

MCCLOUD & ASSOCIATES, INC.

CONTRACT NO. V693C-2098

VABCA-6926-6927

**VA MEDICAL CENTER
WILKES-BARRE, PENNSYLVANIA**

James Harvestus Locus, Jr., Esq., Fayetteville, North Carolina, for the Appellant.

Rheba C. Heggs, Esq., Trial Attorney; *Philip S. Kauffman, 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 Sheridan
On Respondent's Motion to Dismiss**

The Respondent, Department of Veterans Affairs (VA), has filed a MOTION TO DISMISS the above captioned appeals. In VABCA-6926, VA argues that the appeal should be dismissed for lack of jurisdiction because it "is based on a letter that advised Appellant of its poor performance" and "is not based on the issuance of a final decision on a contract claim." VA asserts in VABCA-6927 that Appellant's claim for breach of contract should be dismissed because the "facts

and relevant precedent support a finding by the Board that VA constructively terminated the contract for its convenience” and “Appellant’s entitlement is thus limited to costs associated with the termination, since it has been fully paid for all work performed.”

The Appellant, McCloud & Associates, Inc., responds that VA has misconstrued the two appeals but states that it believes VABCA-6926 “should be dismissed in lieu of the submission of the termination for convenience settlement proposal [submitted] to the Contracting Officer.” Appellant notes, however, that “[w]hile it is clear a dismissal is warranted, McCloud reserves [its] rights to pursue any supplemental right she may have under the *Equal Access to Justice Act (EAJA)*.” With regard to VABCA-6927, Appellant argues that the Board has jurisdiction over the appeal because the Contracting Officer’s failure to issue a timely final decision in response to its July 23, 2002 claim constituted a deemed denial of that claim. Appellant asserts that it is not prohibited from pursuing a breach of contract claim while VA argues that its actions constituted a constructive termination for the convenience of the government.

The record before the Board for purposes of this DECISION consists of the Pleadings; RESPONDENT’S MOTION TO DISMISS; APPELLANT’S RESPONSE TO AGENCY’S MOTION TO DISMISS; Rule 4 Appeal File (R4), tabs 1 through 43; Rule 4 Supplement (R4 Supp.), tabs 101 through 158.

FINDINGS OF FACTS

The following findings of facts are made for the purposes of this decision only.

On July 2, 2001 Karen A. Whalen, a Contracting Officer (CO) at the VA Medical Center (VAMC) Wilkes-Barre, Pennsylvania, awarded Contract No. V693P-2098 to McCloud & Associates, Inc. (McCloud or Contractor) for off-site

medical transcription services. (R4, tabs 2 and 3, pgs. 6 and 19) The Contract contained terms and conditions for commercial items including Federal Acquisition Regulation (FAR) Clause 52.212-4(l) TERMINATION FOR THE GOVERNMENT'S CONVENIENCE, and FAR clause 52.212-4 TERMINATION FOR CAUSE. (R4, tab 3, pg. 15) The Contract's TERMINATION FOR THE GOVERNMENT'S CONVENIENCE Clause provided:

The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(R4, tab 3, pg. 15 *citing* 48 CFR § 52.212-4(l))

Work progressed slowly on the Contract with each party blaming the other for delays and deficiencies. It is not necessary to discuss the parties' various allegations or their merits for purposes of deciding this Motion. On November 15, 2001, the Government sent McCloud a Cure Notice noting various complaints regarding the timeliness and quality of reports being transcribed by McCloud. (R4, tab 21) McCloud responded to the Cure Notice on December 3, 2001, accepting

some of the blame, alleging that some of the problems were within VA's control and responsibility, and proffering some possible solutions to remedy the situation. (R4, tab 26) At some time around December 2001, VA stopped sending McCloud transcription work. ANSWER, ¶ 56. On March 26, 2002, the Contractor wrote CO Whalen to ask her when she would start sending McCloud the work that was required by the Contract. (R4, tab 28) Around May 2002, CO George Bath, who also was involved in administering the Contract, told McCloud's attorney of VA's decision not to continue the Contract because of "excessive performance issues." (R4, tab 30) Samples of what VA considered to be deficient work were forwarded to the attorney. (R4, tab 31) On May 29, 2002, McCloud's attorney wrote:

While we desire to resume performance of this Contract, if the VA has made a final decision regarding this matter, then I would like to be provided with a confirmation of this in writing so that it is clear to both parties where we are at and whether there is room available to negotiate a fair[,] equitable adjustment.

I would like to know if the termination for default is the only option or if the VA is amenable to a termination for convenience with the stipulation that Ms. McCloud be permitted to pursue her costs and profits.

(R4, tab 32)

CO Bath informed McCloud's attorney on June 11, 2002 that "I am in the process of drafting the determination that entails a termination for default based on my review of the contract requirements, work products, computer records, and COTR [Contracting Officer's Technical Representative] documentation." (R4, tab 35) McCloud was informed on June 20, 2002 that the termination for default was still pending. (R4, tab 36)

Through its attorney McCloud submitted a “claim for damages” on July 23, 2002, alleging “wrongful and willful termination” and seeking an equitable adjustment of \$365,734.39 as damages for a breach of contract caused by VA. (R4, tab 41)

On August 9, 2002, CO Whalen wrote to McCloud referencing the Contract, the November 15, 2001, Cure Notice, McCloud’s December 3, 2001 response to the Cure Notice and various teleconferences between the parties. She began the letter with “[t]his serves as my final determination regarding [McCloud’s] response to our Cure Notice,” and ended the letter with “[y]ou are advised that this is the final decision of the contracting officer.” The letter did not contain final decision appeal language. Also in that letter CO Whalen provided her own responses to McCloud’s recommended cure actions and characterized McCloud’s response as providing an “unacceptable roadmap to bring performance into contract compliance” and concluded that VA “found the effort to cure to be of no avail.” CO Whalen also indicated that:

In mid-December the [VAMC] determined that it was in the best interest of the government, more importantly, the safety of the Veterans we serve, to cease utilizing McCloud [] due to poor quality, defective[,] and untimely work products. An emergency purchase order . . . was issued to another vendor to perform the work.

(R4, tab 42)

On November 18, 2003, this Board docketed, as VABCA-6926, McCloud’s appeal “[f]rom the final decision dated August 9, 2002[,] which was issued by Karen A. Whalen, Contracting Officer.” On the same date the Board also docketed VABCA-6927, taken from the Contracting Officer’s failure to issue a final decision on McCloud’s claim dated July 23, 2002, alleging wrongful

termination and breach of contract with purported damages of approximately \$365,734.39. In its Answer VA avers that “Appellant’s right to proceed under the Contract was constructively terminated for VA’s convenience.” ANSWER, ¶ 81.

DISCUSSION

Regarding VABCA-6926, sometimes, as in this case, a document that is called a final decision is not a final decision. Respondent argues that the CO’s August 9, 2002 letter was not a final decision under the *Contract Disputes Act (CDA)*. Appellant agrees but avers that it was forced to file a protective appeal in case the Board considered the August 9 letter a final decision. Respondent also asserts that Appellant’s December 3, 2001 response to the Cure Notice cannot be characterized as a claim because it “did not assert anything against the Government, seek any kind of relief, or expressly or impliedly indicate its purpose was to obtain a decision, final or otherwise.” We agree. Our reading of the December 3 and August 9 letters reveals no intention on the part of either party to submit a claim. Furthermore, while the CO inartfully characterized the conclusions she reached in her August 9 letter as a “final determination” and “final decision” a complete reading of the record reveals it was never her objective to render a final decision. The apparent purpose of the letter was a rebuttal of Appellant’s response to the Cure Notice.

A final decision of a contracting officer is not an appealable final decision within the meaning of the *CDA* unless there has been a disputed claim. The Federal Acquisition Regulation defines a claim under the *CDA*:

Claim, as used in this subpart, means a written demand or written assertion by one of the contracting parties, seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract

terms, or other relief arising under or related to the contract.

48 CFR § 33.201.

Applying the FAR definition of claim, the U.S. Court of Appeals for the Federal Circuit in *Smith v. Dalton* defined a CDA claim as:

[A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. * * * However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under the [CDA] until certified as required by the Act and [FAR §] 33.207.

Smith v. Dalton, 49 F.3d 1563, 1564-65 (Fed. Cir. 1995).

As this Board has stated, “[t]o demonstrate the existence of a claim ‘there must be some evidence of record that the contractor at the time the alleged claim was asserted, manifested a present, positive intention to seek an equitable monetary or other adjustment to the contract terms as a matter of legal right.’” *George Hyman Construction Co.*, VABCA No. 3078, 90-1 BCA ¶ 22,551. Neither Appellant’s December 3, 2001 response to the Cure Notice nor VA’s August 9, 2002 correspondence meet the criteria set forth above for a CDA claim. There is no indication in the record that VA followed through on its stated intention to terminate the Contract for default. Since there was no claim, there can be no valid final decision and the Board lacks jurisdiction over VABCA-6926.

VABCA-6927 presents a different matter. Here, Respondent moves for dismissal of the appeal for lack of jurisdiction alleging that prevailing precedent supports a finding that VA constructively terminated the Contract for its convenience. Appellant argues VA breached the Contract and it is therefore

entitled to breach damages. Other than moving that the appeal be dismissed for lack of jurisdiction, Respondent fails to articulate why it believes this Board lacks jurisdiction over the appeal. In a subsequent Prehearing Conference, Respondent requested that the Motion be considered under Rule 12(b)(6) of the Federal Rules of Civil Procedure as a motion based on Appellant's failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Where matters outside the pleadings are presented to the Board, the motion will be treated as one for summary judgment. *Bradford F. Englander, Liquidating Trustee under the Liquidating Trust for Dulles Networking Associates, Inc.*, VABCA No. 6473, 01-2 BCA ¶ 31,466; *Oak Cliff Realty, Inc.*, VABCA No. 3232, 91-2 BCA ¶ 23,481. Respondent's Motion falls into that category, and we will treat it as a motion for summary judgment. We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to a 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).

A review of Respondent's Motion reveals that summary judgment or dismissal of VABCA-6927 is inappropriate since Respondent fails to sufficiently set forth the material, undisputed facts upon which the Motion is based. We also note that Respondent's Motion fails to address the fundamental issue of what type of contract we have before us. Addressing this question of law would be critical to our determination of whether the Contract was constructively terminated for convenience or breached. Based on the foregoing, Respondent's Motion to Dismiss VABCA 6927 is denied.

DECISION

Based on the foregoing, Respondent's MOTION with regard to VABCA-6926 is GRANTED and the appeal of McCloud & Associates under Contract No. V693C-2098, is DISMISSED for lack of jurisdiction pursuant to Board Rule 5. Respondent's Motion on VABCA-6927 is DENIED.

DATE: **May 16, 2003**

PATRICIA J. SHERIDAN
Administrative Judge
Panel Chair

We Concur:

MORRIS PULLARA, JR.
Administrative Judge

RICHARD W. KREMPASKY
Administrative Judge