

DULLES NETWORKING
ASSOCIATES, INC.

CONTRACT NO. V101(93)P-1586
CONTRACT NO. V693P-2004

VABCA-6077
VABCA-6078

VA MEDICAL CENTER
WILKES-BARRE, PENNSYLVANIA

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Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General
Counsel, Washington, D.C., for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY
ON
GOVERNMENT'S MOTION TO DISMISS**

Appellant, Dulles Networking Associates (DNA), filed a MOTION FOR SUMMARY JUDGMENT seeking a judgment in these two appeals overturning the Respondent's, Department of Veterans Affairs (VA or Government) termination of Contract No. V101(93)P-1586 (Contract-1586) and Contract No. V693P-2004 (Contract-2004) for default and converting the terminations for default to terminations for convenience. The VA responded with its MOTION TO DISMISS FOR LACK OF JURISDICTION OR IN THE ALTERNATIVE DENY APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND GRANT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT. DNA has submitted a MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Because we grant the Government's MOTION TO DISMISS FOR LACK OF JURISDICTION, we include neither facts nor discussion relevant to the cross motions for summary judgment.

FINDINGS OF FACT FOR THE PURPOSE OF RULING ON THE GOVERNMENT'S MOTION

Contract-1586

The VA awarded Contract-1586 to DNA on November 7, 1996 for the replacement of the telephone system and maintenance of the new system at the Department of Veterans Affairs Medical Center in Wilkes Barre, Pennsylvania (VAMC Wilkes Barre). Contract-1586 was entered into under Section 8a of the SMALL BUSINESS ACT (15 U.S.C. § 637a) and was executed by a representative of the Small Business Administration, DNA's Chief Operating Officer (COO) and Ms. Deborah Martinez, a Contracting Officer (CO) in the Department of Veterans Affairs Central Office (VACO). Contract-1586 had a total price \$2,501,654 and had a base term from November 7, 1996 to September 30, 1997; there were nine options to extend the term of Contract-1586 and a 120 month maximum Contract term. The VA issued the Notice to Proceed on June 17, 1997; under the terms of Contract-1586, the replacement of the telephone system was to be completed by June 16, 1998.

On June 17, 1977, Ms. Martinez designated Mr. G. Michael Miller, Director of Resource Management Support Services at VAMC Wilkes Barre as the Administrative Contracting Officer (ACO) for Contract-1586. Written acknowledgement of the ACO designation by the designee and DNA was required by the VACO CO; the acknowledgement was an integral part of the designation form and was executed by Mr. Robert Rizzardi and DNA's COO. Mr. Rizzardi was the Acquisition Program Manager at VAMC Wilkes Barre.

The ACO designation delegated certain contracting officer powers to Mr. Miller. However, the designation contained the following provision:

4. This designation does not authorize the Administrative Contracting Officer to take any other actions, including but not limited to the following, all of which remain the responsibility of the Contracting Officer:
 - a. Requiring extras.
 - b. Extending completion time established in the contract.
 - c. Terminating the contract in whole or part.

On the same day that she issued the ACO designation, Ms. Martinez also designated a Contracting Officer's Technical Representative (COTR) for Contract-1586, Mr. Roger Currie, Telecommunications Specialist at VAMC Wilkes Barre. The delegation of authority to Mr. Currie expressly excludes the right to terminate the contract from the delegated powers.

Contract-1586 included the clause at FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (OCT 1995). Subparagraph (m) of that clause, TERMINATION FOR CAUSE, provides the right to the Government to terminate the contract upon the contractor's default and further provides that, if the Government's termination for default was improper, the termination will be converted to a termination for convenience.

During performance of Contract-1586, Mr. Rizzardi signed various contract correspondence, and contracting actions, including contract modifications and at least one "final decision", directing DNA to perform a particular task at no cost to the Government. In those actions, Mr. Rizzardi variously represented himself as: "Contracting Officer", "Administrative Contracting Officer", "Associate Director, Resources Management Support Services", and "Aquisition Program Manager." There is nothing in the record indicating whether or not Mr. Rizzardi possessed a contracting officer warrant.

On February 24 (and again on February 26), 1999, DNA and its bankruptcy counsel informed Ms. Martinez and Mr. Rizzardi that DNA had filed for bankruptcy. DNA filed a bankruptcy action in the United States Bankruptcy Court for the Eastern District of Virginia under Chapter 11 of the BANKRUPTCY CODE, 11 U.S.C. § 525.

After a series of Cure Notices issued by Mr. Rizzardi between March and June 1999, Mr. Rizzardi issued a letter terminating Contract-1586 for default on July 8, 1999. In the letter, Mr. Rizzardi referenced the contract DISPUTES provisions, provided the appeal information usually found in Federal contracts and asserted that the letter was "...the final decision of the Contracting Officer."

