

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
LA Limited,)
LA Hizmet Isletmeleri) ASBCA No. 52179
)
Under Contract No. F61354-97-H-0001)

APPEARANCE FOR THE APPELLANT: Mr. M. Levent Adali
Director

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Richard L. Hanson, Esq.
Deputy Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD

This dispute involves a concessionaire contract to provide dining services. The appeal is taken from a contracting officer's final decision denying appellant's claims for compensation for losses suffered in performance of the contract and as a result of the termination of the contract. The Disputes clause in the contract is the basis of our jurisdiction. *LA Limited, LA Hizmet Isletmeleri*, ASBCA No. 52179, 00-1 BCA ¶ 30,865.

A hearing was held in Izmir, Turkey. The matters to be addressed at the hearing were to be restricted to those remaining in appellant's complaint after the Board's decision dismissing two of appellant's claims as the Government requested (tr. 9-10). *See LA Limited, supra*. Our decision is limited to those matters. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 18 December 1996, appellant LA Limited, LA Hizmet Isletmeleri and a Non-Appropriated Fund Instrumentality (NAFI) that is not the Army and Air Force Exchange Service entered into Contract No. F61354-97-H-0001, a concessionaire contract for dining services at the United States Air Force Izmir Air Station in Izmir, Turkey. The contract was to begin on 1 January 1997 and continue until 31 December 1997, with one-year options that could extend the contract to a performance period not to exceed five years. (R4, tab 1)

2. Under a concessionaire contract, the contractor pays fees to the Government for operation of its business on Government premises. The fees are usually based on a percentage of monthly gross sales. Competition for award of a concessionaire contract

is based on the percentage fee offered by bidders. The fees received by NAFI from appellant were used to improve the quality of life for service personnel and their dependents through support of morale, welfare, and recreation activities. (Tr. 59, 130, 159, 165)

3. Proposals for the contract were submitted on 31 October 1996. Mr. Robert E. Swisher, II, the initial contracting officer, conducted negotiations with offerors, all of whom were disqualified except for appellant and the incumbent contractor that the Government wanted to replace. Appellant was not an established business prior to award. Mr. Adali was without experience managing food services, but he had 12 years of work experience as a restaurant cashier and hotel desk clerk at the Izmir Air Station. Ms. Betty Westcott was the Facility Area Chief in the operational organization of NAFI known as "Services." She had management responsibility for overseeing contract performance, quality assurance evaluation, and liaison with the contracting officer. Mr. Swisher continued as contracting officer for 21 months of the two-year term of appellant's contract. (Tr. 20, 125-26, 158, 204, 228-29, 233)

4. The contract obligated appellant to provide dining services to U.S. military personnel stationed in Izmir, their dependents, and other authorized patrons at four locations, which included three snack bars and one restaurant (R4, tab 1, Statement of Work at 6; tr. 48). The contractor was responsible for management of the food service operations and required to provide the foodstuffs acquired for resale to customers. The Statement of Work (SOW) in the contract described the scope of work as follows:

The Contractor shall provide all personnel, equipment, tools, materials, supervision, and other items and services necessary to perform Food Services as defined in this Statement of Work (SOW), except as specified in this SOW, Paragraph 3, Government Furnished Property and Services, at Izmir Air Station, Turkey. The Contractor shall perform to the standards in this contract.

(R4, tab 1, SOW at 1)

5. The SOW included the hours of operation for the food services facilities and specified that the facilities would be open on holidays (*id.* at 6). It further required the contractor to perform during crisis unless otherwise directed by the contracting officer. The SOW included the following provision:

1.6.3. Performance of Services During Crisis Declared by the National Command Authority or Overseas Combatant Commander. All services to be performed under the contract have been determined to be essential for performance during

crisis and, according to Department of Defense Instruction (DoDI) 3020.37 and Air Force Implementation thereof, it is determined that the Contractor will be required to perform during crisis as directed by the contracting officer.

(*Id.* at 7)

6. The contractor was to establish and maintain menus and prices for each dining facility, subject to NAFI approval (*id.* at 14).

7. The contractor was required to keep the facilities clean, orderly, attractive, secure and in a safe and sanitary condition to the satisfaction of NAFI (R4, tab 1, Schedule at 2). The contractor was required to provide products and services of the quality satisfactory to NAFI (*id.*). The contractor was required to furnish at its expense all “trade fixtures, tools of the trade, and supplies required for performance” of the contract (R4, tab 1, Special Provisions at 2).

8. The contract specified that the Government would provide facilities, equipment, materials, and services that were listed. Listed facilities were the food service locations, storage areas, employee break areas, and office space as specifically described. The Government-furnished equipment (GFE) was what was located in the listed facilities and what would be determined by a joint inventory after contract award. (R4, tab 1, SOW at 10) The Government agreed to provide all “Government-Furnished materials necessary to perform” the contract, except the cost of goods items and office supplies (*id.* at 11). Ms. Westcott interpreted the contract as “very generous” in that the Government provided the facility, all of the equipment, and other items (tr. 159). Cost of goods items were defined as follows:

2.3.4. Cost of Goods Items. Any and all foodstuffs acquired by the Contractor to provide the food services required by this contract. And, any and all consumable paper or plastic products incidental to serving food; e.g., paper plates and napkins or plastic straws and takeout containers.

(R4, tab 1, SOW at 9) Except for fresh produce that could be acquired from acceptable sources of supply in the local Turkish economy, the contractor was required to acquire all cost of goods items from NAFI-approved sources of supply (*id.* at 13). Office supplies were defined as consumable business materials, such as pens and paper, and computer software not specifically provided with “Government-furnished computers” (*id.* at 9). The Government agreed to provide the computer software entitled “Food Track Program” (*id.* at 12). A computer for performance of the contract was not otherwise mentioned in the contract.

9. The Government was required to provide services that included utilities and custodial services. The contract specified that the Government would clean the windows every three months, shampoo the carpet once each month, clean the restrooms twice each day during normal duty hours, provide refuse collection, provide insect and rodent control services, provide maintenance of facilities except for daily cleaning, and provide maintenance of equipment except routine cleaning. (*Id.* at 12)

10. The contract required the contractor to pay the Government a sum equal to 38 percent of gross sales. Payment of these concessionaire fees due to NAFI was to be made monthly as directed by the contracting officer. The same fees were payable for special event services. (R4, tab 1, Schedule at 1, SOW at 7)

11. The contract included procedures for financial accountability. Pursuant to the SOW in the contract, the contractor was required to pay the fees due to the NAFI within ten calendar days after each monthly sales period in which fees were accrued and provide a concessionaire settlement report to the NAFI at the same time. (R4, tab 1, SOW at 14) Special Provision 12, "Concessionaire Settlement Report," described a monthly concessionaire settlement report signed by the contractor showing the gross sales and percentage due to NAFI. This provision included the following relevant terms:

At the conclusion of the Sales Period the Concessionaire shall prepare a Concessionaire Settlement Report signed by the Concessionaire showing the gross sales for the period and the percent due to the NAFI. . . . The Contractor shall deposit all daily Gross Receipts to the NAFI. For the purposes of this contract, Gross Receipts shall be all currency, checks, and credit card funds received from all sales under this contract. On or before the (10th) calendar day after conclusion of the Sale [sic] Period, the NAFI will pay the contractor all Net Receipts for the Sales Period that ended no more than [sic] ten (10) days earlier. For the purposes of this contract, Net Receipts shall be the amount remaining after the fee due to the NAFI and Cost of Goods for the Sales Period are subtracted from the corresponding Gross Sales. The NAFI will pay the Net Receipts with a bank check denominated in American Dollars.

(R4, tab 1, Special Provisions at 3) The parties' implementation of these provisions involved NAFI collection of receipts and accounting for all transactions and NAFI payments to the contractor (tr. 82-84, 215-16).

12. The General Provisions in the contract included the following standard payments clause:

13. PAYMENTS (1989 SEP) Unless otherwise specified, payment will be made on partial deliveries accepted by the NAFI. Payments and penalties for late payments are subject to the requirements established by the Prompt Payment Act, as amended, and as implemented for NAFIs. If the NAFI makes payment but such payment fails to include a prompt payment penalty due the Contractor within ten days from when the contract payment is made, *penalty amounts will not be paid unless the Contractor makes a written request within forty days after the date of payment.*

(R4, tab 1, General Provisions at 3; emphasis added.)

13. The contractor was required to comply with applicable health and sanitation regulations. The contractor had liability for all Federal, state, host country, and local taxes, including sales taxes. (R4, tab 1, Special Provisions at 4)

14. The contract incorporated by reference standard clauses FAR 52.243-1 CHANGES - FIXED-PRICE and FAR 52.243-7001 PRICING OF ADJUSTMENTS¹ (R4, tab 1, General Provisions at 4)

15. On 20 December 1996, a pre-performance meeting was held. According to the memorandum for record of the meeting, Mr. James Kutrubis, the NAFI chief financial officer, stated the following with reference to sanitation:

Mr. Kutrubis mentioned sanitation, and said that scrubbing and cleaning are very important and that sustaining supervision while doing all these is strongly suggested and required.

(R4, tab 8 at 1)

16. Appellant employed approximately 30 individuals to provide services under the contract (R4, tab 7 at 19; ex. A-1 at 21; tr. 202). The Government provided transportation for appellant to acquire foodstuffs and supplies from the local commissary or other Government-approved sources (tr. 50, 74, 166, 206).

17. There had been an inspection by the host government before award that showed that the facilities were in satisfactory sanitary condition according to the applicable environmental regulations, but appellant found the facilities insufficiently sanitary at the beginning of the contract. Appellant decided to close to do what Mr. Adali called “deep serious cleaning” (R4, tab 38; tr. 21). The Government did not direct appellant to close any facility. The cleaning was done on certain Sundays at the beginning of the contract.

Appellant used high pressure steam cleaning equipment to clean in the kitchen areas of the restaurant and closed the restaurant for business. Appellant expected help and encouragement from the Government in cleaning the facilities for the Air Force community. We find that appellant performed this cleaning, causing a loss of sales and net receipts, but are not persuaded that the closures were for all the facilities or for all the alleged 12 days. (R4, tab 40; tr. 21-22, 37, 46-47, 165)

18. Appellant purchased the food inventory remaining under the prior contract from the Government to begin contract performance. According to Ms. Westcott, appellant was required to make the purchase pursuant to “a prearranged agreement” (tr. 164), and according to Mr. Kutrubis, the purchase was “one of the conditions of the contract” (tr. 211). During contract negotiations appellant understood that this cost of goods would be deducted from its sales revenue over a three-month period. The total cost of the inventory was deducted from the sales revenue in appellant’s first month of operation. The cost of the inventory required to be purchased plus the fee of 38 percent of gross sales were debits that exceeded the gross receipts collected by NAFI. There were no net receipts for payment by NAFI to appellant, and consequently appellant had no income in January 1997, the first month of the contract, but paid its employee salaries in an alleged amount of \$9,000 as Mr. Adali’s out-of-pocket expenses. Mr. Kutrubis knew that appellant did not have working capital, but did not pro-rate the cost of goods over the first three months as agreed with appellant because he found no contract authority or obligation to spread the costs over three months. He was informed that non-appropriated funds could not be used to make what was deemed a loan to the contractor. (R4, tab 40; tr. 21, 35, 52, 207, 211-14)

19. Appellant purchased a computer and printer and internet service for use in contract performance. Mr. Adali did not expect to have to make these purchases at the time of bidding, but found it was required after award. The previous contractors did not use computers in providing food services for NAFI. Mr. Adali used the equipment for e-mail communication with the Government representatives. (Tr. 21, 52-53, 72-73)

20. Appellant used more consumable paper and plastic products than anticipated would be necessary for its contract performance because of problems with the dishwasher which was frequently not working. In November or December 1997, the Government purchased a new replacement dishwasher because of the unsatisfactory operation. Within a month problems with the new dishwasher, which was a Turkish model, were resolved. Government witnesses stated their belief that appellant could have sanitized the dishes by hand when the dishwasher was not working, but this alternative was not a realistic option discussed at the time the problems arose. The Government furnished appellant some disposable paper products when NAFI could receive products free from Government supply. We find that the disposable paper products appellant received without charge or reimbursement were not all the products appellant was required to acquire for contract performance. We are not persuaded by appellant’s evidence that the Government failed to

supply enough tablecloths and linens requiring appellant to use paper products. (Tr. 23-24, 41-43, 71, 160-63, 169-73, 191-92, 210)

21. In August 1997, NAFI Services personnel were not satisfied with appellant's performance and did not request that the first option be exercised (R4, tab 36). Nevertheless, the contracting officer exercised the option in the contract to extend contract performance for a second year. Bilateral Modification No. P00002, dated 19 December 1997, extended the contract through 31 December 1998. (R4, tab 3)

22. In November 1997, appellant's employees made allegations of nonpayment of taxes by appellant to the host government that the Government investigated. NAFI found that appellant had paid the taxes that were due. (R4, tab 13; tr. 184-85) Other allegations made by Services personnel that appellant was not paying its employees the amounts Mr. Adali represented were being paid were investigated by the contracting officer and also found to have no basis in fact (tr. 99-100).

23. NAFI performed the accounting for appellant's sales of food services on a monthly basis. NAFI collected all cash received and receipts at the end of each of three shifts and maintained both a daily control log and ledger balance spreadsheets (R4, tab 42). NAFI made payments to appellant of net receipts after deduction of the cost of goods and the concessionaire fees. On occasion payments were later than the 10th day of the month following the time period that was the previous monthly sales period. After no payment was received in the first month of the contract, prompt payment was important to appellant. Appellant could not receive advance payments upon request because they were not authorized in the contract. Appellant frequently complained to the contracting officer about the delays. During the contract there were difficulties processing payment due to changes in the NAFI accounting personnel, the shift of financial duties from bases in Turkey to Germany, a change in regulation that did not allow a foreign national to pick up cash, and subsequent difficulties appellant had cashing dollar-denominated checks at local banks. Not only the incumbent contracting officer, but other Government witnesses acknowledged that appellant received late payments (R4, tab 42; tr. 85, 88-92, 106, 203). Upon review of the payment documentation,² however, we have found only three payments due on the 10th day of the month that were late:

September 1997	\$2,226.17	4 days overdue
November 1998	1,597.49	8 days overdue
December 1998	6,410.36	5 days overdue

(R4, tab 40; ex. A-24)³ According to Ms. Westcott, Government payments were late because appellant was "uncooperative." In one instance in April 1998, the Government requested assistance from appellant in reconciling receipts and did not receive from appellant revised spreadsheets that showed higher gross sales than the Government had been

able to document. We find no evidence that appellant was in fact uncooperative in providing information to NAFI that NAFI needed to process payments. As a result of late payments, appellant borrowed money to meet appellant's financial obligations under the contract. In addition, appellant's director, Mr. Adali, spent his own money and sold his house at less than fair market value to raise cash to meet appellant's contractual obligations. (Tr. 22, 43, 58, 85, 94, 180, 203, 214-16)

24. Modification No. P00001, dated 1 August 1997, changed the method of payments to the contractor. Provision for a monthly draw in the previous contract was left out of appellant's contract. After a more than 100 percent increase in the minimum wage appellant was required to pay its employees, the Government wanted to ensure enough cash flow on a timely basis for appellant to meet its payroll. The modification provided appellant payment of 20 percent of the accrued gross sales reported for the first two weeks of the month. The modification did not specify a payment date other than to provide that NAFI would "ordinarily" pay on the same day that appellant submitted its financial status report due on the 15th day of the month. (R4, tab 2; tr. 96-97, 121, 186-87)

25. Appellant provided food and services for special events pursuant to task orders that were issued by NAFI. Special events included private parties, birthday cake orders, and "happy hours" for service personnel. The cost of special events was set in NAFI standard brochures, except for out of the ordinary items that were referred to appellant for pricing. Appellant complained that the NAFI prices for special events were too low. Prices for happy hours were discounted. Appellant knew the 38 percent fees applied to special events, but did not know of the requirement to use Government-set prices for special events. The amount of appellant's fees was computed on the gross sales. Appellant received less net receipts than if appellant's fixed menu prices had been used for special events. (Tr. 24, 45-46, 50, 59-60, 173-78)

26. On 23 July 1998, labor union members at the base began a strike which lasted for 69 days until 29 September 1998. Appellant's employees were not union members. In anticipation of the strike, appellant purchased additional food and supplies. During the strike no food could be acquired from the commissary or brought into the buildings for the restaurant facilities. Appellant was able to provide normal food service with its personnel until approximately 17 August 1998, but after that date appellant's income was "negligible" (R4, tab 6 at 4). Appellant did not know the duration of the strike and did not lay off any employees. Appellant did not attempt to confront picketers with any food deliveries after the strike began, but acted in accordance with Government policy to honor the picket line. The strike was unexpected and had an adverse effect on appellant's ability to pay salaries to its employees and meet its other operating expenses. During the strike appellant did not continue to staff the facilities fully, but kept all its employees on the payroll. Mr. Adali believed that the contracting officer should have directed appellant to close the facilities and avoid the expenses. Mr. Swisher could have directed appellant to close the facilities because of the strike, but did not do so. In retrospect, he believed he should have suspended

appellant's performance by mid-August 1998. He explained that he did not do so because his attention was diverted to other projects, he thought the strike would be of short duration, and appellant's employees were providing essential health benefits in rebagging piled up garbage that could not be removed from the buildings. (R4, tab 6 at 9, 13; tr. 25, 50-51, 58, 74-79, 104, 148, 182-83, 238-39)

27. On 10 August 1998, appellant sent a memorandum to the contracting officer stating its losses due to the strike and that it was due to pay salaries on 15 August 1998. By letter dated 20 August 1998, appellant requested return of the fees received by NAFI based on the monthly sales in July 1998. Appellant wanted the funds for payment of past due salaries and taxes, ordering of food and other supplies, and a reserve in case the strike was not settled by 1 September 1998. Appellant did not request "any personal benefit" from return of the fees. (R4, tab 6 at 13-14, 20)

28. On 16 September 1998, Bilateral Modification No. P00005 was executed with an effective date of 1 July 1998. The stated purpose of the modification was to waive a portion of the fee payable to NAFI for July to provide for past due salaries. The modification changed 38 percent of the gross sales for July to a sum equal to 38 percent less \$12,308, which was the amount payable for appellant's salaries, taxes, and insurance for the period 1 August 1998 to 15 September 1998. The contracting officer wanted to ensure payment of wages to appellant's employees who had not been paid while the strikers were receiving payments from strike funds and also wanted to avoid potential Government liability. The modification was intended to help the contractor employees, not the contractor. The modification stated as consideration that the strike had prevented the Government from meeting its contractual obligation to deliver supplies to the contractor. (R4, tab 6; tr. 98-99) The modification contained the following release language:

V. Release of Claims. In consideration of this modification, agreed herein as complete and equitable adjustment for all cost associated with the adjustment reflected herein; the contractor hereby releases the Government from any and all further liability under this or any other contract with the U.S. Government for further adjustment, either directly or indirectly by reason of the actions taken pursuant to this modification.

(R4, tab 6 at 2) Mr. Swisher did not want the Government directly handing money to contractor employees and made arrangements with appellant for Mr. Adali to pay appellant's employees and have them sign receipts while he and Mr. Kutrubis witnessed the transfer of funds (tr. 236-37).

29. In mid-October 1998, Mr. Swisher was relieved of his responsibilities as contracting officer for appellant's contract. Mr. Swisher explained that the reasons for the change involved the overly demanding workload he had after this contract was added to his

primary responsibility for the larger base maintenance contract. Extensive meetings were required to resolve issues with appellant and Services personnel. In addition, he had difficulty getting along with the Services personnel and had received information that they were critical of him for what they perceived to be overly protective measures taken on behalf of Mr. Adali. Services personnel were not happy with appellant's performance at this time. Mr. Swisher's supervisor directed him to cease all contact with Mr. Adali. (Tr. 73-74, 108-11)

30. By letter dated 21 October 1998, the Government notified appellant that it did not intend to extend the contract for another year (R4, tab 24; tr. 147).

31. On 12 November 1998, Modification No. P00006 was executed. The stated purpose of the modification was to make payment of wages to appellant's employees for the month of October 1998. The modification changed 38 percent of gross sales that had been retained by NAFI in the prior month to a sum equal to 38 percent less \$9,230, the amount payable for appellant's salaries, taxes and insurance for the period 1 October 1998 to 31 October 1998. NAFI did not trust Mr. Adali to pay the employees and continue the contract. NAFI did not transfer the funds to appellant to ensure that the employees were paid. Mr. Adali believed that the contract provided for him to have received the payment and objected to the requirement for payment to the employees and getting receipts in the presence of the contracting officer. Appellant did not receive the amounts payable for taxes and insurance because he did not make the payments to the Government and could not provide receipts to NAFI. The modification contained the same release of claims language that was in Modification No. P00005. (R4, tab 7; tr. 54-58, 133-35, 140)

32. During the performance of the contract, Mr. Adali was interested in maintaining good relations with the Government over what he anticipated would be five years, and for that reason did not submit any claims (tr. 39).

33. On 22 December 1998, when Mr. Adali knew the contract would not be extended, appellant submitted a demand in the amount of \$500,000 for its financial losses after termination of the contract. Appellant requested an explanation of why the option was not exercised when the services continued to be required. (R4, tab 33) The contracting officer acknowledged receipt of appellant's letter and advised appellant that its demand was required to be certified before it would be a claim for decision by the contracting officer (R4, tab 34).

34. The contract expired at the end of its term on 31 December 1998 (tr. 40, 140).

35. Appellant resubmitted its previous demand letter as a properly certified claim, which was received by Master Sergeant (MSGt) Dennis K. Smith, the contracting officer, on 3 February 1999 (R4, tab 35). By letter dated 15 March 1999, MSGt Smith requested that appellant submit data in support of its claim by 25 March 1999 (R4, tab 37). Appellant

stated nine claims for specific amounts in a letter, dated 25 March 1999, to the contracting office. Appellant presented the seven claims that are at issue here as follows:

1. I had to buy a computer and a printer for this contract only, and the cost was \$ 2,500.
2. I had pay the salaries and insurances out of my pocket for the very 1st month of this contract as I could not trace any payment from your selves for the month of January 97, and the cost was \$ 9000.
3. I had to close down the facilities after I get the confirmations from necessary departments for doing the deep serious cleaning's to operating areas as the kitchens were very dirty, for this I have closed the facilities for 12 days in total. This has cost me around \$ 20000.
4. As I was never been paid on time and I had to pay interests. This has cost me \$ 120000.
5. I have been forced to pay for not resale stuff which is used (paper plates, plastic forks, napkins etc.) during my contract which has cost me \$ 25000.
6. I have been charged by %38 for the free happy hours provided by club to his members during my contract, which has cost me around \$ 38000.
7. During the strike occurred between July and October I have lost around \$ 46000. [sic]

(R4, tab 38) On 30 March 1999, MSgt Smith requested supporting documentation that would prove appellant incurred the particular costs claimed by 9 April 1999. With respect to the amount appellant stated was lost during the strike, the contracting officer requested an explanation of how the Government was responsible for the amount. The contracting officer's letter did not state that any release was a bar to the claim. (R4, tabs 39, 41)

36. On 19 April 1999, the contracting officer issued a final decision denying appellant's claims. The decision did not refer to release of claims. (R4, tab 42) Appellant filed this timely appeal.

37. During discovery prior to the hearing, Mr. Adali requested that he be allowed to inspect Government documents with Mr. Swisher, who had been the contracting officer and

was familiar with the contract files, in order to verify that the files were complete. Government counsel declined this request apparently because MSgt Smith, the contracting officer who issued the final decision, was responsible for the contract files. The Government offered to make Mr. Swisher available for an interview or deposition that would take place in the presence of Government counsel. Mr. Adali did not interview Mr. Swisher prior to obtaining his testimony at the hearing. Mr. Swisher stayed away from the contractor as he had been instructed by his superiors (tr. 111, 242). Mr. Swisher had no access to the Rule 4 file and was not involved in the Government's preparation of its defense of appellant's claims, except for meeting with Government counsel days prior to the hearing (tr. 72, 103-04).

38. Government counsel objected repeatedly to the Board in pre-hearing submissions and at the hearing that Mr. Adali had not provided a summary of anticipated testimony of Mr. Swisher (tr. 14-15, 223-24). The Government objected that Mr. Swisher did not alert his successor contracting officer and Government counsel of "the areas where he wished to help the [a]ppellant" (tr. 224). The Government found it "highly unusual" and "disturbingly irregular" for the contracting officer to be "seeking to assist the contractor in prosecuting a claim against the United States" (tr. 224, 243). Mr. Swisher continued in the employ of the Government at the Izmir Air Station and was available to Government counsel for whatever information was needed prior to the hearing, but was, in lieu of being asked to cooperate with the Government for the purposes of developing a full record for the Board's proceeding, treated as an adverse, hostile witness. The Board considers the Government's view that it was prejudiced in its preparation for the hearing without merit.

39. The Board finds that there was distrust and animosity between Mr. Swisher and the Government personnel in Services, represented by Ms. Westcott, Mr. Kutrubis, and Major Mario J. Troncoso who testified at the hearing. It is the view of the presiding judge that although Mr. Swisher had been interested in appellant succeeding in its performance of the contract and was eager to provide information to the Board, there was no bias or favoritism that detracted from his credibility as a witness.

POSITIONS OF THE PARTIES

Appellant claims that the Government is responsible for the financial losses it suffered in performance of this concessionaire contract. Appellant presented its position at a two-day hearing and submitted its brief in the form of a short letter promptly after the hearing concluded. In its initial brief appellant highlighted the following point Mr. Adali had also made during the hearing:

Wondering why the Air Force side was not accepting or accepted hardly to bring Mr. Swisher as a witness to the case when he was an contracting officer for 20 months in this 24 months contract [sic].

(app. br.) Mr. Adali testified, and called Mr. Swisher, the initial contracting officer, as a witness. In its reply brief, appellant challenged the Government's proposed findings of fact and stated Mr. Adali's belief about the Air Force conduct as follows:

Just like to tell that can not beilve Air Force attetude in this case did not know that they hire contractors to squeeze them like a lemon and throw it away [sic].

(App. reply br. at 2) Appellant repeated its demand only for its losses.

The Government relied on the testimony of MSgt Smith, the successor contracting officer, and the terms of the contract for its position that there is no contractual basis for any of appellant's claims. According to the Government, appellant was required to incur the costs it has claimed and pay the Government the specified fees of 38 percent of its monthly gross sales.

DECISION

Claim 1 - Computer Equipment

Appellant's first claim is for the cost of a computer, printer, and internet service for contract performance. The contract required appellant to provide all equipment necessary to perform food services in accordance with the SOW, except as specified in the Government-furnished property and materials clauses. The contract required the Government to provide Government-furnished materials necessary to perform the contract with an exception for cost of goods items and office supplies. The contract defined office supplies as consumable materials and referred specifically to "Government-furnished computers." This provision further stated that appellant was required to supply computer software other than the food track program.

Appellant did not volunteer to provide computer services, but purchased equipment solely as a result of a Government-imposed requirement. Appellant did not choose to use a computer to conduct its business, but acquired the equipment for purposes of contract performance. The requirement is not contained in the terms of the contract. The Government changed the contract work when it required appellant to purchase a computer which entitles appellant to an equitable adjustment in the price of the contract under the Changes clause. *See B. R. Services, Inc.*, ASBCA Nos. 47673 *et al.*, 99-2 BCA ¶ 30,397 at 150,271-72. We consider internet service to be within the definition of software that was appellant's responsibility under the contract. Appellant is entitled to recovery for the costs of the computer and printer, but the Government is not liable for the fees appellant paid for internet service.

Claim 2 - Purchase of Inventory

Appellant has claimed losses of \$9,000 in the first month of the contract due to the lack of income from its gross sales in that month. During contract negotiations purchase of the prior contractor's inventory was discussed, and appellant understood that the cost would be pro-rated over three months of appellant's gross sales. After contract performance began, appellant learned that its total cost of goods for the inventory would be deducted from its gross sales in the first month. The Government submits that any other alternative would be giving appellant a cash advance or "an illegal loan" (Gov't br. at 24). Appellant had not anticipated that the cost of goods would exceed the amount of its gross sales in the first month after payment of the 38 percent fee and had no working capital to pay its employee salaries.

As a result of the Government's withholding, appellant did not suffer compensable harm. Appellant had the obligation to pay wages to its employees and meet other operating expenses and did no more than what was required under the contract. There is no evidence that appellant incurred increased costs or was otherwise damaged as a result of any alleged act or failure to act on the part of the Government in deducting the total cost of the inventory in one month.

