwide license in any copyrighted data." It appears that the contracting officer bases this assertion on FAR 27.404(f)(2) and that portion of the Rights in Data clause which attempts to grant such a license, unless such a license is contravened by a collateral agreement incorporated or made part of the contract. See 48 CFR 52.227-14(c)(2). The contracting officer's assertion ignores the clear prohibitions of the Utilizations Limitations clause, which is a collateral agreement made part of the contract that clearly contravenes the copyright license asserted by the contracting officer.

[26] In response to the appellant's motion for summary relief, the Government asserts that the ATICTS 2000 Workbook was "form, fit, and function data" to which the Government acquired unlimited rights pursuant to provision (b)(ii) of the Rights in Data clause. This is not a reasonable argument, because the concept of "form, fit, and function data" involves situations in which a contractor could reasonably be expected to withhold the end item and substitute "form, fit, and function data" instead. See 48 CFR 52.227-14(g). As the ATICTS 2000 software and documentation were end items and deliverables under the contract, the substitution of "form, fit, and function data" in this instance was not a viable option. See 48 CFR 27.404(e).

The ATICTS 2000 data dictionary is also data included in restricted software and does not come within any category of data to which the Government acquires unlimited rights under the Rights in Data clause. It is not data first produced in the performance of the contract; form, fit, and function data delivered under the contract; or data delivered under the contract that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract.

The Government Did Not Acquire Unlimited Rights to the ATICTS Workbook or the ATICTS 2000 Data Dictionary Pursuant to FAR Clause 52.227-19, Commercial Computer Software - Restricted Rights

The FAR clause entitled "Commercial Computer Software - Restricted Rights (JUN 1987)," which was incorporated into the contract, does not support the Government's position that it gained unlimited rights to the ATICTS Workbook. The clause begins with the following definition:

> (a) As used in this clause, *restricted computer software* means any computer program, computer data base, or documentation thereof, that has been developed at private expense and either is a trade secret, is commercial or financial and confidential or -- privileged, or is published and copyrighted.

48 CFR 52.227-19(a) (emphasis added).

ATICTS 2000 is restricted computer software based on the above definition -- it was developed at private expense, is commercial, contains explicitly marked proprietary information, and is published and copyrighted. The ATICTS 2000 data dictionary is an integral part of the restricted software. The ATICTS Workbook is also "documentation" under the contractually supplied definition of "documentation." Documentation is included in the definition of "restricted computer software."

The rights afforded to the Government under the Commercial Computer Software clause do not supersede or expand those that the Government has by virtue of the Utilization Limitations clause. The Commercial Computer Software clause reads in relevant part:

> (b) Notwithstanding any provisions to the contrary contained in any Contractor's standard commercial license or lease agreement pertaining to any restricted computer software delivered under this purchase order/contract, and irrespective of whether any such agreement has been proposed prior to or after issuance of this purchase order/contract or of the fact that such agreement may be affixed to or accompany the restricted computer software upon delivery, vendor agrees that the Government shall have the rights that are set forth in paragraph (c) of this clause to use, duplicate or disclose any restricted computer software delivered under this purchase order/contract. The terms and provisions of this contract, including any commercial lease or license

> agreement, shall be subject to paragraph (c) of this clause and shall comply with Federal laws and the Federal Acquisition Regulation.
>
> (c)(1) The restricted computer software delivered under this contract may not be used, reproduced or disclosed by the Government except as provided in paragraph (c)(2) of this clause or as expressly stated otherwise in this contract.
>
> (2) The restricted computer software may be-
> (i) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;
> (ii) Used or copied for use in or with backup computer if any computer for which it was acquired is inoperative;
> (iii) Reproduced for safekeeping (archives) or backup purposes;
> (iv) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to same restrictions set forth in this purchase order/contract;
> (v) Disclosed to and reproduced for use by support service Contractors or their subcontractors, subject to the same restrictions set forth in this purchase order/contract; and
> (vi) Used or copied for use in or transferred to a replacement computer.

48 CFR 52.227-19(b)-(c).

These provisions in the Commercial Computer Software clause do not conflict with those in the Utilization Limitations clause. They do not provide unlimited rights to the Government.

> Paragraph (c)(3) of the Commercial Computer Software clause states further:
>
> (3) If the restricted computer software delivered under this purchase order/contract is published and copyrighted, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in paragraph (c)(2) of this clause unless expressly stated otherwise in this purchase order/contract.

48 CFR 52.227-19(c)(3) (emphasis added).

This provision does not give the Government the right to disclose appellant's software for the purpose of software development. Even though the software is published and copyrighted, the specific prohibitions in the contract in the Utilization Limitations clause previously discussed are clear expressions that the Government does not receive the software

without disclosure prohibitions.[27] Accordingly, the Commercial Computer Software clause defers to the Utilization Limitations clause in this instance.

Finally, paragraph (d) of the Commercial Computer Software clause affords the contractor further rights to assure protection of disclosure of its material if that material is copyrighted. This provision reads:

> If any restricted computer software is delivered under this contract with the copyright notice of 17 U.S.C. 401, it will be presumed to be published and copyrighted and licensed to the Government in accordance with subparagraph (c)(3) of this clause,[28] unless a statement substantially as follows accompanies such copyright notice: *Unpublished --rights reserved under the copyright laws of the United States.*

48 CFR 52.227-19(d).

The appellant complied with this provision by placing the following legend conspicuously and directly below its copyright statement in the ATICTS Workbook:

> Copyright, 1998, Data Enterprises of the Northwest, Inc.
> Workbook Version 11/06/99
>
> These materials contain confidential and proprietary information and may not be used, reproduced, distributed or disclosed except as specifically authorized under prior written agreement with Data Enterprises of the Northwest, Inc.

The fact that the Government distributed copies of the ATICTS Workbook without this copyright statement and proprietary language is itself a breach of the Utilization Limitations clause and both incorporated clauses.

The Order of Precedence Clause Does Not Support the Government's Position

The clause found in FAR 52.215-33, Order of Precedence (JAN 1986) was included in the list of contract clauses incorporated by reference into the contract between appellant and respondent. It reads as follows:

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[27] It has been suggested that the term "disclosure" as used in this provision merely refers to the ability of the Government to disclose the use and purpose of the software itself, as opposed to disclosure of information for developmental purposes. Matthew Simchak and David Vogel, Licensing Software and Technology to the U.S. Government 287 (2000).

[28] For the same reasons set forth in n. 25 of this decision, no license in DEN's copyrighted data has been created for the benefit of the Government pursuant to paragraph (c)(3) of the Commercial Computer Software clause, as the clear prohibitions of the Utilization Limitations clause contravene such a license.

> Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instruction; (c) contract clauses; (d) other documents, exhibits, and attachments; (e) the specifications.

48 CFR 52.215-33 (1994).

In his final decision, the contracting officer states that according to the Order of Precedence clause, the terms of the Rights in Data clause prevail over the appellant's commercial license in the event of inconsistency. As discussed above, the Rights and Data clause did not give the Government unlimited rights to the ATICTS Workbook. There is therefore no inconsistency among DEN's commercial license, the Utilization Limitations clause in the contract, or the clauses incorporated by reference into the contract. The appellant clearly marked the ATICTS Workbook as proprietary, and DEN's commercial license explicitly referenced the data dictionary as prohibited from disclosure. Neither the contract nor the commercial license authorized the Government to use the ATICTS Workbook or ATICTS 2000 data dictionary to develop competing software or to disclose the Workbook and data dictionary to third parties for this purpose. DEN made every effort to legally prevent the use of its software, including the ATICTS Workbook and ATICTS 2000 data dictionary, for development purposes -- through its license, its inclusion of the proprietary legend on its Workbook, and negotiation of a contract that clearly stated the Government would not disclose its documentation or copy its media.

The Government's Interpretation of the Contract Is Unreasonable and Contrary to the Clear Language of the Contract and the Intent of the Parties

As explained above, the Government gained only restricted rights to the ATICTS Workbook and the ATICTS 2000 data dictionary. The Government promised not to copy or disclose the Workbook, to use it only at the facility for which it was purchased, and to allow a support contractor access for maintenance purposes. These promises cannot be interpreted, as the Government attempts to do, to allow the Government to use the ATICTS Workbook to develop competing software, allow AMS to analyze the software and transmit proprietary information to a third party to use in developing competing software, or for Anteon to use the ATICTS Workbook in the development process.

The Government makes an additional argument that is based upon an unreasonable interpretation of the contract. In his final decision, the contracting officer supports his assertion that the Government had acquired unlimited rights to the ATICTS Workbook by asserting that the ATICTS Workbook was listed as a deliverable under the third SIN of the contract, Classroom Training, and therefore was not subject to the Utilization Limitations clause, which only applied to the first two SINs.

The Government's interpretation conflicts with a plain reading of the contract. The price schedule of the contract states that the software and the "User Manual" are included in SIN 132-31, which was later changed to SIN 132-33, which is the SIN for the Perpetual Software License to which the Utilization Limitations clause applies. The price schedule also

states that additional user manuals are included in that same SIN, and that the SIN includes "media, license, and documentation."

The Government's interpretation is therefore not reasonable and is contrary to the clear contractual definition of the ATICTS Workbook as "documentation" and the promises and prohibitions in the Utilization Limitation clause 1) to refrain from changing or removing any insignia or lettering from the documentation; 2) not to make copies of documentation; 3) that the title and ownership of the documentation would remain with the contractor; and 4) that use of the documentation shall be limited to the facility for which the software is acquired. The position is also contrary to the similar rights of the contractor in the Rights In Data and the Commercial Computer Software clauses.

The Government's interpretation nullifies these promises. Under the Government's interpretation, the Government would be prohibited from disclosing the ATICTS Workbook, which is clearly marked as proprietary information, when it received that workbook bundled as documentation with the software itself under the first SIN, or when AMS received the ATICTS Workbook as a maintenance contractor, but could freely disclose it when received as a deliverable to train the users of the software. It is not reasonable to conclude that the contract restricted NSSG from disclosing documentation that accompanied the purchase of the license of the software and maintenance, but allowed it to disclose that same information to a third-party software developer if the documentation were received by those who were being trained to use the software.

It is well established that in reading a contract as a whole, one should seek to interpret provisions to avoid conflicts with other provisions in the same document. Further, we must interpret the contract in a manner that gives meaning to all its provisions and makes sense. Ace Federal Reporters, Inc. v. General Services Administration, GSBCA 13298-REM, et al., 02-2 BCA ¶ 31,913, at 157,657. In light of the clear prohibitions in DEN's commercial license and the contract clauses, the Government's interpretation justifying disclosure of the ATICTS Workbook because it was acquired for training simply does not make sense, especially when viewed in the broader context of the purpose of the classroom training. The ATICTS Workbook was only available to licensed users of the software. NSSG personnel could only be trained to use ATICTS 2000 because NSSG had a four-user license to use appellant's software. The classroom training was useful only in conjunction with the use of the software, and could be received only by a purchaser of the software license. It is unreasonable for the Government to expect that it could gain unrestricted rights to the contractor's proprietary information simply because that Workbook was being used in the context of classroom training, rather than being bundled with the software.

The Government's interpretation fails for another reason, as well. The Government offered no evidence that its interpretation was that upon which it relied at the time the contract was negotiated. No testimony was offered by the contracting officer who negotiated the contract as to the interpretation during contract formation. In fact, the Government's memorandum of negotiation and award cites DEN's commercial license as the basis of negotiation. That license certainly cannot be read as a grant to the Government to use DEN's proprietary information to develop competing software.

Additionally, the doctrine of concurrent interpretation, or contemporaneous construction, holds that great, if not controlling, weight should be given to the parties' actions before a dispute arises in order to interpret a contract. Saul Subsidiary II Limited Partnership v. General Services Administration, GSBCA 13544, et al., 98-2 BCA ¶ 29,871, at 147,861. In Alvin Ltd. v. United States Postal Service, 816 F.2d 1562 (Fed. Cir. 1987), our appellate authority expressed the rule of concurrent interpretation as follows:

> One may not ignore the interpretation and performance of a contract, whether termed "mistake" or not, before a dispute arises. As in Macke Co. v. United States, 467 F.2d 1323, 1325, 199 Ct.Cl. 552 (1972), we discern an "excellent specimen of the truism that how the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself." [The contractor]'s position as to the parties' original intent is supported by the [Government]'s past and continuing conduct considered in light of the surrounding circumstances.

816 F.2d at 1566.

The Government's own actions before the dispute arose indicate it did not believe that it had acquired unlimited rights to the ATICTS Workbook. The Government's internal correspondence contains a recognition that the Government had become a competitor of DEN by initiating the development process for competing software. When DEN became aware of the disclosure of the ATICTS Workbook and wrote a letter of objection to the Government, the Government directed Anteon to return the ATICTS Workbook to the Government, rather than asserting an unlimited right to disclose the ATICTS Workbook. Only after DEN filed its claim did the Government assert that it had acquired unlimited rights to the ATICTS Workbook.

The contracting officer's interpretation of the contract, that the Government had acquired unlimited rights to the ATICTS Workbook and could disclose its contents to a third-party developer to develop competing software, is contrary to the clear intent of the parties as evidenced in the provisions of DEN's commercial license and the Utilization Limitations clause of the contract. The Government's rights under the Rights in Data clause, relied upon by the contracting officer in his final decision, do not conflict with or negate the parties' intent. Accordingly, the Government's interpretation is unreasonable and does not prevail over DEN's interpretation.

The Government's Uses of the ATICTS Workbook and the Data Dictionary to Develop Competing Software Were Breaches of Contract

Justice Holmes once said that "[m]en must turn square corners when they deal with the Government." Rock Island, Arkansas & Louisiana Railroad Co. v. United States, 254 U.S. 141, 143 (1920). This sentiment was reiterated by Justice Jackson's comment that the Government should be held to the same standard, since "there is no reason why the square corners should constitute a one-way street." Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 388 (1947) (Jackson, J., dissenting). Our appellate authority and the boards of

contract appeals have applied this principle to the Government's dealings with its contractors. In Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988), the Court stated:

> The need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement. It is no less good morals and good law that the government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.

847 F.2d at 1556. See also Alvin Ltd., 816 F. 2d 1562, 1566; Turner Construction Co. v. General Services Administration, GSBCA 11361, 92-3 BCA ¶ 25,115, at 125,212-13; New England Tank Industries of New Hampshire, ASBCA 26474, 88-1 BCA ¶ 20,395, at 103,171.

In the instant case, the Government did not "turn square corners." The Government did not have the right to use the ATICTS Workbook and the data dictionary to develop competing software, and its uses for this purpose were breaches of contract. The Government's interpretation of the contract lacks merit, as it is contrary to the plain language of the contract and the intent of the parties at the time of contracting.

The Government Breached the Contract by Allowing AMS to Copy the ATICTS Workbook into the SRS

In January 2000, AMS, the Government's support contractor for TIMA, proposed a methodology by which ATICTS 2000 would be analyzed by Anteon, a third-party developer, for the purpose of determining if the functionality of ATICTS 2000 could be incorporated into MAXIMO, software owned and developed by Anteon. AMS's proposal's use of the term "ATICTS" refers to ATICTS 2000 software and is not a generic interchangeable term used for tool management, as is clear by AMS's actions thereafter.

