

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Alive & Well International, Inc.) ASBCA No. 51850
)
Under Contract No. LEE 96-104)

APPEARANCE FOR THE APPELLANT: Ms. Jo-Linda M. Sanders
Secretary-Treasurer

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
LTC Richard B. O'Keefe, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Alive & Well International, Inc., (Alive) appeals an assessment of liquidated damages for employee theft under an Army and Air Force Exchange Service (AAFES) concession contract. The parties have submitted the appeal for decision under Rule 11 without oral hearing.

FINDINGS OF FACT

1. Alive was awarded the contract on 13 May 1996 to operate a nutrition center at Fort Lee, Virginia. The contract had a fee rate payable to AAFES of 21.5 percent of total adjusted gross sales (R4, tab 1 at ex. E). Paragraphs b and c of the "INSPECTIONS (OCT 1995)" clause of the contract stated in relevant part:

b. AAFES may perform surveillance to verify concessionaire and concessionaire employee compliance with contract terms and to detect theft of government funds. Surveillance may include the use of electronic equipment.

c. Concessionaire is liable and will pay AAFES for losses under this contract detected by surveillance or otherwise discovered. In the event actual losses cannot be determined, the contractor will be liable for liquidated damages under this contract computed as follows:

(1) The contractor will pay an amount equal to fifty percent (50%) of the highest one month's dollar fee paid to AAFES during the most recent 12 months for each employee contributing to the loss

(R4, tab 1 at ex. C at 16)

2. Alive hired Mr. Wayne Batts on 10 February 1998 to work in the concession. On 15 July 1998, AAFES installed video surveillance equipment at the concession. During the next five days (16-20 July 1998), AAFES detectives observed Batts stealing funds by failing to ring in sales on the cash register and pocketing the money. By reviewing the surveillance videotapes, AAFES concluded that \$168 had been stolen by Batts. Batts was terminated by appellant on 22 July 1998, and subsequently pleaded guilty in U.S. District Court to theft of Government funds. (R4, tab G-4; Gov't br. at 8, 9)

3. By letter dated 11 August 1998, the contracting officer requested payment of \$1,949.85 by Alive as liquidated damages for Mr. Batts' theft pursuant to paragraph (c) of the Inspections clause. In a subsequent letter dated 9 September 1998, the contracting officer contended that liquidated damages were appropriate on the ground that "because sales were steadily declining . . . it is reasonable to assume that other undetermined amounts were not recorded by this employee." (R4, tab 6)

4. The only evidence in the record of declining sales is Exhibit 8 to Alive's complaint. Exhibit 8 shows "net" monthly sales for January through October 1998. Sales in February, the month Batts was hired, were \$18,138. In March, sales declined to \$14,416 and continued to decline each month thereafter to June when they were \$11,154. In July, the month when Batts was fired, sales rose to \$13,239, but in August and September they declined again to \$11,639 and \$11,960 respectively. In October, sales were only \$10,130. The October sales were lower than June, the last full month when Batts was employed.

5. In letters to the contracting officer dated 4 September and 5 October 1998, Alive contended that it was liable for no more than the Government's share of the proven amount (\$168) stolen, and that the decline in sales did not prove other thefts by Mr. Batts since sales continued to decline after he was terminated. (R4, tabs 5, 7) By letter dated 20 October 1998, the contracting officer demanded payment of the liquidated damages. (R4, tab 8) This appeal followed.

DECISION

The Government argues that “It is unreasonable to believe that the videotape surveillance . . . captured the totality of Mr. Batts’ thefts, and farfetched in the extreme to believe that [he] chose 16 July 1998 to begin stealing.” The Government further argues that “the fact that AAFES immediately caught Mr. Batts with his hand in the till strongly suggests that he had been stealing before 16 July 1998,” and that the likelihood of more extensive theft is “enhanced” by Mr. Batts status as a low-wage, no-benefits, part-time employee. From these arguments, the Government concludes as a “modest leap of logic,” that the actual losses from Mr. Batts’ theft cannot be determined, and that it is accordingly entitled to the liquidated damages demanded. (Gov’t br. at 14-15)

We disagree. The contract terms do not impose liability for the liquidated damages at issue on the basis of strong suggestions, or modest leaps of logic. The relevant terms read: “Concessionaire is liable and will pay AAFES for losses under this contract detected by surveillance or otherwise discovered.” (Emphasis added) Absent contractual definition, we give “discover” its plain and ordinary meaning. *George Hyman Construction Company v. United States*, 832 F.2d 574, 579 (Fed. Cir. 1987) The plain and ordinary meaning of “discover” is “to reveal by divulging, as a secret . . . to expose . . . to bring to light . . .” Webster’s New International Dictionary 745 (2d ed. 1957)

On the evidence before us, the only “losses” detected by surveillance, or otherwise revealed, exposed or brought to light were the \$168 taken by Batts during the period 16-20 July 1998. The monthly sales record for the period January-October 1998 is insufficient proof of other thefts by Batts of indeterminable amounts. There is no record of prior year sales or other evidence tending to show that the monthly decline in 1998 could only be explained by theft. Moreover the cited sales record shows a continuing decline after Batts was fired. On this evidence, the Government has failed to carry its burden of proof establishing actual losses of indeterminable amount over and above the \$168 revealed by the surveillance videotape. Absent such proof, it is not entitled to the claimed liquidated damages.

The appeal is sustained.

Dated: 15 February 2000

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

JACK DELMAN
Administrative Judge
Acting Vice Chairman
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. 51850, Appeal of Alive & Well International, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals