

APPEAL OF)	
)	
BRADFORD F. ENGLANDER)	
LIQUIDATING TRUSTEE UNDER)	
LIQUIDATING TRUST FOR DULLES)	
NETWORKING ASSOCIATES, INC.)	
)	
CONTRACT NO. V101(93)P-1586)	DOCKET NO. VABCA-6473
)	AND 6474
VA MEDICAL CENTER)	
WILKES-BARRE, PENNSYLVANIA)	

APPEARANCES

Shelton H. Skolnick, Esq., Skolnick & Leishman, P.C., Landover, Maryland; and *Joseph G. Billings, Esq.*, Professional Corporation of Joseph G. Billings, Landover, Maryland, for the Appellant.

Cameron V. Gore, Esq., Trial Attorney; *Philip S. Kaufman, Esq.*, Deputy 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
APPELLANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND RESPONDENT’S CROSS MOTION TO DISMISS**

Appellant, Bradford F. Englander, Liquidating Trustee under the Liquidating Trust for Dulles Networking Associates, Inc. (Trustee) has moved for a judgment that, as a matter of law, Contract No. V101(93)P-1586 (Contract)

between Dulles Networking Associates, Inc. (DNA) for installation and maintenance of the telephone system at the Department of Veterans Affairs Medical Center in Wilkes-Barre, Pennsylvania (VAMC Wilkes-Barre) expired on September 30, 1997, and that the one year maintenance warranty on the telephone system installed by DNA ended prior to June 18, 1999, the date DNA abandoned the job site.

The Respondent, Department of Veterans Affairs (VA or Government), opposes and asserts that, as a matter of law, the Contract did not end prior to DNA's abandonment of the job site and that the maintenance warranty did not end until sometime in the calendar year 2000. In addition, the VA cross moves for dismissal of these appeals on the basis that the predicate for the appeals is the expiration of the Contract and maintenance warranty as asserted by the Trustee. Both parties assert that the facts material to the Board's decision on the MOTIONS are undisputed.

We have before us Appellant's MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO VABCA NOS. 6473 AND 6474 (MOTION) and accompanying MEMORANDUM in support of the MOTION, RESPONDENT'S REPLY TO APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO VABCA NOS. 6473-6474 AND CROSS MOTION TO DISMISS VABCA NOS. 6473-6474 IN RESPONDENT'S FAVOR (RESPONSE) and APPELLANT'S RESPONSE TO RESPONDENT'S REPLY TO APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO VABCA NOS. 6473 AND 6474 AND CROSS MOTION TO DISMISS VABCA NOS. 6473-6474 IN RESPONDENT'S FAVOR (REPLY). The record in this matter, in addition to the above, includes the pleadings and the Appeal File consisting of 116 numbered exhibits.

PRELIMINARY MATTERS

The Trustee cites to the Appeal File in the appeals in VABCA-6571-6573 relating to Contract No. V101(93)P-1590 between DNA and the VA for installation and maintenance of a telephone system at the Department of Veterans Affairs Medical Center in Beckley, West Virginia (VAMC Beckley) in support of its MOTION. The Appeal File in VABCA-6571-6573 is not part of the record in these appeals and, as is evidenced by the discussion below, the parties' actions concerning the performance of the VAMC Beckley contract are neither relevant to, nor necessary for, our decision on the MOTIONS. Thus, we will not consider the Appeal File in VABCA-6571-6573 as part of the record for the purposes of deciding these MOTIONS.

Neither DNA's certified claim from which these appeals arise nor the Contracting Officer's Final Decision denying the claim are currently part of the Appeal File for these appeals. However, both documents are included in the record as attachments to pleadings. For ease of reference, we will include DNA's certified claim of June 30, 2000, as amended on August 23, 2000, as Exhibit 115 of the Appeal File and the Final Decision of October 25, 2000, as Exhibit 116 of the Appeal File.

FINDINGS OF MATERIAL FACT FOR THE PURPOSE OF RULING ON THE MOTIONS

The VA awarded the Contract to DNA on November 7, 1996 for the replacement of the telephone system and other services related to the telephone system at VAMC Wilkes-Barre. However, a protest was lodged with the

Comptroller General against the award of the Contract on November 22, 1996. The VA suspended further actions on the Contract on December 6, 1996. The protest was finally resolved on April 28, 1997; DNA executed Contract on May 23, 1997. (R4, tabs 1, 3, 73, 115; *International Business Systems, Inc.*, Comp. Gen. B-275554, 97-1 CPD ¶ 114, March 3, 1997)

The Contract 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 and Ms. Deborah Martinez, a Contracting Officer (CO) in the Department of Veterans Affairs Central Office (VACO). The Contract had a total estimated price of \$2,501,654 and a base term from November 7, 1996 to September 30, 1997; there were 9 one-year options, each running the term of the Federal fiscal year (October 1 to September 30), to extend the term of Contract and a 120-month maximum Contract term. (R4, tabs 1, 3)

The Contract is a firm-fixed-price, indefinite delivery/indefinite quantity (ID/IQ) commercial items contract. The work for the base period of Contract included the installation of the new phone system up to and including final acceptance of the phone system which included a new computerized switch (EPBAX), associated cabling, phone instruments and the installation of a new public address system. Under the terms of Contract-1586, DAVIS-BACON ACT wage rates applied to base period work; option year work was subject to SERVICE CONTRACT ACT wage rates. In addition, DNA was required to provide MILLER ACT performance and payment bonds for base period work. The Contract price for the base period installation work was \$1,685,687. (R4, tabs 1, 3, 73)

The option or "out" year services within the scope of the Contract included maintenance of the phone system, training, and "adds, moves, changes

growth/follow-on" (MAC) work to the installed phone system. This scope was priced on either a monthly or unit basis and, by the terms of the Contract, DNA was required to comply with the SERVICE CONTRACT ACT in providing these services. (R4, tabs 1, 3, 73)

The Contract includes the standard Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, and Department of Veterans Affairs Acquisition Regulation ("VAAR"), 48 C.F.R. Chapter 8, clauses usually found in VA indefinite delivery/indefinite quantity contracts, including the following clauses relevant to these appeals:

ORDERING, FAR 52.216-18 (APR 1984)
DELIVERY-ORDER LIMITATIONS, FAR 52.216-19 (APR 1984)
INDEFINITE QUANTITY, FAR 52.216-22 (APR 1984)
OPTION TO EXTEND SERVICES, FAR 52.217-8 (AUG 1989)
AVAILABILITY OF FUNDS FOR THE NEXT FISCAL YEAR, FAR 52.232-19 (APR 1984)

(R4, tabs 1, 3, 73)

The Contract contains several provisions concerning options. These provisions include:

FAR 52.217-8 (AUG 1989) OPTION TO EXTEND SERVICES

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension [*sic*] of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within the period specified in the schedule.

Chapter E, Section E.2.4 TERM OF CONTRACT

The term of this contract is 120 months from date of award and consists of a base period and nine (9) one year options.

Chapter E, Section E.2.4.1 OPTION TO EXTEND THE TERM - BASIC CONTRACT PERIOD

If less than 60 days exists between award and the end of the basic contract period, the award shall be construed as to imply sufficient intent to exercise the first option to extend the term.

Chapter E, Section E.2.4.2 OPTION TO EXTEND THE TERM OF THE CONTRACT (APR 1984 FIRMR)

This contract is renewable at the prices stated elsewhere in the contract, at the option of the Government, by the Contracting Officer giving written notice of renewal to the Contractor by the first day of each fiscal year of the government or within 30 days after funds for that fiscal year become available, whichever date is the later; provided that the Contracting Officer shall have given preliminary notice of the Government's intention to renew at least 30 days before this contract is to expire. Such a preliminary notice of intent to renew shall not be deemed to commit the Government to renewals. If the Government exercises this option for renewal, the contract as renewed shall be deemed to include this option provision. However, the total duration of this contract, including the exercise of any options under this clause, shall not exceed 120 months.

Chapter E, Section E.2.4.3 OPTION FOR INCREASED QUANTITIES (APR 1984 FIRMR)

The Government may increase the items called for herein by the quantities stated and at the unit price specified elsewhere in the contract. The Contracting Officer may exercise this

option at any time during the Contract life by giving written notice to the Contractor. Delivery of items added by exercise of this option shall be within 30 days after issuance of a delivery order.

(R4, tabs 1, 3, 73)

Several Contract provisions pertain to contract warranties including:

FAR 52.212-4(o) (OCT 1995) CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (WARRANTY)

The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in the contract.

Chapter E Section E.2.13 WARRANTY

The Contractor shall furnish, without additional charge to the contract, maintenance service and all parts for a minimum period of one (1) year (unless a longer period is proposed) beginning with the first date of final acceptance. The Contractor is relieved of this warranty obligation in the event Government fault or negligence caused the damage in question.

(R4, tabs 1, 3, 73)

The Contract terms pertaining to acceptance of the base period work are as follows:

Chapter B, Section B.1.4.5.7-9 TECHNICAL PURCHASE DESCRIPTION

Provide the COTR, for review and approval, an Acceptance Test Plan 90 days prior to cutover of the EPBAX. The plan shall be used for test and acceptance of the system. It shall include sufficient tests to demonstrate the systems capabilities

of providing the services outlined in this document. Test equipment required for demonstration shall be Contractor provided and approved by the VA. A list of test equipment required shall be included with the acceptance test plan. Test equipment shall have calibration certification within six months of system cutover.

Provide contractor personnel (switch technicians, installers, trainers, and the project manager) on premise for seven consecutive days after cutover to clear any malfunctions which may develop, to assign/reassign any software features/COS and conduct any additional training as required.

Insure that the project manager and sufficient skilled personnel remain on premise until all items on the punch list, developed during inspection, cutover, and acceptance testing of the telephone system are completed, inspected, and accepted by the Administrative Contracting Officer or their designee.

Chapter B, Sections B.1.4.30, 34 FINAL ACCEPTANCE

The VA and the Contractor shall jointly conduct a Final Acceptance Test, in accordance with the VA approved Acceptance Test Plan previously provided by the Contractor. This test shall be conducted within 30 days following successful cutover of the EPABX. In addition to compliance with the technical characteristics and quantities of equipment specified in this document, the Final Acceptance Test shall contain the provision that 30 days of uninterrupted telephone service must be completed prior to the Contractor being deemed to be in compliance with the contract.

At the conclusion of the Acceptance Test, the VA and the Contractor shall jointly agree to the results of the test, and reschedule testing on deficiencies and shortages, if any. When

the test shows the system performs in accordance with VA specifications, the 30 days of uninterrupted service provision begins. This provision must be successfully met for contract compliance. If any retests are needed to reach agreement on the results of the tests or to establish compliance with these specifications such retesting will be done at the Contractor's expense.

Chapter E, Section E.2.11.4 INSTALLATION REQUIREMENTS AND OPTIONS

The Contractor shall install the equipment/software as specified in Chapter B, Part 1 (or any attachment referenced therein), ready for use, in accordance with the following schedule:

The Contractor will start work within 10 calendar days after receipt of notice to proceed from the Contracting Officer. The Contractor shall complete installation and cut-over to the new system, correction of all deficiencies, and successful completion of the 30 day acceptance test period, as described in this document within a maximum of 365 calendar days after receipt of notice to proceed. The 30 day uninterruptable acceptance test period, identified in Chapter B, Paragraph B.1.4.30.1, will not begin until all deficiencies identified at cut-over on the Memorandum of Understanding (punch list) have been corrected and signed off by the Contracting Officer or their designee.

Chapter E, Section E.2.12.1.2 SCHEDULE OF PAYMENTS- INSTALLATION COSTS

50% of installation costs upon cut-over of the EPBAX. Remaining 50% of installation costs at the time of final acceptance of the system.

Final acceptance is defined as the complete installation and cut-over of the system, correction of all deficiencies and successful completion of the 30 day acceptance test period.

(R4, tabs 1, 3, 73)

The VA issued a Notice To Proceed with the base period installation work on June 17, 1997. Under the terms of the Contract, DNA was obligated to complete installation of the phone system by June 16, 1998. (R4, tab 8)

On May 15, 1998, DNA activated the replacement telephone system at VAMC Wilkes-Barre and began the 30-day acceptance test period which successfully concluded on June 14, 1998. On June 15, 1998, DNA told the VA that, with the completion of the 30-day acceptance test, “[p]er the contract, DNA has satisfied the condition for the acceptance of the EPABX.” The VA issued a “Memorandum of Understanding” (MOU) on June 21, 1998, finding the new phone system “technically acceptable”; Paragraph 4 of the MOU lists 22 “discrepancies” to be corrected. Paragraph 6 of the MOU states:

If all the requirements noted in Paragraph 4 have been satisfied, then the system will be considered fully acceptable. At this time, all debts, credits, and outstanding invoices can be settled and processed for payment for the telephone portion of the contract.

(R4, tabs 17, 19, 56, 99)

By letter dated November 23, 1998, DNA informed the VA that it “has completed all the MOU items and is now ready to commence with the maintenance part of the contract.” On April 15, 1999, DNA, by letter to the VA, noting the VA’s failure to exercise the October 1997-September 1998 and October 1998-September 1999 options, asserted that the Contract was no longer in existence and that a new contract would have to be negotiated for DNA to

perform any more work at VAMC Wilkes-Barre. In May 1999, the parties jointly executed the May 1998 MOU. The executed MOU reflects that 20 of the 22 discrepancies were resolved, signified by the initials of both DNA and VA representatives. Sixteen of the discrepancies were resolved as of October 28, 1998 and four were resolved as of May 5, 1999. The executed MOU waives the other two discrepancies listed in the June 1998 MOU and also states, in part: "In accordance with E.2.12 the warranty will commence upon signature of the Contracting Officer's Technical Representative, TSO on the date as indicated above for a period of one year." The Contracting Officer's Technical Representative, TSO executed the MOU on May 7, 1999. (R4, tabs 29, 39, 52, 56)

The VA issued Supplemental Agreement #2 to the Contract (SA #2) as a change to the base period work for installation of the new phone system in areas of VAMC Wilkes-Barre not previously specified for a price of \$60,029.54 on February 22, 1999. Although DNA never executed SA #2, it prosecuted the work specified therein, characterizing the work as MAC work, not base period installation work. (R4, tabs 37, 40, 42-45)

DNA ceased all work on the phone system and abandoned the site on June 18, 1999. DNA's abandonment of VAMC Wilkes-Barre was based on its assertion that it had completed its base period warranty obligation and that there was no contract between the VA and DNA. On July 1, 1999, the VA procured the services of another Contractor to maintain the phone system at VAMC Wilkes-Barre. (R4, tabs 56, 64, 65, 69, 105)

The VA did not exercise an option under the Contract.

After a series of cure notices, the VA attempted to terminate the Contract for default because of DNA's abandonment of VAMC Wilkes-Barre by

a purported CO final decision dated July 8, 1999. DNA appealed the default termination to this Board, which held it was void and of no effect because the person who executed the final decisions on behalf of the VA did not have the authority to do so and DNA's appeals were dismissed for lack of jurisdiction in *Dulles Networking Associates, Inc.*, VABCA Nos. 6077-78, 00-1 BCA ¶ 30,775.

On February 19, 1999, DNA filed a voluntary petition for relief under Chapter 11 of the BANKRUPTCY CODE. Thereafter, DNA continued in possession of its property and managed its business as a debtor-in-possession pursuant to Sections 1107 and 1108 of the BANKRUPTCY CODE. By four separate letters, each dated February 24, 1999 from DNA to various people in the VA including the CO Deborah Martinez, VA Acquisition Program Manager, Robert D. Rizzardi, CO Kathy Hymes and CO Stratton, DNA notified the VA of DNA's bankruptcy filing. By ORDER dated January 31, 2001, the Bankruptcy Court eventually approved DNA's PLAN OF REORGANIZATION in which Bradford F. Englander was appointed as Liquidating Trustee for DNA. DNA's PLAN OF REORGANIZATION also placed these appeals as assets of the liquidating trust. The VA never filed a proof of claim against DNA with the Court nor did it request an extension of time to file such claim. At no time during DNA's bankruptcy case did the VA either file a request that it receive notices and pleadings in DNA's bankruptcy case or seek to have its claim estimated by the Court. The VA never petitioned the Court for relief from the automatic stay and, except for the vote against confirmation, never filed an objection to any plan, proposed plan or disclosure statement filed in the DNA

