

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Harry Pohl KG ) ASBCA No. 51523  
 )  
Under Contract No. 94-020-94-501 )

APPEARANCE FOR THE APPELLANT: Mr. Harry Pohl  
Owner

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA  
Chief Trial Attorney  
CPT James M. Dorn, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MOED

This is an appeal from the termination of a concession contract awarded by the U.S. Army and Air Force Exchange Service (AAFES) and the denial of monetary claims asserted by appellant ("Pohl") relating to the performance and termination of the contract. Only entitlement is now to be decided

FINDINGS OF FACT

1. AAFES awarded this concession contract to Pohl on 25 May 1995 for the operation of specialty shops at base exchanges operated by AAFES at military facilities in Mannheim and Heidelberg, Germany. The awarded contract stated that the Heidelberg specialty shop would be located in Building 3802 (hereinafter referred to as the "Heidelberg Concession Mall"). The Mannheim specialty shop would be located in Building 312, Benjamin Franklin Village. The shops would carry the following types of merchandise: military gift items, coffee and beer mugs, key chains, trophies and plaques, clocks, engravable gifts, and watch accessories. The shops would also provide jewelry repair, engraving, and keymaking services. The duration of the contract was five years beginning 8 July 1995 for Mannheim and 31 July 1995 for Heidelberg. Pohl agreed to pay a concession fee of 25 percent of gross sales to AAFES. (R4, tabs 1, 2) Pohl had considerable experience in operating retail concessions in U.S. military exchanges. This included operation of the same type of shop in two other base exchanges during the period 1990-1995 (tr. 2/52).

2. The contracting officer cognizant of this contract was located at AAFES headquarters in Dallas, Texas. Contract performance was monitored by personnel in the

local AAFES Service Office, principally Ms. Lynn Machovoe, the service business manager. (Tr. 1-10 through 1-12; 1-65 through 1-68; 2-39 through 2-42)

3. On 30 October 1996, the contracting officer issued unilateral contract Amendment No. 6 stating that, effective 2 December 1996, the Heidelberg specialty shop would be relocated from the Heidelberg Concession Mall to the basement of Building 3850 (R4, tab 5). The ACTIVITY (MAR 1990) clause of the contract contains the following:

d. During the contract period, the contracting officer may require the concession to relocate to better meet AAFES needs or those of the installation, as determined by the contracting officer. Concessionaire will be given advance notice. AAFES will pay for moving and installing AAFES furnished equipment and fixtures and hooking up utility lines. AAFES will reimburse the reasonable cost of moving and installing concessionaire furnished equipment and fixtures. AAFES will not be liable for lost income, profit and/or salaries associated with relocating.

4. AAFES decided to relocate the specialty shop for two reasons. First, AAFES desired to use the space in the Concession Mall occupied by that shop for a “high-end gift shop,” which would better complement the other establishments in the Mall and, thereby, produce more revenue for AAFES from that space.

5. Secondly, AAFES believed that the space in Building 3850 was a better location for the Heidelberg specialty shop than the Concession Mall. The clientele for that shop consisted largely of military personnel and units desiring to purchase souvenirs and to arrange for engraved plaques and plates as gifts for departing service members. The space in Building 3850 was well-suited for that clientele inasmuch as it was located next to the military clothing store and near numerous military support operations, such as the commissary, a uniform and tailor shop, a military in-processing center, and a Red Cross office - all of which could be expected to generate increased customer traffic for the specialty shop. (Tr. 1/14-20)

6. Pohl agreed to the relocation when the same was proposed by AAFES (tr. 1/19-20, 2/51-52). It now contends, however, that the Concession Mall was a much better location for its business than the space assigned in Building 3850. The contrary facts, however, are that prior to the relocation, Pohl’s revenues from operation of the shop in the Concession Mall had failed to meet expectations. (Tr. 1/19-20, 2/3-26) They were lower than estimated and were the lowest sales volume in the Mall (tr. 1/20).

7. Pohl contends also that the space in Building 3850 was physically less suited to the operation of a specialty shop than the space in the Concession Mall. The record

contains the following relevant facts: (a) the space in Building 3850 was located in a basement whereas the space in the Concession Mall was at ground level; (b) the space in Building 3850 was windowed whereas the Concession Mall space was solid-walled (tr. 1/15); (c) the Building 3850 space was brightly lit (tr. 1/27; ex. G-18); (d) the space in Building 3850 was adequately ventilated, being equipped with machinery which was capable of adequate recirculation of the interior air (tr. 1/28, 58), whereas the space in the Concession Mall was not served by dedicated ventilation equipment (tr. 1/15). Considering the foregoing, we find that the space in Building 3850 was not less suitable for conducting the concession business than the space in the Concession Mall.

