



**DEPARTMENT OF VETERANS AFFAIRS
BOARD OF CONTRACT APPEALS
WASHINGTON, D.C. 20420**

APPEAL OF)
)
BRADFORD F. ENGLANDER)
LIQUIDATING TRUSTEE UNDER)
LIQUIDATING TRUST FOR DULLES)
NETWORKING ASSOCIATES, INC.)
)
CONTRACT NO. V101(93)P-1586) **DOCKET NOS. VABCA-6475-6477**
CONTRACT NO. V693P-2004) **AND 6479**
)
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; *Phillip 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 TO DISMISS**

Appellant, Bradford F. Englander, Liquidating Trustee under the Liquidating Trust for Dulles Networking Associates, Inc. (Trustee) has moved to dismiss the above captioned appeals on several grounds stemming from

bankruptcy proceedings regarding Dulles Networking Associates, Inc. under Chapter 11 of the U.S. BANKRUPTCY CODE in the United States Bankruptcy Court, Eastern District of Virginia. The appeals for which the Trustee seeks dismissal all result from a Contracting Officer's (CO) Final Decision asserting affirmative claims by the Government against Dulles Networking Associates, Inc. (DNA) arising out of Contract No. V101(93)P-1586 (Contract-1586) and Contract No. V693P-2004 (Contract-2004).

The Respondent, Department of Veterans Affairs (VA or Government), opposes, asserting that the U.S. BANKRUPTCY CODE does not preclude it from asserting or recovering its claims.

We have before us Appellant's MOTION TO DISMISS VABCA NOS. 6475, 6476 AND 6479; including six attached exhibits, RESPONDENT'S REPLY TO APPELLANT'S MOTION TO DISMISS VABCA NOS. 6475, 6476, 6477, AND 6479, including three attached exhibits and APPELLANT'S RESPONSE TO RESPONDENT'S REPLY TO APPELLANT'S MOTION TO DISMISS VABCA NOS. 6475, 6476, 6477 AND 6479. The record in this matter, in addition to the above, includes the pleadings and the Appeal File consisting of 113 numbered exhibits.

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

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 of \$2,501,654 and 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. No options under Contract-1586 were ever exercised.

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-2004 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. The base year of 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 only the first option extending the term of Contract-2004 from October 1, 1998 to September 30, 1999.

The VA also entered into a corollary contract to Contract-1586 with DNA (Contract-1990) in August 1998 requiring DNA to maintain the existing switch at VAMC Wilkes Barre prior to the cut over of the new switch to be installed under Contract-1586.

On January 18, 1998, DNA and the VA had a meeting to discuss the current status of Contract-1586. This meeting included a discussion of the quantities installed of the separately priced line items and other Contract issues. At the conclusion of the meeting the VA assumed that DNA had agreed to a total net credit due the VA of \$206,709.57. However, DNA never confirmed this alleged credit agreement and there was never any change to the Contract executed reflecting the credit.

On May 15, 1998, DNA successfully completed the cut-over of the replacement telephone system at VAMC Wilkes-Barre and the VA obtained beneficial use of the replacement telephone system beginning on May 15, 1998. DNA completed the Final Acceptance Test on the new system 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.” Additional work under Contract-1586 remained to be completed and Contract-1586 provided for a one-year maintenance period after acceptance of the system.

In a letter dated February 9, 1999, the Acting Regional Administrator of the U.S. Department of Labor (DOL) Wage and Hour Division informed the VA that an investigation revealed that DNA had violated the DAVIS-BACON ACT by failing to pay its employees the wages required by the ACT. The total stated amount of DNA's violation was \$295,167.40. The letter formally requested the VA to withhold Contract funds in that amount, but also instructed the VA not to withhold if it received notice that DNA had filed for bankruptcy. The VA withheld Contract funds in the amount requested by DOL in accordance with

DOL's request as provided in FEDERAL ACQUISITION REGULATION (FAR) § 52.222-7. Under a subsequent DOL DECISION AND ORDER relating to DNA's wage violations, the VA transferred \$267,000 of Contract funds to the General Accounting Office on August 14, 2000.

After a series of cure notices relating to both Contract-1586 and Contract-2004, the VA attempted to terminate both contracts for default by purported CO final decisions on July 8, 1999. DNA appealed the default terminations to this Board, which held the terminations for default to be void and of no effect and DNA's appeals therefrom were dismissed for lack of jurisdiction in *Dulles Networking Associates, Inc.*, VABCA Nos. 6077-78, 00-1 BCA ¶ 30,775 because the person who executed the final decisions on behalf of the VA did not have the authority to do so.

DNA submitted a certified claim to the CO in the amount of \$664,105.28 with respect to Contract-1586 on June 30, 2000. This claim, in addition to claims for additional labor and other costs, included a demand for payment of funds being withheld by the VA, including the withholding under Contract-2004. On August 23, 2000, DNA revised its certified claim upward to the amount of \$1,159,836.88 with regard, a revision DNA attributed the settlement of its dispute with DOL.

Responding to DNA's claim, Ms. Deborah M. Martinez, the CO, by a final decision dated October 25, 2000, denied DNA's claim in its entirety. In addition, the final decision asserted the following affirmative claims, the appeals from which were docketed as indicated:

<u>Claim</u>	<u>Amount</u>	<u>Docket #</u>
Overpayment of NEC System Maintenance (Contract-1990)	\$10,345.00	VABCA-6476

DNA Credits Owed Under
the Contract Per 1/13/99
Meeting Agreement
(Contract-1586) \$215,757.34 VABCA-6477

VA Payment for Emergency
Service Due to DNA
Abandonment
(Contract-2004) \$2,500.00 VABCA-6475

VA Payment for
Telephone Switch Service
From July 5, 1999 to May 5,
2000 After DNA
Abandonment
(Contract 1586) \$59,165.20. VABCA-6479

After crediting the funds remaining in Contract-1586, the CO demanded a net payment by DNA to the VA of \$275,128.22. It is these affirmative claims that are the subject of this MOTION. The VA has reduced the amount now claimed for the alleged credit agreement to \$206,709.57. The final decision's reference to a January 13, 1998 meeting is apparently in error; the meeting at which the credits were allegedly agreed to was held January 18, 1998. The VA has also revised the claim in VABCA-6476 to \$15,517.50.

The CO stated that the basis for the affirmative claims was DNA's breach of Contracts-1586 and 2004. DNA appealed the final decision on November 11, 2000.

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 on Contact-1586, Deborah Martinez, Robert D. Rizzardi, VA Acquisition Program Manager, Kathy Hymes, a VA Contracting Officer and Ms. T. Stratton, a VA Contracting Officer, DNA notified the VA of DNA's bankruptcy filing.

On March 31, 1999, pursuant to Section 1102 of the BANKRUPTCY CODE, the United States Trustee appointed an Official Committee of Unsecured Creditors in DNA's bankruptcy case (the "Committee").

On May 5, 2000, DNA filed its first DISCLOSURE STATEMENT and PLAN OF REORGANIZATION. On June 9, 2000, the Committee, and other creditors, filed an OBJECTION TO DNA'S FIRST DISCLOSURE STATEMENT AND PLAN OF REORGANIZATION. On September 26, 2000, following negotiations between DNA and the Committee, a joint AMENDED PLAN OF REORGANIZATION (Joint Plan) was filed and DNA finalized its DISCLOSURE STATEMENT. A hearing on the Joint Plan and DISCLOSURE STATEMENT was held in the United States Bankruptcy Court for the Eastern District of Virginia on October 24, 2000. The Court entered an ORDER APPROVING DISCLOSURE STATEMENT that same day.

On November 28, 2000, the VA cast a ballot against the Joint Plan alleging that the VA held a general unsecured claim in an amount "to be determined." The ballot was signed by the CO for the Wilkes-Barre Contract, Deborah M. Martinez. The VA's ballot was the only vote against confirmation of the Joint Plan.

On December 1, 2000, DNA filed a SUMMARY OF BALLOTS with the Court. On December 6, 2000, a hearing was held regarding confirmation of the Joint Plan. On January 11, 2001, the Bankruptcy Court entered its ORDER confirming

the Joint Plan; the Joint Plan became effective January 31, 2001. Pursuant to the confirmed Joint Plan, Bradford F. Englander (formerly counsel to the Creditor's Committee) was appointed as Liquidating Trustee for DNA.

Section 10.04 of the confirmed Joint Plan specifically provides, in part, that:

No creditor shall have any recourse, *including by offset or recoupment*, against the assets of the Liquidating Trust, except to the extent of its right to receive distributions pursuant to this [Joint] Plan. (Emphasis added)

The VA has never filed a proof of claim against DNA with the Court nor has it requested 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.

DISCUSSION

The Trustee seeks dismissal of the appeals in VABCA-6475, 6476, 6477 and 6479 on four grounds. First, the Trustee avers that, upon the confirmation of DNA's Reorganization Plan, the BANKRUPTCY CODE created an injunction barring the VA's pursuit of its claims. Second, the Trustee maintains that confirmation of the Joint Plan is *res judicata* as to the VA claims. Third, by asserting its claims under the CONTRACT DISPUTES ACT (CDA) while DNA's bankruptcy case was pending without first obtaining permission of the Bankruptcy Court, the Trustee avers that the VA violated the automatic stay imposed by the BANKRUPTCY CODE

and that the action taken in violation of the automatic stay is void *ab initio*. Finally, the Trustee asserts that the rights of creditors of a debtor in bankruptcy are determined in accordance with the BANKRUPTCY CODE and RULES. The VA cannot advance its own agenda by ignoring the BANKRUPTCY CODE and RULES, or by impermissibly attempting to establish the amount and priority of its claims outside of established bankruptcy procedures.

The VA responds that proceedings in these appeals before the Board may go forward under the equitable defense of recoupment, asserting that none of the four grounds on which the Trustee seeks dismissal apply to a recoupment defense. The Trustee's view on the VA's position is that any claim grounded on a recoupment defense is precluded by the terms of the Joint Plan.

In the context of bankruptcy proceedings, recoupment is an equitable defense that can be asserted without the encumbrance of automatic stay provisions or other strictures of the BANKRUPTCY CODE or RULES. Recoupment, a concept rooted in common law, permits the crediting of reciprocal rights against liabilities arising under the same transaction, here Contracts-1586 and 2004. To place it in the familiar terms of the Federal procurement law, recoupment is equivalent to the Government withholding of funds due a contractor for debts arising from that contract or the liquidation of progress or advance payments on the contract. *U.S. Postal Service v. Dewey Freight System, Inc.*, 31 F.3d 620 (8th Cir. 1994); *In re Holford*, 896 F.2d 176 (5th Cir. 1990); see also 48 CFR Part 32.

Thus, the VA is correct, to a point, in its position that it can here assert these claims under a theory of recoupment without fear of being held to have violated the automatic stay or being limited by other provisions of the BANKRUPTCY CODE. We note that the appeal in VABCA-6476 involves the VA's

alleged mistaken payments under Contract-1990 that the VA credits against amounts due under Contract-1586. This is a set-off, not a recoupment since the VA is attempting to recover a debt under a transaction different (Contract-1990) from the transaction for which it seeks to reduce its liability (Contract-1586). There is not the prerequisite mutuality of obligation that would permit the VA to assert the claim for overpayment on Contract-1990 as a recoupment. Setoff claims are subject to the strictures of the BANKRUPTCY CODE and must be pursued in bankruptcy proceedings. Based on the discussion below, however, we need not explore whether the VA can press a setoff claim against the Trustee before the Board. *Dewey Freight System, Inc.*, 31 F.3d 620; *In re Midwest Service and Supply*, 44 B.R. 262 (Bankr. D. Utah 1983); *In re Mohawk Industries, Inc.*, 82 B.R. 174 (Bankr. D. Massachusetts 1987); 11 U.S.C. § 353.

The Government's election to not participate in the bankruptcy proceedings or in the development of the Joint Plan defines the limits of its rights to assert its recoupment claims before this Board. It is clear that the Bankruptcy Court's confirmation of the Joint Plan here is a final judgment for the purposes of giving the Plan *res judicata* effect. A court order confirming a bankruptcy reorganization plan under Chapter 11 of the BANKRUPTCY CODE, such as we find here, discharges the debtor and effects a broad injunction against any proceeding to collect a discharged debt. Here, the Joint Plan does not include the claims the VA asserts in these appeals, by its express terms, restricts any creditor from having recourse by "offset" [setoff] or "recoupment" against the Trustee. Other than casting a vote in opposition to the Joint Plan, the VA took no part in the bankruptcy and Plan confirmation proceedings nor did the VA avail itself of the opportunity to appeal the Joint Plan. The VA vote in opposition to the Joint Plan does not affect the Joint Plan's conclusiveness with regard to the VA's claims.

The claims at issue here could have been raised in those proceedings and the VA is now bound by the results. In effect, by not asserting its rights in the bankruptcy proceeding, the Government has now waived those rights. Thus, the VA claims represented by these appeals are not consistent with the provisions of the Joint Plan and the VA is precluded from asserting the claims against Appellant before the Board under the doctrine of *res judicata*. *Varat Enterprises, Inc.*, 81 F.3d 1310 (4th Cir. 1996); *Dep't of the Air Force v. Carolina Parachute Corporation*, 907 F.2d 1469 (4th Cir. 1990); *A. H. Robbins Company, Inc.*, 216 B.R. 175 (Bankr. E.D. Va. 1997); 11 U.S.C. §§ 542(a), 1141(a), (d).

To permit the VA to go forward with these claims before the Board would be a collateral attack on the process of the Bankruptcy Court. As the Supreme Court has held, such an attack “cannot be permitted ...without seriously undercutting the orderly process of the law.” *Celotex Corporation v. Edwards*, 514 U.S 300, 313 (1995)

In light of the discussion above, it is unnecessary for us to discuss the other grounds put forward by the Trustee in support of its MOTION.

DECISION

For the foregoing reasons, the Appellant's MOTION TO DISMISS is **GRANTED**. The appeals of Bradford F. Englander, Liquidating Trustee under Liquidating Trust for Dulles Networking Associates, Inc. under Contract Nos. V101(93)P-1586 and V693P-2004, VABCA-6475, VABCA-6476, VABCA-6477 and VABCA-6479 are **SUSTAINED**. Appellant is entitled to funds withheld as a result of the final decision plus payment of interest under the CONTRACT DISPUTES ACT from June 30, 2000, the date of the Contracting Officer's receipt of Appellant's certified claim.

DATE: **April 24, 2001**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

MORRIS PULLARA, JR.
Administrative Judge

WILLIAM E. THOMAS, JR.
Administrative Judge