bankruptcy case. The VA did not appeal the Court's ORDER confirming the Joint Plan. See: *Dulles Network Associates, Inc, Debtor in Possession*, VABCA-6473, 6474-6477, 2001 WL 306898 (March 28, 2001) and *Bradford F. Englander, Liquidating Trustee Under Liquidating Trust for Dulles Network Associates, Inc*, VABCA-6475-6477 and 6479, 2001 WL 457868 (April 24, 2001)

DNA submitted a certified claim to the CO in the amount of \$664,105.28 with respect to the Contract on June 30, 2000. DNA demanded an equitable adjustment to reflect its actual costs on several grounds, including bid mistake/contract reformation, changes to the base period work and constructive change or implied contract resulting from the failure to exercise any option under the Contract. On August 23, 2000, DNA revised its certified claim upward to the amount of \$1,159,836.88; this upward revision resulted from DNA's recomputation of its actual labor costs. (R4, tab 115)

Ms. Deborah M. Martinez, the CO, by a final decision dated October 25, 2000, denied DNA's claim in its entirety; these timely appeals followed. (R4, tab 116)

DISCUSSION

The Trustee seeks a judgment that the Contract expired on September 30, 1997 and that the one-year maintenance warranty on base period work was completed prior to DNA's departure from VAMC Wilkes-Barre on June 18, 1999. The VA opposes the Trustee's MOTION on the basis that DNA had not completed the base period work, including the maintenance warranty prior to its departure from VAMC Wilkes-Barre and cross moves for dismissal of these appeals.

Although not clearly articulated, the VA apparently asserts that, if we deny DNA's MOTION and find that DNA did not complete its maintenance warranty obligation, there is no legal basis for DNA's claims. Apparently, the VA CROSS MOTION is in the nature of either a Fed. R. Civ. P. Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted or a Fed. R. Civ. P. Rule 12(c) motion for judgment on the pleadings. Although the VA characterizes its CROSS MOTION as a MOTION TO DISMISS, we will consider it a CROSS MOTION FOR SUMMARY JUDGMENT since the VA assertion of entitlement to judgment as a matter of law is based on undisputed material facts found outside the pleadings. In such cases, we treat a motion to dismiss as a motion for summary judgment. *S & J Contractors*, VABCA No. 3743, 93-3 BCA ¶ 26,022; *Oak Cliff Realty, Inc.*, VABCA No. 3232, 91-1 BCA ¶ 23,481; *TLT Construction Corp.*, ASBCA No. 40501, 92-1 BCA ¶ 24,458.

We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Saturn Construction Company*, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd.*, 991 F.2d 810 (Fed. Cir. 1993) (Table). The moving party carries the burden of showing that there is no genuine issue of material fact; all doubts over whether a genuine factual dispute exists will be resolved in favor of the nonmovant. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Our role in deciding a motion for summary judgment is to determine whether a genuine triable issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A nonmovant may not establish the existence of a genuine, triable issue of material fact simply by challenging a fact or by an unsupported conclusion. The nonmovant must present sufficient evidence, by

pointing to some part of the record or additional evidence, indicating that the facts differ significantly from the way the movant has presented them and upon which a reasonable fact finder, drawing inferences in favor of the nonmovant, could decide in favor of the nonmovant. *Fire Security Systems, Inc.*, VABCA No. 3086, 90-3 BCA ¶ 23,235; *Hengel Associates*, VABCA No. 3921, 94-3 BCA ¶ 27,080; *C. Sanchez and Son, Inc.*, 6 F.3d 1539 (Fed. Cir. 1993).

The parties have both moved for summary judgment; this does not, however, mean that the Board must grant judgment to one of the parties. Each party's motion must be evaluated individually and on its own merits under the standard set forth above. The fact that the parties' claims are inherently contradictory neither precludes our granting a parties' motion nor relieves us of the responsibility to draw inferences as to existence of a dispute as to a material fact in favor of the nonmovant on each motion. *Mingus Constructors, Inc. v. United States.*, 812 F.2d 1387, 1391 (Fed. Cir. 1987); *Agency Construction Corp.*, VABCA Nos. 4559, 4660, 96-2 BCA ¶ 28,611.

The material facts here are not in dispute. The parties differ on whether, under the terms of the Contract, DNA's performance of work subsequent to September 30, 1997 was part of performance of this Contract and whether DNA fulfilled the Contract base period maintenance obligation prior to its departure from VAMC Wilkes-Barre. The parties' differences are questions of Contract interpretation, which are appropriate for resolution by summary judgment.

The Contract is an ID/IQ construction and service contract. Under the included FAR clauses and other terms of the Contract, as is normal for an ID/IQ contract, DNA's performance was triggered by VA issuance of a delivery order pursuant to the Contract ordering provisions. The initial term of the Contract was November 7, 1996 (the date of award) to September 30, 1997.

The Contract term in an ID/IQ contract defines the period during which the Government may place orders and expect performance of those orders within the time specified in the order. The Government can demand completion under the terms of a contract of an order properly placed within the term of an ID/IQ contract even if performance under the order will not be complete until after the end of the contract term. FAR 52.216-22, INDEFINITE QUANTITY (APR 1984); *Dynamic Science, Inc.*, ASBCA No. 29510, 85-1 BCA ¶ 17,710; *Park Cities Van Lines, Inc.*, ASBCA No. 20431, 78-2 BCA ¶ 13,502; NASH & CIBINIC REPORT, Vol. 13, No. 7, ¶ 37 (July 1999).

It is clear that the VA's issuance of the Notice To Proceed on June 17, 1997 acted as an initial delivery order for the installation of the new phone and public address systems, activities characterized in the Contract as base period work. This initial delivery order for base period work created a construction contract since the Contract required performance and payment bonds and application of DAVIS-BACON ACT wage rates to the work. The parties' bargain for this construction included DNA's completion of the work within 365 days and performance of maintenance on the installed system for one year for the price stated. When the Notice to Proceed was issued, DNA obligated itself to complete the installation and to provide maintenance of the new system for one year after final acceptance of the system. As established by the completion date in the Notice To Proceed and the terms of the Contract, DNA was to complete the installation by June 16, 1998 and provide system maintenance until June 15, 1999. The Trustee, citing *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed. Cir. 1997) and *Principles of Federal Appropriations Law*, General Accounting Office, 2d ed., Vol. I, Ch. 5.B.5 (1991), argues that the VA's failure to exercise any option to extend the term of the Contract rendered all of DNA's performance after

September 20, 1997 as performance under a constructive change to the Contract or a new implied-in-fact contract, either of which would entitle it to reprice the installation work. However, as the Trustee points out, the General Accounting Office recognizes that services that are “entire” or “non-severable” may, as applied to this case, utilize appropriations current when the delivery order is issued regardless of whether the performance will extend into a subsequent fiscal year. The base period construction work here is an example of non-severable services and the VA is entitled to receive completion of the base period work, including the one year of maintenance services, at the Contract price.

The real dispute here is the date of final acceptance of the new phone and public address systems. The date of final acceptance is crucial because, under the Contract, the one-year system maintenance requirement begins on that date. The Trustee argues that DNA substantially completed the base period work on June 14, 1998 when the 30-day acceptance test was successfully completed, thereby making June 13, 1999 as the completion date of its one-year maintenance responsibility. In the alternative, the Trustee argues that it is entitled to reprice all maintenance services commencing on June 14, 1998, the date it asserts the installation work was substantially complete because of the VA’s failure to exercise the option to extend the term of the Contract. As to the latter, we have already rejected that argument. With regard to the former, the Trustee’s analysis ignores the plain meaning of the relevant terms of the Contract and would have us delve into the subjective intent of the parties and evidence outside the Contract to reach the conclusion urged. The Contract is clear that final acceptance of the base period work would occur upon completion of the 30

day uninterrupted service test and DNA's successful completion of all work, including MOU items. The Contract is equally clear that the one-year maintenance responsibility begins on "the first date of final acceptance."

Notwithstanding its assertions that the Contract had expired September 30, 1997 and its position in November 1998 that it had completed the MOU work and was ready to commence the one-year maintenance requirement, DNA executed the MOU as contemplated by the Contract and, thereby, acceded to the beginning of the one-year maintenance requirement on May 7, 1999.

Consequently, DNA was obligated under the Contract to provide maintenance for the installed telephone system from May 7, 1999 to May 6, 2000. We note the VA's argument that DNA had to provide 30 days uninterrupted service after completion of the MOU items before the maintenance period began. While there may be a basis in the Contract language for that assertion, the VA waived any right to demand another 30-day acceptance test with its execution of the MOU.

The Trustee argues that, since the base period work was construction work, the work was substantially complete in May 1998 when DNA cut-over the new system and, based on internal VA discussions concerning the similar contract with DNA at VAMC Beckley and other memoranda, the VA conceded that the one-year maintenance requirement started on June 15, 1998. In addition, the Trustee would have us find legal significance in the fact that the MOU issued by the VA in May 1998 used the term "discrepancies" not the term "deficiencies" used in the Contract. DNA took no exception to the terminology used in the MOU in 1998; the Trustee simply argues a distinction without a difference that has no legal significance. There is no ambiguity in the Contract documents and DNA, despite its assertions of its early completion of the installation and the

non-existence of a contract, executed the MOU that precisely establishes, as provided by the Contract, the beginning of the maintenance period. In the face of these circumstances, it would not be appropriate for us to go beyond the Contract documents to discern the parties' intent or beliefs about when the maintenance period began. Thus, to the extent that it seeks a judgment, as a matter of law, that it is entitled to a repricing of base period installation work founded on the expiration of the Contract or the ending of the one-year maintenance period prior to DNA's departure from VAMC Wilkes-Barre, the Trustee's MOTION must be denied. However, the Trustee's MOTION is granted with regard to the expiration of the Contract and the VA's right to order non-base period services under the Contract. *Centex Bateson Construction Co*, VABCA No. 4613, 5162-5224, 99-1 BCA ¶ 30,153, *aff'd.*, 2000 WL 898731 (Table) (Fed. Cir. 2000); *McAbee Construction, Inc. v. United States*, 97 F.3d 1431 (Fed. Cir. 1996).

The VA's right to order services under the Contract terminated on September 30, 1997. Therefore, the price for services (other than base period work) ordered after that date performed by DNA would not be limited by the Contract. Moreover, any claims of the Trustee for reformation of the Contract or changes in base period work are unaffected by our decision here. The Trustee's MOTION is, therefore, granted to the extent that all services ordered and provided by DNA at VAMC Wilkes-Barre after September 30, 1997 were not ordered or performed under the Contract. Since the scope of these appeals includes claims other than the claims for additional labor costs for base period work grounded in the Trustee's assertions of the expiration of the Contract or the early completion of the one-year maintenance requirement, the VA's MOTION must be denied.

DECISION

For the foregoing reasons, the Appellant's MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO VABCA NOS. 6473 AND 6474 under Contract No. V101(93)P-1586, VABCA-6473 and 6474 is **DENIED** in part and **GRANTED** in part. The Respondent's CROSS MOTION TO DISMISS VABCA NOS. 6473-6474 IN RESPONDENT'S FAVOR is **DENIED**.

DATE: **June 12, 2001**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

MORRIS PULLARA, JR.
Administrative Judge

WILLIAM E. THOMAS, JR.
Administrative Judge