

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Chum Hooper T/A Eye4Sports ) ASBCA No. 56755  
 )  
Under Contract No. MDE 06-556 )

APPEARANCE FOR THE APPELLANT: Ms. Chum Hooper  
Owner

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
MAJ Timothy A. Furin, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STEMLER  
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before us on the government's motion for summary judgment. The appeal is from the termination of a concession contract at the Fort Meade Post Exchange. The parties have filed briefs in support of their respective positions.<sup>1</sup> For the reasons stated below, we grant the government's motion and deny the appeal.

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<sup>1</sup> The government filed a Rule 4 file. Appellant made no evidentiary submissions.

## STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 12 June 2007, the Army and Air Force Exchange Service (AAFES or government) awarded Contract No. MDE 06-556 to Chum Hooper T/A Eye4Sports (Eye4Sports or appellant) for the operation of a specialty shop concession in the Post Exchange at Fort Meade, Maryland. The contract was awarded for a five year term beginning 30 June 2007, and required appellant to provide AAFES with a 22% sales-based fee. (R4, tab 1)

2. The contract contained a disputes clause which stated the contract was “subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.” (R4, tab 1, ex. A ¶ 11.a) The contract also contained a provision stating that only the contracting officer had the authority to waive or change contract terms (R4, tab 1, ex. A ¶ 1.a).

3. The contract contained a clause entitled TERMINATION (JUN 94) which provided in part, “This contract may be terminated in whole or in part by either party immediately upon written notice to the other party in the event of breach of this contract by the other party” (R4, tab 1, ex. A ¶ 8.a).

4. The INTERNAL CONTROLS (JAN 05) clause of the contract required that appellant keep a complete and accurate accounting of all transactions and stated that:

[a]ll sales (cash, charge card or deposit) will be recorded on the cash register when the transaction is made. Service and merchandise sales will be recorded separately on the designated keys of the cash register. The customer will be given a cash register receipt for the sale.

(R4, tab 1, ex. C ¶ 13.a(2))

5. The contract also contained the INSPECTIONS (MAR 00) clause which authorized AAFES to “perform surveillance to verify concessionaire and concessionaire employee compliance with contract terms and to detect theft of government funds.” (R4, tab 1, ex. C ¶ 31.b)

6. The contract required that “the manager or designated representative will be knowledgeable of contract terms and conditions...” (R4, tab 1, ex. C ¶ 17.a)

7. On 29 October 2008, an AAFES loss prevention officer (LPO) purchased about \$86.77 worth of items from appellant’s concession, which included an initial purchase plus an additional item. Ms. Chum Hooper only rang up the initial purchase of about

\$63.49 on the cash register. She gave the investigator a cash register receipt for that amount and a calculator tape showing the total amount of the purchase. (Rule 4, tab 3)

8. The same LPO purchased \$33.82 worth of items from appellant on 14 November 2008. Ms. Hooper accepted payment in cash, but did not ring up the purchase on the cash register. She gave the investigator only a calculator tape showing the amount of the purchase, not a cash register receipt. (Rule 4, tab 3)

9. On 4 December 2008, the LPO and another AAFES employee interviewed Ms. Hooper's final customer. The customer purchased \$68.00 worth of items from appellant. Ms. Hooper failed to record the sale on the register and did not provide the customer with a cash register receipt. (R4, tabs 2, 3)

10. Later on 4 December 2008, the investigator and the other AAFES employee interviewed Ms. Hooper at the Fort Meade loss prevention office (R4, tabs 2, 3). Ms. Hooper admitted in a signed statement that she intentionally failed to ring up sales on the cash register. When asked about the above \$68.00 purchase, she said in part that she "did not ring it up because the percentage is too high and we have to pay for orders.... I feel better that I told the truth to you. I'm going to stop doing this. It makes me feel better to stop doing it." (R4, tab 2)

11. By letter dated 15 December 2008, the contracting officer terminated the contract on the basis that appellant failed "to properly record sales or provide a receipt for purchase as required by clause number 13.a (2) of Exhibit C, Special Provisions" (R4, tab 4).

12. The Board received appellant's undated notice of appeal of the termination on 26 February 2009.

13. After the complaint, answer, and Rule 4 were filed, the government moved for summary judgment and submitted a brief in support of its motion. Appellant submitted a brief in opposition.

### DECISION

Title 41 U.S.C. § 602 provides that the Contract Disputes Act (CDA) applies to contracts of non-appropriated fund activities described in 28 U.S.C. § 1491. AAFES is a non-appropriated fund activity described in 28 U.S.C. § 1491(a)(1). The CDA and the contract's disputes clause (SOF ¶ 2) provide the Board with jurisdiction. *Home Entertainment, Inc.*, ASBCA No. 50791, 98-1 BCA ¶ 29,641 at 146,875.