8. The revenue of the specialty shop declined, however, after the move to Building 3850 (tr. 1/33; ex. G-1). Coincident with the relocation, there began a pattern of noncompliance by Pohl with contract requirements relating to days and hours of operation. The contract (R4, tab 1) stated that the business days and hours for the shops would be the following: Monday - Wednesday, 1000-1800 hours; Thursday, 1000-1900 hours; Friday, Saturday, 1000-1800 hours; and Sunday 1200-1800 hours. After the move to Building 3850, the Heidelberg specialty shop opened late on at least seven different occasions (23 May 1997, 9 July 1997, 27 August 1997, 4 September 1997, 25 September 1997, and 26 September 1997) and failed to open at all on three other dates (7 July 1997, 8 July 1997, 24 September 1997). (R4, tabs 6, 7, 10; tr. 1/36-39)

9. On 27 August 1997, the contracting officer wrote to Pohl concerning several additional dates on which the shop had not been open and other dates on which it had been opened later than the prescribed hour. Pohl was directed to “have the shop open during scheduled operating hours” and was warned that failure to comply with the contract in this regard would “result in further contractual action.” (R4, tab 6) That direction was repeated by the contracting officer in a letter to Pohl dated 8 September 1997 (R4, tab 7) together with a warning that if there were further noncompliances with scheduled operating hours, the contract might be terminated for default.

10. Pohl’s response of 19 September 1997 (R4, tab 8) did not address the failure to maintain required business days and hours. It consisted, instead, of complaints concerning poor ventilation, the lack of sunlight in the new location, and the failure of AAFES to install a permanent sign informing potential customers of the shop’s new location. In addition, Pohl asked for a reduction of the concession fee on the ground that 25 percent was excessive for space in the basement.

11. Subsequently, Pohl failed to open the Heidelberg specialty shop, as required, on 24-26 September 1997. Citing these omissions, the contracting officer terminated the contract in its entirety for default, effective close of business 11 October 1997. The notice cited ¶ (a) of the TERMINATION (JUN 1994) clause of the contract which was as follows:

a. 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.

12. The termination letter stated, further, that “[i]n the event that termination for default is not effective, then this letter will constitute a 30-day notice of termination pursuant to Clause No. 8.b.” That provision is as follows:

This contract may be terminated in whole or in part by either party upon thirty (30) days notice (ninety (90) days for vending contracts) in writing to the other party.

13. Pohl closed the Heidelberg specialty shop on 15 October 1997 after receiving the termination notice. In a letter to the contracting officer, dated 16 October 1997 (R4, tab 11), Pohl objected to the inclusion of the Mannheim specialty shop in the termination action on the ground that no failures to maintain required business hours had occurred at that location. AAFES did not, and has not since, given any explanation or justification for terminating the Mannheim element of the contract. The record does not indicate any noncompliance with the contract with regard to operation of the Mannheim shop.

14. The contracting officer responded by letter, dated 4 November 1997, reminding Pohl that the contract had been terminated alternatively under ¶ (b) of the clause (finding 12). Pohl was told that it “should make arrangements to depart from the Mannheim facility by close of business on 15 November 1997, 30 days from the day you indicated receipt of the” notice of termination (R4, tab 13). In letters dated 15 and 23 December 1997, Pohl repeated its objection to the termination of the contract as it related to the Mannheim specialty shop and asserted unquantified compensation requests for the matters set forth below (R4, tabs 16, 18). The requests, coupled with specific amounts demanded, were reasserted as claims in Pohl’s letter to the contracting officer dated 15 January 1998 (R4, tab 19).

15. *Excess Merchandise Purchases* - Exhibit H (“Specifications”) to the contract states, in § 3, that Pohl “agrees to have a representative quantity of the authorized stock assortment available for immediate sale to satisfy the bulk of expected customer demand.” Clauses 25.a and 35 of the contract Special Provisions notified Pohl that “AAFES pursues an active sales promotion program as an integral part of total customer service” and that the AAFES marketing program “consists of numerous elements to enhance the sale of consumer products and services.”

16. The duties of Ms. Machovoe as AAFES service business manager (finding 2) included evaluation of concession operations and rendering assistance to concessionaires (tr. 1/11, 2/22). During the course of the contract, she noted that revenue from the Mannheim shop was lower than had been expected. Over a course of several visits,

she observed that the shop consistently appeared to be understocked with merchandise compared to the level of stock maintained by the prior operator of the concession (tr. 2/27). She discussed these observations with Pohl on several occasions and suggested that “an increase in merchandise would . . . assist in bringing up the sales” of the shop. In her view, however, Pohl never cured that deficiency. (Tr. 2/26-29)

17. Pohl, however, asserts that it purchased additional merchandise for the Heidelberg and Mannheim shops at the direction of Ms. Machovoe. It is claimed that the merchandise was disposed of at a substantial financial loss when the contract was terminated. Pohl alleges, also, that Ms. Machovoe issued that direction with knowledge that the concession would be terminated within a few days. Pohl seeks to recover the cost of that merchandise in the amount of DM 15,000. At the hearing, Ms. Machovoe denied issuing such a direction. She testified that “[w]hen I talked with Mr. Pohl about the merchandising it was always more in a recommendation type tone, as a way for us to build the business.” (Tr. 2/30) In testimony at the hearing, Pohl conceded that Ms. Machovoe’s statements were more in the nature of strong suggestions than the issuance of directions (tr. 2/65-69). On that record, we find that the purchase of the additional merchandise was occasioned by the suggestion, and not at the direction, of Ms. Machovoe. There is no evidence that the suggestion was made with knowledge of the imminent termination of the contract.

18. The contract does not contain the FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) or a similar clause providing for reimbursement of costs to the contractor in the event of termination of the contract.

19. *Losses On Sale of Shop Facilities* - Pohl seeks to recover DM 2,000 for losses incurred in selling shop equipment below fair market value in order to generate cash for payment of employee wages after the termination of the contract. Paragraph b of the EQUIPMENT, FURNITURE AND MOVABLE TRADE FIXTURES (DEC 1988) clause of the contract provides in part as follows:

b. Concessionaire Furnished: Concessionaire will provide and install all equipment, furniture and movable trade fixtures required by this contract . . . . Concessionaire investment in equipment, furniture and fixtures for this contract is a business risk of the concessionaire. It is expressly understood and agreed that neither AAFES nor any other agency or instrumentality of the United States is or will be liable to concessionaire for costs of concessionaire’s investing in equipment, furniture or movable trade fixtures in the event of termination of this contract without extension.

20. *Deduction for Customer Claim* - Subsequent to the termination, AAFES paid \$245.00 to a customer of the Heidelberg specialty shop for property (a necklace) left with Pohl for repairs but not returned. AAFES reimbursed itself for that payment by deducting the equivalent amount (DM 346) from amounts owed to Pohl. The CUSTOMER COMPLAINTS AND CLAIMS (DEC 1988) clause of the contract provides in part as follows:

Concessionaire will adhere to AAFES' policy of customer satisfaction guaranteed. All customer complaints and claims will be resolved at concessionaire's expense. Any disagreement that cannot be resolved between concessionaire and the customer will be decided by the contracting officer, whose decision will be final and not subject to the Disputes clause. If concessionaire fails to process complaints and claims timely, AAFES may, in addition to other rights and remedies available under this contract, settle customer complaints and claims and charge them to concessionaire's account. . . .

21. The customer complained to AAFES by letter concerning Pohl's loss of the necklace left for repairs. After sending a copy of the letter to Pohl, AAFES made at least three unsuccessful attempts to secure a response. On the fourth inquiry, Pohl reported to AAFES that the item may have been returned to the customer, for which no record existed, or given by mistake to another person. The record does not indicate that Pohl took any steps to resolve the matter directly with the customer nor did it comment on the customer's valuation of the lost item in the range of \$245-300. AAFES decided to settle the matter by reimbursing the customer for the loss in the amount of \$245. (Tr. 2/89-90) Pohl contends that the payment was excessive. Without any support or substantiation, it asserts that based on the DM 20 price for the repairs, the value of the necklace could not have been more than DM 100 (tr. 2/70).

22. *Water Damage to Shelving System* - Sometime after Pohl's relocation to Building 3850, leakage from the building plumbing system, owned and maintained by AAFES, caused water to seep into Pohl's premises, causing damage to the lower portions of shelving units owned and installed by Pohl. The damage was discovered while Pohl was preparing to vacate Building 3850 after the termination. AAFES was first notified of the leakage and consequent damage in Pohl's letter of 15 December 1997, later quantified in the amount of DM 395. (R4, tabs 16, 19) No evidence was adduced that Pohl knew or reasonably should have known of that condition or the ensuing damage prior to that time. The contracting officer did not dispute the assertion that the damage occurred in the manner claimed but denied the claim on the basis that the liability of AAFES for damage to Pohl's property was limited to the circumstances set forth in ¶ c. of the ACTIVITY (MAR 1990) clause of the contract which did not occur here. The provisions relied upon by AAFES are as follows:

If premises furnished by or through AAFES are destroyed either in whole or in substantial part, so as to significantly hinder or prevent normal operations by concessionaire, by acts of God (such as, but not limited to, fire, flood, hurricane, unusually severe weather conditions) or unusual occurrence (unless solely and directly caused by AAFES negligence), AAFES will not be responsible to concessionaire for repair/restoration of the premises, lost income, sales, or lost profits, damage to concessionaire property, employee salaries, or any consequential costs incurred, or be obligated to relocate concessionaire. Concessionaire should consider obtaining business insurance to cover risks to its property and concession activity.

23. The FACILITIES/MAINTENANCE (MAR 1990) clause of the contract states, in ¶ a., that:

Concessionaire investment for buildings and installed property or fixtures will not be required. AAFES will maintain AAFES furnished premises including ordinary running repairs and interior decorating. Concessionaire will be liable for damage to the premises resulting from acts and omissions of concessionaire, concessionaire's employees, or agents. AAFES may inspect the premises at any time.

24. By letter of 3 February 1998 (R4, tab 20), the contracting officer issued a written decision pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, entirely denying the claims set forth in Pohl's letter of 15 January 1998 (R4, tab 19). Pohl filed a timely appeal from that decision.\*

## DECISION

### Termination of the Contract

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\* In its letter of 26 March 1998, giving notice of appeal from that decision (R4, tab 29), Pohl sought compensation for additional items which were stated to have "arise[n] only after final decision." At the hearing, the presiding Board member declined to receive testimony on these additional items on the basis that the appeal was confined to the claims involved in this appeal, namely those set forth in its letter of 15 January 1998 which were addressed in the contracting officer's decision of 3 February 1998 (tr. 2/73; findings 14, 24).

The contract was terminated for default because of Pohl's failure to comply with the requirements of the contract concerning the days and hours during which the Heidelberg shop was to be open for business. Pohl contended that said failure was excusable because the space in Building 3850 was unsuitable for the conduct of the specialty shop business.

The specialty shop in Heidelberg was relocated from the Concession Mall to a space in the basement of Building 3850 (finding 3) pursuant to the ACTIVITY (MAR 1990) clause of the contract which permitted the contracting officer to relocate the specialty shops "to better meet AAFES needs or those of the installation, as determined by the contracting officer" (finding 3). Appellant has not established that the space in Building 3850 was less suitable for conducting the specialty shop business than the space in the Concession Mall furnished under the contract as awarded (finding 7).

In any event, Pohl's dissatisfaction with the space in Building 3850 was not a proper basis for breach of the contract. The course of action open to Pohl was to seek remediation of the situation from the contracting officer or, in the alternative, to exercise its right to terminate the contract on 30 days prior notice pursuant to clause 8b (finding 12). Until the contract was terminated, however, Pohl was obligated to fully comply with its terms and conditions. Its failure to keep the shop open on the days, and during the hours, specified in the contract was a material breach thereof, justifying immediate termination thereof.

There was no failure of compliance with the contract in the case of the Mannheim shop (finding 13). On that basis, Pohl asserts that the default termination of the entire contract, including the Mannheim shop, was improper. Even if there were merit to Pohl's position on the basis that the Mannheim shop constituted a severable part of the contract, *Overhead Electric Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,471, that would not invalidate the termination of that portion of the contract.