At NSSG's direction, AMS authored a document that was titled "Draft Facilities and Equipment Maintenance Tool Management (FEM TM) Software Requirements Specification," which is referred to as the SRS. While purporting to be a description of the requirements of software to be developed for managing tools within the FEM system, the SRS contains information almost exclusively from the table of contents and headers of the ATICTS Workbook. There is no description as to the functions to be performed. One is left to guess at the meaning of the topics contained in the SRS. Early versions of the SRS contained references to the ATICTS Workbook as a source document and to ATICTS 2000. Later versions of the SRS did not contain references to the ATICTS Workbook and ATICTS 2000, but the content remained almost exclusively information copied word-for-word from the ATICTS Workbook. Testimony by DEN personnel at the hearing noted that functions of ATICTS that are described in the Workbook but are used only by non-Governmental customers were also listed in the SRS.

The SRS is clearly part of the "analysis of ATICTS functionality" referred to in AMS's proposed methodology. The phrase "analysis of ATICTS functionality" was a reference to the ATICTS 2000 software, and not just a reference to TIMA or tool management. While AMS's Mr. Camacho says he did not use the ATICTS Workbook in his preparation of the

SRS, someone clearly did, as the information contained in it is virtually copied from the ATICTS Workbook. In an August 14, 2000, electronic mail message from Lester Kramer, the director of the NSSG, to the contracting officer, identifying documents that had been supplied by NSSG to Anteon, Mr. Kramer stated that the SRS was a "document [that] describes the functionality of the ATICTS 2000 product." There is no question that the SRS describes ATICTS 2000.

The use of the ATICTS Workbook to prepare the SRS as an analysis of ATICTS functionality for the use of a third-party software developer is a clear violation of DEN's commercial license and the Utilization Limitations, Rights in Data, and Commercial Computer Software clauses of the contract. While these last two clauses allow disclosure "to and reproduc[tion] for use by support service Contractors or their subcontractors," AMS was not acting in its role as a support contractor to TIMA when it used its personnel to prepare information to be used by Anteon to develop software.

The Transmission of the SRS to Anteon Was a Breach of Contract

The transmission of the SRS to Anteon was a breach of DEN's commercial license and the Utilization Limitations, Rights in Data, and Commercial Computer Software clauses, as the SRS contained proprietary information from the ATICTS Workbook. Anteon's Mr. Linna offered credible testimony that the SRS was not used during the feasibility study and the development phase of FEM TM. He testified that the SRS was useless to him. At the time, he had the entire ATICTS Workbook, so it is understandable that he had no need for a document that did nothing more than copy headers from the Workbook. As described herein, he relied on the ATICTS Workbook to develop the Anteon Analysis, a major portion of the feasibility study which convinced NSSG to task Anteon with the development of software to incorporate tool management into the FEM system. This does not detract, however, from the conclusion that the transmission of the SRS to Anteon was a breach.

The Government Breached the Contract by Disclosing the ATICTS Workbook to Anteon

The Government breached its contract with appellant when it authorized AMS to make a copy of the ATICTS Workbook and give it to a third party, Anteon. The disclosure of the ATICTS Workbook to Anteon was a breach of DEN's commercial license and the Utilization Limitations, Rights in Data, and Commercial Computer Software clauses. The ATICTS Workbook was given to Anteon's Mr. Linna at his request immediately after the Government had tasked Anteon to perform a feasibility study to determine whether the functionality of tool management, the very purpose of ATICTS, could be incorporated into the FEM system, which used the Anteon-owned COTS software, MAXIMO. The Government's removal of the proprietary warnings and copyright insignia from the ATICTS Workbook was itself a breach of the Utilization Limitations clause of the contract, which specifically prohibited removal of markings and insignia.

The Government Breached the Contract by Using the ATICTS 2000 Data Dictionaries to Develop Competing Software and Disclosing Them to Anteon

A puzzling aspect of this case is the Government's actions with regard to the disclosure of the data dictionary to Anteon. Almost simultaneously with the Government's direction to Anteon to return the ATICTS Workbook, AMS transmitted the Navy's version of the ATICTS data dictionary to Anteon to use during the development phase of FEM TM. Subsequently, it transmitted several different versions. The contracting officer's final decision does not mention the data dictionary. Apparently at the time the contracting officer issued his final decision he did not understand the import of the data dictionary or was not even aware that AMS had transmitted it to Anteon. These transmissions of these various versions of the data dictionary were clear breaches of DEN's commercial license and the Utilization Limitations, Rights in Data, and Commercial Computer Software clauses of the contract.

Phillip Camacho, the AMS employee who generated the hard copy of the NAVSEA data dictionary for Anteon, testified that the data dictionary was not part of the ATICTS software but was resident in the Pick or D3 database management system for ATICTS. This was contradicted by both Mr. Linna of Anteon and Ms. Stark of DEN, who confirmed that the data dictionary is resident in the ATICTS 2000 database application itself. Ms. Stark demonstrated in detail how one would access the data dictionary from the ATICTS 2000 compact disk by the use of a laptop computer and the ATICTS 2000 software.

The Fact that the Government Did Not Reveal the Source Code of ATICTS 2000 Does Not Justify Its Breaches of Contract

The Government has argued that, regardless of the information it disclosed, it did not give Anteon the "source code" of ATICTS 2000. Source code is defined as follows in the contract.

> SOURCE CODE - Software programming statements written in a programming language, which can be translated into machine readable language for execution.

Even though the Government did not give Anteon the source code for ATICTS 2000, apparently the Government does not understand the import of DEN's proprietary information that it allowed to be used in the development of FEM TM, and the use that Anteon made of this information during the development process as described in this opinion.[29]

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[29] We note that throughout the proceedings in this appeal, DEN has alleged that additional breaches of contract have occurred by NSSG revealing the functions of ATICTS 2000 to Anteon's Mr. Linna by showing him an ATICTS terminal during his initial visit to NNSY. Mr. Linna stated that he was shown the computer screen by Ms. Crittendon while she discussed the ATICTS 2000 kitting function, but that he did not look at the screen while Ms. Crittendon described other functions. Additionally, Ms. Crittendon testified that she showed James Bent of Anteon the ATICTS software during the later stages of developing FEM TM. Even though this limited viewing occurred, we do not consider it significant. We have based our findings of breach on the Government's use of DEN's proprietary information to develop competing software, the disclosure of the ATICTS Workbook, AMS copying portions of same into the SRS and transmitting copies to Anteon, and the disclosure of the

DEN is Entitled to Damages for Breach of Contract that Were Foreseeable as the Result of the Breaches

In Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA 14165, 00-2 BCA ¶ 31,123, this Board stated:

> In order to recover for breach of contract, the non-breaching party must establish that its damages were caused by the breach. The principle of legal causation employed in contract cases is foreseeability, much the same as proximate cause is the principle used in most tort cases. Breach damages are recoverable only if, at the time the contract was made, the breaching party had reason to foresee that such damages were the probable result of a breach. Damages are foreseeable either if they are the natural and ordinary consequence of a breach, or if they are due to special circumstances of which the breaching party was aware at the time of contracting.

00-2 BCA at 153,740 (citing Exxon Co. U.S.A. v. Sofec Inc., 517 U.S. 830, 839-40 (1996); Wells Fargo Bank v. United States, 88 F.3d 1012 (Fed. Cir. 1996), cert. denied, 520 U.S. 1116 (1997); Landmark Land Co. v. United States, 46 Fed. Cl. 261 (2000); California Federal Bank v. United States, 43 Fed. Cl. 445 (1999); S.N. Nielsen Co., GSBCA 4916, 81-1 BCA ¶ 14,921; Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854); Restatement (Second) of Contracts §§ 344, 351 (1981).

Accordingly, the damages recoverable by appellant must be caused by the breach and the foreseeable result of the breach.

It Was Foreseeable that the Government and a Third-Party Developer Would Benefit from DEN's Proprietary Information and that ATICTS 2000 Would Be Replaced by the Third-Party Developer's Enhanced Software

That appellant would suffer damages as the result of the Government's use of its proprietary information to develop competing software and the disclosure of its proprietary information to a third-party developer was foreseeable at the time of contracting. The terms of DEN's commercial license, the Utilization Limitations clause, and the restrictions against disclosure in the Rights in Data clause and the Commercial Computer Software clause were an implicit recognition by the contracting parties that such damages were foreseeable and a natural consequence of the breach.

The Government made a business decision to develop competing software and pay a third-party software developer to enhance its own software, MAXIMO, so that the enhanced software would replace the use of ATICTS 2000 and be compatible with the Oracle database management system. The software developer, Anteon, derived a benefit from its use of DEN's proprietary information in the development of FEM TM. Anteon's senior information

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ATICTS data dictionaries to Anteon.

engineer, Kenneth Linna, testified that he did not gain sufficient detailed information about tool management during his initial visit to the NNSY, and apparently this led him to request the ATICTS Workbook. The use of the ATICTS Workbook as the primary source of the Anteon Analysis clearly accelerated the feasibility study. The knowledge gained from the ATICTS Workbook accelerated the software development process.

Additionally, Anteon's Mr. Linna testified that he used the versions of the ATICTS 2000 data dictionaries to create data elements in MAXIMO, and this made possible the data migration process from the ATICTS 2000 database to the new FEM TM database. If he had not been able to use the ATICTS 2000 data dictionaries, data migration would have a been a long, tedious process.

There is no doubt that appellant's proprietary information, which the Government was prohibited from disclosing, played a critical role in the development of FEM TM, which is being used by the Government to replace ATICTS 2000. Even though FEM TM is not an exact duplicate of ATICTS 2000, and does not perform certain functions of ATICTS 2000 that the end users wanted, the Government is using the software that was developed to replace ATICTS 2000. FEM TM has replaced ATICTS 2000 for tool management in various Government facilities to date, and the Government pays no licensing fees for the use of FEM TM, as it claims that it has unlimited rights to the software that was developed at Government expense. The replacement of ATICTS 2000 by Government users was foreseeable when appellant's proprietary information was disclosed for the purpose of being used in the software development process of FEM TM.

DEN has suffered foreseeable economic harm because the Government breached the contract with DEN and developed competing software by disclosing its proprietary information to a third party which developed software the use of which replaced the use of DEN's software. As described previously, the record in this case demonstrates how the ATICTS Workbook and the various versions of the ATICTS 2000 data dictionaries were used to develop FEM TM. Anteon derived both the functionality and structure of ATICTS 2000 from DEN's proprietary information. The ATICTS Workbooks was used as the primary source of Anteon's feasibility study and Anteon retained possession and use of the ATICTS Workbook after the feasibility study. The ATICTS data dictionaries were used to define data elements by data mapping and accelerate the migration of data from the existing ATICTS 2000 data base to the new FEM TM database

Quantum

With regard to quantum, the general rule is that for breach of contract damages, the non-breaching party is entitled to be restored to an economic position in which it would have been if the various breaches of contract had not occurred. As this Board stated in Western Aviation:

> In addition to being recoverable only if they are the foreseeable result of a breach, breach damages are recoverable only in the amount that can be established with reasonable certainty. Reasonable certainty does not mean mathematical certainty. However, in order for the Board to make an award of

> damages, the appellant must present sufficient evidence to permit us to make a "fair and reasonable approximation" of the amount of damages.

00-2 BCA at 153,740 (citing Locke v. United States, 283 F.2d 521,524 (Ct. Cl. 1960); Restatement (Second) of Contracts § 352 (1981); see also Wells Fargo.

Appellant has posited several alternative methods of determining the quantum of breach of contract damages. We review each in turn.

Damages for Loss of Net Worth Are Speculative and Not Recoverable

Appellant's chief executive officer has offered testimony, supported by third-party affidavits, that appellant was seeking to sell its company immediately before it discovered that the Government had disclosed the ATICTS Workbook to Anteon. Appellant alleges that when appellant discovered that respondent had disclosed its proprietary information to a third party and revealed this information to prospective purchasers, the net worth of the company was diminished:

> The uncontested facts are that DEN had a purchaser for ATICTS who was ready, willing, and able to purchase ATICTS for $5 million. But for the Government's disclosures and its efforts to have a third party software development company replicate and replace ATICTS, DEN would have sold ATICTS to this group of investors or another interested purchaser for at least $5 million. The Government has never contested these facts.
>
> This prospective, arms-length buyer has provided a sworn affidavit in this matter regarding their negotiations with DEN and their extensive due diligence efforts regarding DEN's business. . . . This group of investors was of the opinion that DEN's business was worth the $5 million asking price . . . . The valuation of this price was "predicated almost entirely upon the value of . . . [DEN's] sole software asset". . . until they learned of the Government's breach. As a result of learning of the Government's disclosures, this group of investors determined that DEN's business had "little or no value." . . . The Government's breach unquestionably caused this reduced value in DEN's business. Thus, as a direct result of the Government's actions, the value (measured by the market) was significantly reduced, if not entirely destroyed.

Appellant's Post-Hearing Brief at 47-48.

The affidavit submitted by appellant does not support appellant's assertion that "DEN had a purchaser . . . ready, willing, and able to purchase ATICTS for $5 million." The affidavit is from an attorney who states that he was asked to represent certain individuals in negotiating a sale with DEN and that he was also asked to "invest personally" in that venture. The affidavit does not say that the purchasers were "ready, willing, and able" to purchase the company; rather, it states that the prospective purchasers were of the opinion that the company was worth $5,000,000 before they were aware of the Government's alleged use of DEN's

proprietary information and that their valuation would change "if the position of the respondent is sustained."

There is no certainty that the transaction would have been concluded for $5,000,000, or for any other price, regardless of the Government's actions, or that any other purchaser would have purchased the company. Additionally, the affiant's opinion that the appellant's value was diminished by the actions of the Government was predicated on a condition precedent which has not occurred, i.e, a finding that the position of "the General Services Administration is sustained." We have not sustained respondent's position in this appeal; rather, we have found that the Government's actions are breaches of contract which entitle the appellant to damages.

We have held previously that alleged losses of net worth are generally speculative damages and not recoverable. David J. Tierney Jr., Inc., GSBCA 5585 et al., 88-2 BCA ¶ 20,806, at 105,169-70; see also Prudential Insurance Company of America v. United States, 801 F.2d 1295, 1302 (Fed. Cir. 1986) (Nichols, J., concurring); William Green Construction Co. v. United States, 477 F.2d 930, 936-37 (Ct. Cl. 1973), cert. denied, 417 U.S. 909 (1974). The alleged loss of net worth cannot serve as a measure of damages in the instant case. We grant respondent's motion on this issue and deny recovery of this specific element of damages.

Damages Cannot Be Measured by Creation of a Contract that Was Never Agreed Upon

DEN's chief executive officer offered testimony concerning the structure and amount of an agreement he would have attempted to negotiate had the Government requested permission to use ATICTS 2000 to develop similar software. He stated that he would have asked for an "up front" fee of $1,000,000 plus a royalty for sales of licenses of the software developed from ATICTS. He estimated this royalty as approximately $35,000 per year per license. He calculated this royalty by dividing his total revenue from the Government sites by the number of Government sites. Appellant posits this testimony as a fair measure of damages to be awarded as the result of the Government's breaches of contract. We find this proposed methodology of calculating damages highly speculative. We cannot award damages on the basis of an agreement that never came into existence. See Wells Fargo, 88 F. 3d at 1021 ("Attempting to determine what would have happened if the guarantee had been issued necessarily involves a highly speculative and conjectural inquiry.").

This Board Cannot Award a Royalty for the Government's Use of FEM TM

Appellant also suggests that the Board calculate damages based upon a "reasonable royalty," a methodology used to calculate recovery in claims for taking under the Fifth Amendment as well as for infringement of intellectual property rights such as copyright, patent, and trade secret. As stated previously, we do not have jurisdiction over such claims. As discussed below, we award to appellant damages for breach of contract that are supported by the record in this appeal.

DEN is Entitled to Lost Profits on Contract Sales It Would Have Made Had No Breach Occurred

DEN is entitled to lost profits on contract sales that would have been made under its contract with the Government had no breach occurred. A contractor is not entitled to an award of damages for profits lost on transactions that are not directly related to the contract that was breached. Wells Fargo, 88 F.3d at 1021.

In order to determine the quantum of damages, we first realize that the Government made a business decision to replace ATICTS by funding the development of an Oracle-compliant database software product. Ultimately, the Government would very likely have developed software to replace ATICTS, even if it had not used DEN's proprietary information. We must determine the economic damage that appellant incurred by the Government's use of its proprietary information in developing the new software.

The Government did not intend to use another product instead of ATICTS before it developed FEM TM. The Government therefore would have continued to license ATICTS until FEM TM was available for use. It is clear from the evidence in this appeal that the Government was able to replace the use of ATICTS with FEM TM more quickly by using DEN's proprietary information in the development of FEM TM. Accordingly, we find that appellant was damaged to the extent that it lost sales under its contract in the period of time during which FEM TM would not have been able to be used by the Government but for the use of DEN's proprietary information.

The Board Employs a "Jury Verdict" Approach to Calculate DEN's Breach of Contract Damages

When the fact of damages is established, it is proper for the Board to enter a jury verdict when there is uncertainty as to the extent or amount of the damage. This relaxation of the requirement that the injured party support its claim with definite and specific proof is allowed when such proof is not reasonably available to the injured party. Clark Concrete Contractors, Inc. v. General Services Administration, GSBCA 14340, 99-1 BCA ¶ 30,280, at 149,751; Vehicle Maintenance Services v. General Services Administration, GSBCA 11663, 94-2 BCA ¶ 26,893, at 133,892; Marty's Maid and Janitorial Service v. General Services Administration, GSBCA 10614, et al., 93-1 BCA ¶ 25,284, at 125,940.

In this instance, the extent of the damage is not yet known because the damages are to be calculated by sales that would have been made in a period during which the Government would have used appellant's software but for the Government's use of the appellant's proprietary information to accelerate the Government's ability to replace the use of ATICTS 2000 with the use of competing software. We apply a jury verdict to determine the length of this period and the profit on sales that would have been made in order to arrive at a damage award.

In Dawco Construction, Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991), rev'd on other grounds, Reflectone, Inc.v. Dalton, 60 F. 3d 1572 (Fed. Cir. 1995) (en banc), the Court required that three factors be present before adopting a jury verdict: (1) clear proof of injury

exists, (2) there is not a more reliable method for computing damages, and (3) the evidence is sufficient for a court to make a fair and reasonable approximation of the damages. These three factors are present in the instant case, and a jury verdict is therefore appropriate. There is clear proof of injury as described above; we do not have a more reliable method of computing damages; the record contains sufficient evidence for this Board to make a fair and reasonable approximation of damages.

DEN is Entitled to Lost Profits on Sales for the Period of Time that the Data Migration from ATICTS 2000 to FEM TM Was Accelerated

In order to determine the amount of time that the use of DEN's proprietary information accelerated the ability of the Government to replace the use of ATICTS 2000 with FEM TM, we base our jury verdict determination upon testimony in the record of this appeal that relates to the use of DEN's proprietary information in the software development process.

The first phase in the development of FEM TM, as in most software development, was a feasibility study. Anteon's senior information engineer, Kenneth Linna, was the principal creator of Anteon's feasibility study for FEM TM. Mr. Linna visited the NNSY for one day at the end of February 2000. He testified that his knowledge of tool management was based on his own experience, and until the day of his visit to the NNSY he did not know that ATICTS was the tool management software used by the NSSG. He testified further that the Navy personnel with whom he met did not discuss the Navy's use of tool management in sufficient detail. Even though Mr. Linna left the NNSY with insufficient input from the Navy personnel who managed tools, he was able to accomplish the Anteon Analysis, his portion of the Anteon feasibility study, in two months, apparently without any additional interaction with Navy personnel. The record is clear that Mr. Linna was able to accomplish this because he relied solely on the ATICTS Workbook. During the hearing, he attempted to minimize his use of the ATICTS Workbook in the feasibility study by stating that he "never read past the cover of the document." Mr. Linna's portion of the feasibility study, the Anteon Analysis, contradicts his assertion, as the document states that the "ATICTS 2000 Training Workbook, version 11/06/99 was used as the primary requirement source document for this analysis" and that the analysis was written to show "how major ATICTS functions described in the Training Workbook will be incorporated in NAVSEA FEM." Mr. Linna's supervisor, James Bent, relied upon the Anteon Analysis to prepare the remainder of the feasibility study, the White Paper, and the Cost Analysis.

Without the ATICTS Workbook, Mr. Linna would have needed other support for the feasibility study, presumably face-to-face or telephone interviews with Navy users describing their tool management needs and the functions that they currently accomplished by tool management software. Whether this would have required more than the two months that Mr. Linna spent preparing the Anteon Analysis by using the ATICTS Workbook, however, is not addressed in the record. It is clear that Mr. Linna used the ATICTS Workbook to prepare his portion of the feasibility study and that this use made the preparation of the study more efficient. Even so, we do not have sufficient evidence to allow us to approximate the extent damage was incurred by DEN as the result of Anteon's use of the ATICTS Workbook to accelerate the feasibility phase of the development of FEM TM.

As described by Mr. Linna, the development of FEM TM after the feasibility study consisted of gathering user requirement information, designing the database, writing software code, and testing. The development phase of FEM TM began with the Government's issuance of the task order to Anteon in mid-July 2000, three months after receipt of the feasibility study. Shortly thereafter, Mr. Linna requested and received the ATICTS data dictionary in order to use it to perform data mapping. While Mr. Linna testified that the use of the data dictionary reduced the effort to perform the data mapping, he also testified that his efforts to perform the data mapping were ongoing throughout the development phase of FEM TM. Accordingly, we cannot conclude that the design phase of FEM TM was accelerated by Anteon's use of the various versions of the ATICTS data dictionary.

A systems acceptance test was begun in mid-June 2001, but as of November 27, 2001, FEM TM had not been used by any Government facility. Installation and migration of data occurred at various shipyards in the months that followed. By July 2002, various shipyards had migrated their data from ATICTS and were using FEM TM. Mr. Linna testified that based upon his experience as a software engineer, if Anteon had not received the ATICTS data dictionary, the data migration could not have been accomplished by electronic transfer as it was actually accomplished. In fact, had he not received the ATICTS data dictionary, Mr. Linna stated that he would have informed his supervisor that Anteon would not have been capable of fulfilling its contractual requirement to migrate data from the ATICTS 2000 data base to the FEM TM data base when FEM TM was initialized at the various Government facilities. Instead, the various users at the Government facilities would have had to input the data manually. Thus, the time period for migration of data would have been significantly extended if Anteon had not used the ATICTS data dictionary.

When questioned by the Board as to the additional amount of time that would be required to manually input the data, Mr. Linna responded that the users "would probably still be working on it." As FEM was initially implemented in July 2002 and Mr. Linna testified in March 2003, Mr. Linna's response indicates that he believed that at least an additional eight months, and probably more, would have been required to manually input the data had he not been able to use the ATICTS data dictionary to perform data mapping to allow for electronic migration of data. Mr. Linna's response to the Board was credible, made in good faith, and based upon his experience and his knowledge of the amount of data that was migrated. He reiterated during his testimony that significant time would have been required to manually input the data from ATICTS 2000 to FEM TM at the various Government facilities after the implementation of FEM TM.

While the amount of data to be migrated may vary from facility to facility, we make a jury verdict determination that the data migration process would have required an additional ten months at each facility but for the use of DEN's proprietary information. We find that this amount of time is a reasonable determination, in view of Mr. Linna's experience with software development and data migration, his knowledge of the quantity of data and Anteon's capability to migrate data, and his estimate of at least eight months in response to the Board's question as to the additional time required to manually input data.

We find that, but for the use of DEN's proprietary information, ATICTS 2000 would have been used at each Government facility where its use was replaced by FEM TM for an

additional ten months. Therefore, we find that DEN is entitled to damages as a result of the Government's breaches in the amount of the lost profits on sales under the contract that DEN would have received during this ten-month period, calculated by DEN's pricing structure in its contract as discussed below.

Determination of Lost Profits

According to DEN's contract pricing structure, the annual revenue DEN receives from each Government site where ATICTS 2000 is installed is determined by the number of users at each site. DEN's chief executive officer testified that approximately thirty percent of its revenue is attributable to cost. The Government did not rebut this testimony. Accordingly, we find that DEN's profit is seventy percent of its contract revenue.

Determination of Damages

The Government is directed upon receipt of this decision to identify the Government facilities to date where the use of FEM TM has replaced the use of ATICTS 2000, determine the number of individual users at each facility, and pay DEN damages in the amount of seventy percent of the revenue the Government would have paid DEN under its contract at these facilities for an additional ten months.

Thereafter, on June 31 and December 31 of each year through the year 2006, the Government is to identify any additional Government facilities where the use of FEM TM has replaced the use of ATICTS 2000 during the preceding six-month period, determine the number of users at each facility, and pay DEN damages accordingly. By December 2006, we believe that the Government would have been able to accomplish its goal of using Oracle-compliant software for tool management even without the use of DEN's proprietary information, and DEN would therefore not be entitled to breach of contract damages after that date.

Decision

The appeal is **GRANTED IN PART** and **DISMISSED FOR LACK OF JURISDICTION IN PART**. Appellant is awarded damages for breach of contract as stated herein.

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ALLAN H. GOODMAN
Board Judge

We concur:

_____
STEPHEN M. DANIELS
Board Judge

_____
CATHERINE B. HYATT
Board Judge