DNA filed its appeal of the termination for default of Contract-1584 with the Board on September 28, 1999.

Contract-2004

The VA awarded Contract-2004 to DNA on February 1, 1998 for the maintenance of the telephone system at the Department of Veterans Affairs Outpatient Clinic Substation in Sayre, Pennsylvania (Sayre Clinic). Contract-1586 was also entered into under Section 8a of the SMALL BUSINESS ACT and was executed by a representative of the Small Business Administration, DNA's COO and Mr. Jerry L. Hayden, Lead Contract Specialist at VAMC Wilkes Barre who was also designated the CO for Contract-2004 within its terms. Contract-2004 had a base term of February 1, 1998 to September 30, 1998 and included 9 options permitting the extension of the contract for one year each. Contract-2004 had a price of \$24,000 for maintenance of the telephone switch at Sayre Clinic and a fixed price list for other telephone services and equipment that could be ordered as needed. Each of the options was similarly priced; the VA exercised the first

option extending the term of Contract-2004 from October 1, 1998 to September 30, 1999.

Contract-2004 included the clause at FAR 52.249-8, DEFAULT, FIXED-PRICE SUPPLY AND SERVICE (APR 1984).

By letter, dated July 8, 1999, Mr. Rizzardi terminated Contract-2004 for default, again referencing the contract DISPUTES provisions, providing the standard appeal information and stating that the termination was "...the final decision of the Contracting Officer."

DNA filed its appeal of the termination for default of Contract-2004 with the Board on September 28, 1999.

DISCUSSION

We have before us only the appeals from the terminations for default of the two instant contracts issued by Mr. Rizzardi.

A termination for default is a Government claim that must be asserted by a CO's final decision. Under the CONTRACT DISPUTES ACT (CDA), 41 U.S.C. §§ 601-613, a proper CO's final decision is a prerequisite to our jurisdiction. For a final decision to be proper, it must be issued by an individual possessing the necessary authority. Without a proper final decision, there can be no appeal over which we have jurisdiction. *DERM/BURO, Inc.*, VABCA No. 4455, 95-1 BCA ¶ 27,359; *The Sharman Company, Inc. v. United States*, 2 F.3d 1564 (Fed. Cir. 1993); *Emily Malone d/b/a/Precision Cabinet Company v. United States*, 849 F.2d 1441 (Fed. Cir. 1988).

In their submissions, the parties agree that Mr. Rizzardi was without authority to default terminate either contract. The parties differ on the effect of Mr. Rizzardi's lack of authority. DNA asserts that it results in the default terminations being "improper" and urges us to convert the default terminations

to convenience terminations as provided in the terms of the two contracts. The VA questions our jurisdiction on the basis that the default terminations were not final decisions as required by the CDA.

We agree with the parties that Mr. Rizzardi was without authority to terminate the contracts for default. Thus, there is no proper final decision in either of these appeals that would support our jurisdiction. Since there was no final decision, the contracts have not been terminated for default. *J.J. Bonavire Co.*, ASBCA No. 32733, 87-2 BCA ¶ 19,908; *John C. Grimberg Company, Inc.*, AGBCA No. 96-141-1, 96-2 BCA ¶ 28,503.

Moreover, we note that both purported terminations for default were issued subsequent to DNA's notifying the VA that it had filed a PETITION IN BANKRUPTCY under Chapter 11 of the BANKRUPTCY CODE. Although there is nothing in the record regarding the current status of DNA, we presume that DNA appeals the default terminations as the debtor in possession as provided in Chapter 11. There is no evidence that the automatic stay provided by the BANKRUPTCY CODE was lifted prior to the issuance of the terminations or that the VA ever considered its obligations or restrictions on its actions with regard to a bankrupt contractor. In this circumstance, even if Mr. Rizzardi had the authority to terminate these contracts, the terminations for default are null and void.

Las Vegas Medical Equipment Repair, Inc., VABCA No. 3848-54, 94-2 BCA ¶ 26,644; *Mattel Truck & Tractor Service, Inc.*, ENGBCA No. 6191, 96-2 BCA ¶ 28,368.

DECISION

For the foregoing reasons, the Appeals of Dulles Networking Associates, Inc., under Contract No. V101(93)P-1586, VABCA-6077, and Contract No. 693P-2004, VABCA-6078, are **DISMISSED** for lack of jurisdiction pursuant to Rule 5.

DATE: **February 16, 2000**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

MORRIS PULLARA, JR.
Administrative Judge

WILLIAM E. THOMAS, JR.
Administrative Judge