Summary judgment is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may

affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

To counter a motion for summary judgment, more than mere assertions are necessary. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-77 (Fed. Cir. 1984). Conclusory assertions do not raise a genuine issue of fact. The non-movant must submit, by affidavit or otherwise, specific evidence that could be offered at trial. Failing to do so may result in the motion being granted. (*Id.*)

According to the government, there are no material facts in dispute. The termination for default was proper because appellant knowingly failed to record all sales as required by the INTERNAL CONTROLS (JAN 05) clause of the contract. On at least three occasions appellant failed to ring up the correct dollar amount and failed to provide customers with a cash register receipt. Appellant so admitted. Her actions constituted a material breach of the contract, entitling the government to immediately terminate the contract upon written notice pursuant to the contract's TERMINATION (JUN 94) clause. Written notice was provided by letter dated 15 December 2008. (Gov't mot. at 5, 6)

Appellant's brief states that during contract performance, she decided the contract fee was too high and wanted the commission rate reduced. She was directed to apply to the contracting officer, Ms. Laura Cotton, for relief (app. opp'n at ¶ 2). We have no record evidence that appellant ever did so, but this is not germane to the motion before us. Nor are several other allegations she suggests in her brief—problems appellant had with credit card vendors (app. opp'n at ¶ 8), the requirement to accept checks (app. opp'n at ¶ 9), disruption of concession business caused by VIP tours (app. opp'n at ¶ 10), the impact of over-rings on register balances (app. opp'n at ¶ 11), and work environment issues (app. opp'n at ¶ 14.2), among others.

What is relevant is appellant's admission that she did fail to comply with the terms of the contract (SOF ¶¶ 7-10; app. opp'n at ¶ 4.1). As justification, she asserts that in the spring of 2008, a Ms. Luz Margarita Figueroa, identified in appellant's brief as an office assistant to Mr. John Shiroky, who was AAFES' services business manager (notice of appeal, 12 June 2007 AAFES letter), said things to her that led her to understand she should "keep some sales out of the register on occasion [in] lieu of contractual relief."<sup>2</sup> Appellant acknowledges that she "gave into the temptation of what I knew to be the incorrect way to [do] business." (App. opp'n at ¶ 3) However, she explains, the government may have wanted to get rid of her and entrapped her due to a friendship she

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<sup>2</sup>This assertion appears only in appellant's brief. It is notably absent from her statement (SOF ¶ 10).

had had with the prior vendor manager assistant (app. opp'n at ¶ 3.1). There is no allegation that Ms. Figueroa was a contracting officer. Nor is there an offer of evidence of any of the foregoing facts and appellant offers only supposition that this might have happened.

Appellant complains in her brief about the surveillance of her concession—that somehow it was excessive (app. opp'n at ¶¶ 3.1, 7). The contract, however, specifically authorizes surveillance to verify contract compliance and detect theft (SOF ¶ 5). Appellant has made no showing that it was excessive or targeted in an improper way. The surveillance appears to have done exactly what it was supposed to do. She also suggests that she signed her statement under duress (app. opp'n at ¶¶ 13, 14.3). However, again, nothing other than her unsubstantiated assertion is offered as proof, and, in any event, she confirms the truth of the salient points of the interview in her brief.

Appellant makes several statements to the effect that she did not understand the contract or its terms and her actions were simply mistakes due to this lack of understanding or naïveté (app. opp'n at ¶¶ 2, 6, 7, 12). She also complains she was not given an opportunity to correct her mistakes (app. opp'n at ¶ 4.3). However, the contract specifically required that appellant, as manager of her business, have knowledge of the contract terms (SOF ¶ 6). Further, she admitted in her statement to AAFES and in her submission to the Board, that she knew her actions were wrong (SOF ¶ 10; app. opp'n at ¶¶ 3, 4.1).

The contract clearly requires that all sales be recorded on the cash register when the transaction is made and that the customer be given a receipt (SOF ¶ 4). It is undisputed that appellant failed to fulfill these obligations on at least three occasions (SOF ¶¶ 7-9). Appellant was observed violating the terms of the contract and has provided no evidence to the contrary. We have held that a concession contractor's actions, such as occurred here, amount to a material breach of contract, entitling the government, pursuant to the Termination clause, immediately to terminate the contract upon written notice. *International Hair*, ASBCA Nos. 50948, 51053, 01-1 BCA ¶ 31,393 at 155,099.

The contract here provided for such immediate termination in case of breach (SOF ¶ 3). There is no requirement for an "opportunity to correct," as appellant suggests. The government terminated the contract in writing, pursuant to the contract's terms (SOF ¶¶ 3, 11). Appellant has raised no triable issue of fact.

CONCLUSION

As a matter of law, the government is entitled to summary judgment. We grant the government's motion for summary judgment and deny the appeal.

Dated: 24 July 2009

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur

I concur

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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CHERYL L. SCOTT  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56755, Appeal of Chum Hooper T/A Eye4Sports, rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals