

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

*Cohen
PK-1
8459*

FILE: B-192354

DATE: November 29, 1978

MATTER OF: Vialease Corporation *DLG00260*

DIGEST:

1. Protest against termination of contract is appropriate for review by GAO where there are no material facts in dispute and only question concerning propriety of termination is one of law.
2. Although assignment of Government contract may violate Anti-Assignment Act, Government can recognize assignee as successor in interest if in best interests of United States.
3. Contract "A" with FAA provided that it would run concurrently with contract "B," also with FAA, and would expire upon expiration or termination of contract "B." Contract "B" was subsequently novated with FAA's approval. Since general legal effect of contract novation is extinguishment of contract and substitution of new one, resulting in discharge of transferor, FAA view that novation of contract "B" operated to cause expiration of contract "A" under cited provision was not improper.
4. Determination to set aside procurement under section 8(a) of Small Business Act is matter for contracting agency and SBA, not GAO.

On July 2, 1976, the Federal Aviation Administration (FAA) awarded contract No. DOT-FA-NA-5218 to Vialease Corporation (Vialease) for the lease of a parcel of land adjacent to the viaduct at Washington National Airport until October 31, 1980. The land was to be used to conduct a rental car operation and provide a public parking facility. The rental car operation was the subject of contract No. DOT-FA-NA-5145 between Vialease and the FAA, which was also to expire on October 31, 1980. *#GC00030*

(Protest AGAINST TERMINATION of Contract and Award on a Sole-Source Basis)
002524

Contract No. -5218 provided in article II.B:

"The period of this Contract DOT-FA-NA-5218 has been established to coincide with the expiration date of Contractor's contract DOT-FA-NA-5145 with the Government for operation of a car rental concession at the Airport; and further, the Parties understand and agree that this Contract DOT-FA-NA-5218 shall expire immediately upon expiration or termination of Contractor's aforementioned concession Contract DOT-FA-NA-5145."

DLG00273
DLG00274
Contract No. -5145 was novated by Vialease to Dollar Rent-A-Car Systems, Inc. (Dollar), on December 16, 1977, with the FAA's approval. On March 22, 1978, Vialease requested the FAA's approval to assign contract No. -5218 to Corporate Fleet Management, Inc. (CFM). The FAA denied the request by letter of April 25 in which the FAA also directed Vialease to vacate the property leased under contract No. -5218 by June 30. The basis for that advice was that since contract No. -5145 was novated to Dollar, Vialease was no longer considered to be operating a rental car concession under that contract, and contract No. -5218 accordingly expired by operation of article II.B thereof, set out above. Vialease was subsequently advised that the FAA proposed to lease the property that had been involved in contract No. -5218 to Parkington, Inc., for the period beginning July 1, 1978. *DLG00272*

Vialease has filed a protest in our Office against the FAA's actions. Vialease contends that the termination of contract No. -5218 was improper, and the contract should therefore be reinstated, with compensation to Vialease for alleged loss of revenue since July 1. In addition, Vialease argues that the FAA should then approve the assignment of the contract by Vialease to CFM. Vialease further contends that, in any case,

the FAA cannot properly award a lease contract to Parkington on a sole-source basis without affording Vialease the opportunity to compete.

In a report on the protest, the FAA contends that the termination of contract No. -5218 is not appropriate for our review because it involves a matter of contract administration. See in this connection Kaufman DeDell Printing Inc., - Reconsideration, B-188054, October 25, 1977, 77-2 CPD 321. The FAA suggests that the dispute over the propriety of the contract termination is, therefore, a matter for review under the procedures set forth in the contract's "Disputes" clause.

Our Office does not generally rule upon matters cognizable under a "Disputes" clause. Precision Service & Sales Co., B-186139, April 16, 1976, 76-1 CPD 263. However, there are no material facts in dispute here for resolution under such clause. There exists only a question of law to be resolved on the basis of the facts of record, i.e., whether the novation of contract No. -5145 operated to terminate contract No. -5218 pursuant to article II.B thereof. Therefore, we will consider the issue presented. 53 Comp. Gen. 167 (1973).

We note here that the FAA's report also suggests that Vialease's performance under contract No. -5218 was not satisfactory, and the contract could have been terminated for default. However, it is clear from the record that the contract was terminated under article II.B, and not for default.

The transfer of a Government contract is prohibited by the Anti-Assignment Act, as amended, 41 U.S.C. § 15 (1976). However, the prohibition is intended for the Government's protection; therefore, the Government may treat a contract as annulled by an assignment or recognize the assignment as the circumstances in a particular case may warrant. See B-173331, August 19, 1971; 32 Comp. Gen. 227 (1952). Thus, the FAA could properly recognize Dollar as the new contractor, as it did here by approving the novation agreement,

since such recognition obviously was determined to be in the best interests of the United States. See B-173331, supra; compare Vertical Aviation Transport Systems, Inc., ASBCA No. 18266, 74-1 BCA § 10,617.

In its report, the FAA justifies the termination of contract No. -5218 under article II.B, as follows:

"The novation of Contract DOT-FA-NA-5145 to Dollar resulted in a substitution of parties and the termination of all interest of Vialease in and under that contract. As a result, Vialease's right to continue performance under the contract was effectively terminated by the approved novation agreement."

The legal effect of a novation as the term is generally used is the substitution of a new agreement or obligation for the old one, which is thereby extinguished or discharged. Simpson on Contracts § 206 (2d ed., 1965); Corbin on Contracts §§ 1293, 1297 (1952).

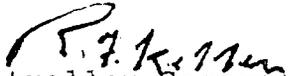
Thus, and notwithstanding that the Government may have properly exercised its discretion to recognize Dollar as Vialease's successor in interest under contract No. -5145, the novation operated to extinguish that contract and to substitute a new contract between the FAA and Dollar, albeit with the same contractual provisions as in the discharged contract. On that basis, we cannot disagree with the FAA view that the novation was tantamount to an "expiration or termination" of contract No. -5145 to cause the expiration of contract No. -5218 under article II.B thereof.

In view of the above, the matter of whether the FAA should have approved the assignment of contract No. -5218 to CFM is academic.

AGC0002

In regard to the proposed award of a contract to Parkington, Inc., on a sole-source basis to lease the same land involved in contract No. -5218, the FAA advises in its report that the contract will be awarded pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976). That section authorizes the Small Business Administration (SBA) to enter into a contract with any Government procuring agency, and the contracting officer of such agency is authorized "in his discretion" to let the contract to the SBA under such terms and conditions as may be agreed upon by the SBA and the procuring activity. It is clear, therefore, that the determination to set aside a procurement and to award a contract under section 8(a) is a matter within the sound discretion of the contracting agency and the SBA. Communicology, Inc.; Ocean Technology, Inc., B-191486, B-191581, April 18, 1978, 78-1 CPD 302.

The protest is denied.


Deputy Comptroller General
of the United States