The contract was terminated on the alternative basis of clause 8b. No explanation or justification was required for termination on that basis. In *Christine Turner*, ASBCA No. 26900, 84-1 BCA ¶ 17,138, the appellant contended that the termination of a concession contract by AAFES was invalid for several reasons including the fact that "the contracting officer made virtually no investigation into the facts or the law regarding the termination." We did not agree that this omission nullified the termination. We held, instead, that clause 8b - the so-called "no fault" termination clause - "gives either party the unfettered right to terminate the contract upon 30 days' notice to the other party and the motive of the party exercising his right is immaterial." *Id.* at 85,381 The 30 day notice required under clause 8b was given in the contracting officer's termination notice.

#### Pohl's Monetary Claims

*Excess Merchandise Purchases* - Pohl seeks to recover the costs of certain merchandise purchased during the contract for the Heidelberg and Mannheim shops

allegedly at the direction of Ms. Machovoe, the AAFES service business manager. We have found as fact, however, that the purchase of the additional merchandise was occasioned by the suggestion, and not the direction, of Ms. Machovoe (finding 17). As such, the purchase represented the exercise of business judgment on the part of Pohl, no different than any other decision that it would have made in the normal course concerning stock in trade. The contract did not require AAFES to make any payment to Pohl as a condition of terminating the contract pursuant to clause 8b. Since the FAR was not applicable to the AAFES contract, there was no clause in the contract akin to FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) obligating AAFES to reimbursement of eligible costs in such an eventuality. In these circumstances, the costs of all merchandise owned by Pohl, on hand at the time of termination, including the items purchased at the suggestion of Ms. Machovoe, were solely for the account of Pohl and not recoverable from AAFES. On that basis, the denial of the claim was proper.

*Losses On Sale of Shop Facilities* - The express terms of the EQUIPMENT, FURNITURE AND MOVABLE TRADE FIXTURES (DEC 1988) clause of the contract preclude Pohl's recovery for loss of value of equipment sold to meet payroll costs. Para. b of the clause states that AAFES would not be liable to Pohl for "costs of [Pohl's] investing in equipment, furniture or movable trade fixtures in the event of termination of this contract without extension." (Finding 19)

*Deduction for Customer Claim* - The CUSTOMER COMPLAINTS AND CLAIMS (DEC 1988) clause of the contract stated that all customer complaints and claims were to be resolved "at [Pohl's] expense." Furthermore, if Pohl failed to process these matters in a timely manner, AAFES was entitled to settle the same and charge the cost to Pohl's account. (Finding 20) Those were the circumstances in which AAFES settled a customer's claim for lost property and deducted the amount paid from moneys that were owed to Pohl. Pohl did not fulfill its contractual obligation to settle the matter directly with the customer. (Findings 20, 21) Its assertion that the payment made by AAFES was excessive is wholly unsubstantiated (finding 21). On that record, there is no merit to the claim. Accordingly, the same was properly denied.

*Water Damage to Shelving System* - In the course of preparing to vacate Building 3850 after the termination, Pohl discovered damage to its shelving units caused by water leaking from the building plumbing system, owned and maintained by AAFES. On those facts, Pohl seeks compensation for the damage to its property (finding 22).

Under the FACILITIES/MAINTENANCE (MAR 1990) clause of the contract, AAFES was obligated to "maintain AAFES furnished premises including ordinary running repairs and interior decorating" (finding 23). That obligation was impliedly conditioned upon Pohl giving reasonable notice of conditions requiring maintenance or repair. 6 Williston on Contracts § 887BB at 523-27 (3rd ed. 1962). Pohl's failure to notify the Government of the water leakage until submission of its claim was not a breach of that obligation inasmuch

as there is no evidence that it knew, or reasonably should have known, of the water leakage prior to the discovery of the damage (finding 22). AAFES' reliance on ¶ c. of the ACTIVITY (MAR 1990) clause of the contract (finding 22) is misplaced. Under its plain meaning, that clause does not serve to relieve the Government from a breach of its above obligation under the FACILITIES/MAINTENANCE (MAR 1990) clause of the contract. Accordingly, Pohl is entitled to recover on its claim for damage to its shelving units.

CONCLUSION

The appeal is sustained as to the claim for water damage to Pohl's shelving system and this matter is referred back to the parties for negotiation of the amount payable to Pohl plus interest pursuant to § 12 of the CDA from the date of receipt of Pohl's claim dated 15 January 1998 (finding 14). In all other respects, the appeal is denied.

Dated: 28 February 2001

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PENIEL MOED  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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EUNICE W. THOMAS  
Administrative Judge  
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. 51523, Appeal of Harry Pohl KG, rendered in conformance with the Board's Charter.

Dated:

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