

challenges a Government Claim cancelling “for cause” two express Purchase Order Contracts between Tektel and the Clerk of Court, United States District Court for the Northern District of Illinois (the Clerk). These two express Purchase Order Contracts were issued by the Clerk upon a delegation to the Clerk of the procurement authority vested in the Director, Administrative Office of United States Courts (AOUSC), 28 U.S.C. § 604(10).

2. Plaintiff Tektel asserts: (1) that by reason of the terms and conditions incorporated in these two express Purchase Order Contracts, it is discretionary, not mandatory, that proposed technicians pass a background investigation (“Technicians *may* also be required to undergo and pass a background investigation”) (Emphasis added); (2) there is no requirement whatsoever in either of these two express Purchase Order Contracts that a Contractor’s Officers pass a background investigation; (3) that the Clerk’s cancellation of these two express Purchase Order Contracts “for cause” is arbitrary, capricious, or an abuse of discretion because Tektel’s President

was found guilty of a misdemeanor, not of a felony as was claimed by the Clerk; (4) that this misdemeanor conviction of Tektel's President is in no way a default of any of Tektel's obligations under these two express Purchase Order Contracts; and (5) that the DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause incorporated in these two express Purchase Order Contracts expressly provides in subparagraph (g) that if, after termination, it is determined that the Contractor was not in default, or that the default was excusable, then the rights and obligations of the parties shall thereafter be determined as if the termination had been issued for the convenience of the Government, thereby entitling the Contractor to an equitable adjustment, not a forfeiture of the Contractor's rights, *McDonnell Douglas Corp. v. United States*, 76 Fed. Cl. 385, 415 (2007).

3. Plaintiff Tektel asks that the Court declare: (1) that by reason of the terms and conditions incorporated in these two express Purchase Order Contracts, it is discretionary, not mandatory, that proposed technicians pass a background investigation;

(2) there is no requirement whatsoever in either of these two express Purchase Order Contracts that a Contractor's Officers pass a background investigation; (3) that the Clerk's cancellation of these two express Purchase Order Contracts "for cause" is arbitrary, capricious, or an abuse of discretion because Tektel's President was found guilty only of a misdemeanor, not of a felony as was claimed by the Clerk; (3) that this misdemeanor conviction of Tektel's President is in no way a default of any of Tektel's obligations under these two express Purchase Orders Contracts; and (4) that Tektel was not in default, or that Tektel's default was excusable, and that the rights and obligations of these parties arising by reason of the Clerk's cancellation of these two express Purchase Order Contracts "for cause" shall be determined as if this cancellation had been issued for the convenience of the Government, thereby entitling Tektel to an equitable adjustment, and not a forfeiture of Tektel's rights.

PARTIES

4. Plaintiff Tektel is a closely-held for-profit Kentucky Corporation and a Small Business in good standing with the Commonwealth of Kentucky. Plaintiff Tektel is operating as a debtor-in-possession under a Chapter 11 Voluntary Petition, Bankruptcy Petition Number 11-30348, filed in the United States Bankruptcy Court, Western District of Kentucky (Louisville) on January 25th, 2011. Plaintiff Tektel is a Kentucky-based Information Technology solutions provider incorporated in 1998 whose services include, among other things, converged telecommunications and data networking. (<http://www.tektel.net/>, last visited June 28th, 2011).

5. Plaintiff Tektel is the Awardee of two express Purchase Order Contracts. The first of these Purchase Order Contracts is for equipment required to upgrade a Nortel Communication Server (\$95,917), and for installation of this new equipment, and for training on this new equipment (\$40,000). The second of these Purchase Order Con-

tracts is for phone maintenance on this Nortel equipment for a period of one year (\$48,857). Both Purchase Order Contracts are firm, fixed-price bilateral Agreements.

6. The DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause incorporated in these two express Purchase Order Contracts expressly provides in subparagraph (g) a substantive right to money damages, i.e., these two express Purchase Order Contracts promise that if it is determined that Tektel was not in default, or that Tektel's default was excusable, then the rights and obligations of these parties arising by reason of the Clerk's cancellation of these two express Purchase Order Contracts "for cause" shall be determined as if this cancellation had been issued for the convenience of the Government, thereby entitling Tektel to an equitable adjustment. *Novell, Inc. v. United States*, 46 Fed. Cl. 601, 605 (2000).

7. Plaintiff Tektel is a proper party for purposes of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii), i.e., Tektel is a private party and a closely-held for-profit Kentucky Corporation which at the time this Complaint on Government

Claims Under Express Contracts is filed has not more than 500 employees and whose net worth does not exceed \$7,000,000 averaged over the past three years.

8. The Clerk and the AOUSC, both here exercising a ministerial procurement function, are mere Article III adjuncts. *Tashima v. AOUSC*, 967 F.2d 1264, 1269 (9th Cir. 1992). Authority to contract for services on behalf of the Judicial (U.S. CONST. art. III) Branch is vested in AOUSC by 28 U.S.C. § 604(a)(10). *Goldhaber v. Foley*, 519 F. Supp. 466, 478 (E.D. Pa. 1981). The Clerk and the AOUSC are instrumentalities of the United States and these two express Purchase Order Contracts are within the jurisdiction of this Court under 28 U.S.C. § 1491(a)(1). *Cf. Bell BCI Co. v. United States*, 56 Fed. Cl. 465, 468 (2003) (protest under 28 U.S.C. § 1491(b)(1)). Defendants the Clerk and the AOUSC are hereinafter referred to, collectively, as “the Defendants.”

JURISDICTION

9. This Court has jurisdiction under 28 U.S.C. § 1491(a)(1). The two express Purchase Order Contracts here in issue establish a contractual relationship which provides Tektel a substantive right to money damages. The Clerk and the AOUSC are instrumentalities of the United States and within the waiver of sovereign immunity provided by 28 U.S.C. § 1491(a)(1) for Actions against the United States founded upon express Contracts with the United States.

10. This Civil Action is timely filed. The Clerk terminated (cancelled) these two express Purchase Order Contracts by letter dated Thursday, March 18th, 2010. Plaintiff Tektel wrote the Court's Manager of Administrative Services on Thursday, March 17th, 2011 challenging this termination and asking for her final decision. These two express Purchase Order Contracts incorporate the DISPUTES CLAUSE (AOUSC 1999) provision. This provision requires a written determination from a Contracting Officer on all matters arising under these express Purchase Order Contracts. No such

written determination has been issued. More than sixty calendar days have passed since Plaintiff Tektel requested a final decision. This Civil Action is timely filed within six years from the date the right to pursue this Action first arose, Thursday, March 18th, 2010. 28 U.S.C. § 2401(a).

AVERMENTS

Contract Formation.

11. On September 8th, 2009 the Clerk issued a Solicitation for new telephone equipment, and for its installation, and for training on this equipment. The deadline for submission of a response was September 22nd, 2009. The Solicitation invited the submission of firm fixed-prices on a list of specific equipment, on the installation of this specific equipment, on training for this equipment, and on the maintenance of this equipment for a period of one year. The Clerk announced that Award would be made on a low price, technically acceptable basis.

12. The Solicitation required services from technicians dedicated to the Court's telephone system at the Dirksen Federal Building, Chicago, Illinois; a guarantee that technicians would be available for dispatch after hours, and that technicians would be available seven days a week, twenty-four hours each day, with a response time of four hours; and that the selected Contractor would provide on-site an inventory of critical components. The Solicitation required:

Technicians used on this project must be Certified in Nortel Meridian PBX and Call Pilot. Please provide the names of the local technicians that would be working on this account. All technicians must have a valid state I.D. to enter the Dirksen Federal Building. Technicians may also be required to undergo and pass a background investigation, which will include, but is not limited to a comprehensive criminal background check and fingerprint check. Each technician must come to the courthouse and complete the fingerprint check during normal business hours before starting the project. The US District Court will not pay for the technician's time while being fingerprinted. The cost to perform the background check is at the expense of the US District Court.

13. The Solicitation included the following Disputes Clause:

DISPUTES CLAUSE (AOUSC 1999)

- a. A contract dispute means a written claim, demand or assertion by a contracting party for the payment of money in a sum certain, the adjustment or interpretation of contract terms or other specific relief arising under or relating to the contract. A dispute also includes a termination for convenience settlement proposal and any request for an equitable adjustment, which is denied. A voucher, invoice or other routine payment that is not disputed by the parties is not a “dispute” under this clause.
- b. A contract dispute must be filed within 12 months of its accrual and must be submitted in writing to the contracting officer. The dispute must contain a detailed statement of the legal and factual basis of the dispute and must be accompanied by any documents that support the claim. The claimant must seek specific relief, as provided in paragraph (a.) above. However, the time periods set forth here shall be superceded if the contract contains specific provisions for the processing of any claim which would otherwise be considered a “dispute” under this clause.
- c. Contracting officers are authorized to decide or settle all disputes under this clause. If the contracting officer requires additional information, the contracting officer shall promptly request the vendor to provide such information. The contracting officer will issue a written determination within 60 days of the receipt of all the requested information from the vendor. If the contracting officer is unable to render a determination within 60 days, the vendor shall be notified of the date on which a determination will be made. The determination of the contracting officer will be signed by the Office of General Counsel and shall be considered the final determination of the agency.

d. The contractor shall proceed diligently with performance of this contract pending resolution of the dispute. The contractor shall comply with the final determination of the contracting officer, unless such determination is overturned by a court of competent jurisdiction. Failure to diligently continue contract performance during the pendency of the claim or failure to comply with the final determination of the Contracting Officer may result in termination of the contract for default or imposition of other available remedies.

14. The Solicitation incorporated by reference the DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause set out at Federal Acquisition Regulation (FAR)

52.249-8. This clause provided, *inter alia*:

(a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not

cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

....

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

15. For supplies, the Solicitation incorporated by reference the TERMINATION FOR CONVENIENCE OF GOVERNMENT (Fixed Price) (Short Form) (APR 1984) clause set out at FAR 52.249-1. For services, the Solicitation incorporated by reference the TERMINATION FOR CONVENIENCE OF GOVERNMENT (Services) (Short Form) (APR 1984) clause set out at FAR 52.249-4. The TERMINATION FOR CONVENIENCE OF GOVERNMENT (Fixed Price) (Short Form) (APR 1984) clause provides, for supplies, that the rights, duties, and obligations of the parties, including compensation to the Contractor, will be as provided in FAR Part 49—Termination of Contracts in effect on the date of the Award. The TERMINATION FOR CONVENIENCE OF GOVERNMENT (Services)

(Short Form) (APR 1984) clause provides, for services, that in the event of Contract termination, the Government is liable only to make payment for services rendered before the effective date of the termination.

16. On September 30th, 2009 the Clerk notified Plaintiff Tektel that it had been awarded Purchase Order Contract Number O2-09462400486 at a firm fixed-price of \$135,917.18 for new telephone equipment, and for its installation, and for training on this equipment. On October 13th, 2009 the Clerk notified Plaintiff Tektel that it had been awarded Purchase Order Contract Number 12-10462400002 at a firm fixed-price of \$48,857.40 for maintenance on this telephone equipment for a period of one year. Plaintiff Tektel signed the first of these bilateral Purchase Order Contracts on September 30th, 2009. Plaintiff Tektel signed the second of these bilateral Purchase Order Contracts on October 21st, 2009.

The Claimed Default.

17. On Monday, March 1st, 2010 the Clerk wrote Plaintiff Tektel that “I have received a background investigation report to determine your *suitability to be a contractor* for the United States District Court, Northern District of Illinois.” (Emphasis added). The Clerk wrote in this letter that Plaintiff Tektel’s President had “previously been convicted of drug related offenses” and that “this is considered to be a felony charge.” The Clerk did not provide a copy of the background investigation report and did not request documentation of the judgment of conviction.

18. On Friday, March 5th, 2010 Plaintiff Tektel wrote the Clerk that its President had never been convicted of a felony offense and that the felony offense charged had been reduced to a misdemeanor conviction. Plaintiff Tektel asked the Clerk to allow Plaintiff Tektel, its technicians and its President, to continue performance of the two express Purchase Order Contracts. Plaintiff Tektel explained that it was currently delivering services to other Federal agencies, and that these other Federal agencies re-

quired, and had performed, background checks. On Wednesday, March 17th, 2010 Plaintiff Tektel provided the Clerk with a Case Number from the Kentucky court system documenting that its President had been convicted of a misdemeanor, not the felony charged.

The Government Claims Under Express Contracts.

19. On Thursday, March 18th, 2010 the Clerk wrote Plaintiff Tektel as follows:

I previously gave you until March 16, 2010 to provide any documentation necessary to clarify this issue. You provided two e-mails informing me that this was not a felony, but you provided no documentation. The contract with your firm is considered highly sensitive. I have consulted with the Court, and the Court has more stringent policies than other government units.

I am hereby canceling the contract for cause, effective at the close of business on Friday, March 19, 2010. Please make the appropriate arrangements with . . . of my office regarding the return of any equipment.

I do wish you success in your future endeavors.

20. The Clerk did not request from Plaintiff Tektel documentation, documentation which would have established that Plaintiff Tektel's President had been convicted only of a misdemeanor, and not the felony charged. Under the DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause incorporated in the two express Purchase Order Contracts, the Clerk was obligated to give Plaintiff Tektel a period of ten calendar days to cure the performance failures claimed before Plaintiff Tektel could be terminated for cause. No such ten days was offered to Plaintiff Tektel before the two express Purchase Order Contracts were terminated for default.

COUNT I

THE DEFAULT TERMINATION WAS NOT JUSTIFIED.

21. Plaintiff Tektel incorporates and re-alleges paragraphs numbers 1. through 20. hereinabove as if fully set forth herein.

22. Defendants' Claim of default for lack of a demonstration of suitability as a Federal Contractor is not justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759,

764 (Fed. Cir. 1987). It is only discretionary, not mandatory, that Plaintiff Tektel's proposed technicians pass a background investigation, and there is no requirement whatsoever in either of these two express Purchase Order Contracts that Plaintiff Tektel's Officers pass a background investigation. Defendants never afforded Plaintiff Tektel an opportunity to review the background investigation. Defendants at no time requested from Plaintiff Tektel documentation, documentation which would have established that Plaintiff Tektel's President had been convicted of a misdemeanor, and not the felony charged.

COUNT II
DEFENDANTS' DEFAULT TERMINATION IS ARBITRARY, CAPRICIOUS
OR AN ABUSE OF DISCRETION

23. Plaintiff Tektel incorporates and re-alleges paragraphs numbers 1. through 20. hereinabove as if fully set forth herein.

24. Defendants' default termination of Plaintiff Tektel's two express Purchase Order Contracts is arbitrary, capricious, or an abuse of discretion because there is no

reasonable, contract-related basis for the Clerk's decision. *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999) (quoting *United States Fidelity & Guarantee Co. v. United States*, 676 F.2d 622, 630 (Ct. Cl. 1982)). Tektel's President was found guilty only of a misdemeanor, not of a felony as was claimed by the Clerk. While the Clerk's decision to terminate for default is premised on the lack of documentation of this fact, the Clerk never asked that this documentation be produced by Plaintiff Tektel. Plaintiff Tektel did provide Defendants with the Case Number from the Kentucky Court system which Defendants could have utilized to investigate Plaintiff Tektel's assertions. A default termination is a drastic sanction which may be sustained only for good grounds and on solid evidence. *Grot, Inc. v. United States*, Fed. Cl. No. 03-1951C, October 5th, 2007, 2007 U.S. Claims LEXIS 425, *21. Neither is present here.

COUNT III
DEFENDANTS DID NOT AFFORD PLAINTIFF TEKTEL
AN OPPORTUNITY TO CURE.

25. Plaintiff Tektel incorporates and re-alleges paragraphs numbers 1. through 20. hereinabove as if fully set forth herein.

26. These two express Purchase Order Contracts incorporate by reference the DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause. This clause requires that Plaintiff Tektel have been given not less than ten calendar days to cure its supposed failure to perform any of the provisions of these two express Purchase Order Contracts. Defendants' failure to afford Plaintiff Tektel an opportunity to cure its supposed performance failure is a material breach of these two Purchase Order Contracts by Defendants, and this pre-existing material breach excuses Plaintiff Tektel from compliance with any of these supposed performance obligations.

PRAYER FOR RELIEF

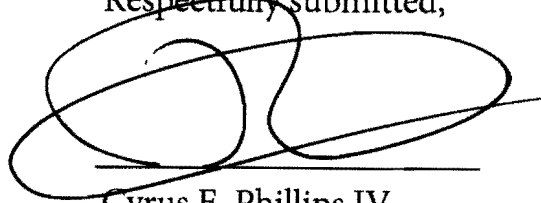
WHEREFORE, premises considered, Plaintiff Tektel respectfully requests the Court to grant Judgment for Plaintiff Tektel in this Civil Action, and to Order the following relief:

(a) a Declaration that by reason of the terms and conditions incorporated in these two express Purchase Order Contracts, it is discretionary, not mandatory, that proposed technicians pass a background investigation; a Declaration that there is no requirement whatsoever in either of these two express Purchase Order Contracts that a Contractor's Officers pass a background investigation; a Declaration that the Clerk's cancellation of these two express Purchase Order Contracts "for cause" is arbitrary, capricious, or an abuse of discretion because Plaintiff Tektel's President was found guilty of a misdemeanor, not of a felony as was claimed by the Clerk; a Declaration that this misdemeanor conviction of Tektel's President is in no way a default of any of Plaintiff Tektel's obligations under these two express Purchase Orders Contracts; and

a Declaration that Plaintiff Tektel was not in default, or that Plaintiff Tektel's default was excusable, and that the rights and obligations of these parties arising by reason of the Clerk's cancellation of these two express Purchase Order Contracts "for cause" shall be determined as if this cancellation had been issued for the convenience of the Government, thereby entitling Plaintiff Tektel to an equitable adjustment, and not forfeiting Plaintiff Tektel's rights under these two express Purchase Order Contracts; RCFC 57; and;

(d) such other and further relief as the Court may deem just and proper.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Cyrus E. Phillips IV
Virginia State Bar Number 03135

July 7th, 2011

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