Claim 3 - Cleaning

Appellant claims that the Government should have cooperated and provided assistance in cleaning the facilities to an appropriate standard of cleanliness, and that its failure to do so caused a loss of gross sales. The Government argues that the contract required appellant to clean the facilities and they were unclean as a result of appellant's operations. To support its position that the facilities were clean, the Government argues that appellant visited the facilities before contract award, but did not complain about unsanitary conditions and that the facilities passed the requirements of a pre-award host government inspection.

The Government was contractually required to provide maintenance of the facilities "except for daily cleaning" (finding 9). In addition to this contractual obligation, it is well established that the Government has a duty to cooperate with its contractors. There is an ever-present obligation on any contracting party to carry out its bargain reasonably and in good faith. *Donohoe Construction Company*, ASBCA No. 47310 *et al.*, 98-2 BCA ¶ 30,076, *aff'd on reconsideration*, 99-1 BCA ¶ 30,387. With respect to an allegation of failure to cooperate, we have stated that we consider the following:

[The Government's] implied duty to cooperate is "to do what is reasonably necessary to enable the contractor to perform."
"[T]he gravamen of the . . . inquiry in cases involving a breach of the duty of cooperation is the reasonableness of the Government's action considering all of the circumstances."

Coastal Government Services, Inc., ASBCA No. 50283, 99-1 BCA ¶ 30,348 at 150,088 (citations omitted). There is no dispute that appellant performed an amount of cleaning that was in addition to routine daily cleaning. Appellant's cleaning was performed at the beginning of the contract. The Government has alleged, but pointed to no evidence that uncleanness was caused by appellant's operations. We conclude that the Government is liable for the increased cost of cleaning incurred by appellant.

Claim 4 - Late Payments

Appellant claims that the Government's failure to make payments by the 10th day of the month was contrary to the contract and caused it to expend its own funds, borrow money, and dispose of personal assets of appellant's director, Mr. Adali. The Government argues that appellant failed to comply with contract terms for protesting late payment in writing and therefore cannot recover a penalty for late payment.

In this appeal there is a contractual provision requiring the payment of a penalty (*i.e.*, interest) for late payment according to the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-3907. The parties agreed that payment of an interest penalty would run from the date payment was due. In the contract modification which amended the method of payment, the Government did not agree to pay by a date certain, and no penalties were provided for if the advances were delayed. We have found that some NAFI payments were late (finding 23). The Government was aware that appellant protested late payment from appellant's complaints to the contracting officer. There was no resulting prejudice to the Government from the lack of written protest by appellant and this failure, accordingly, does not bar appellant's recovery of the interest penalty owed. Appellant has shown that specific payments were delayed for longer than the parties agreed in the contract in three instances and consequently is entitled to recovery under the contract of interest for those delays. Appellant would not be entitled to the additional penalty set forth in 39 U.S.C. § 3902(c)(3) that is contingent on making written demand not later than 40 days after the date of late payment.

Claim 5 - Disposable Supplies

Appellant claims that it was required to use more paper plates, plastic forks, and napkins as a result of the Government's failure to meet its obligations under the contract to furnish and maintain dishwashing equipment and supply a sufficient amount of linens. The Government argues that appellant was responsible for the supply of disposable products under the cost of goods provision in the contract and further states that appellant would not have incurred the cost if it had used manual sterilization of the dishes, which is permissible under Air Force regulations.

The GFE dishwasher did not operate satisfactorily, and a new replacement unit was not furnished until near the end of the first year of the contract. The new unit was also not satisfactory when it was first placed in use. Appellant could not use the dishwasher regularly to sanitize the dishes and glassware after use. Appellant used disposable products when the dishwasher was not working, which the evidence showed was a frequent, recurring occurrence. The Government supplied some disposable supplies, but the record is not clear that they were supplied as other than cost of goods. The failure of the Government to provide adequate equipment for washing dishes resulted in an increase in disposable supplies which increased the cost of goods and caused a loss in appellant's net receipts. We are not persuaded that the Government failed to supply an adequate amount of tablecloths and linens causing an increased use of disposable paper products. Appellant is entitled to recovery only for the increased costs resulting from the defective GFE.

Claim 6 - Happy Hours

Appellant's claim for improper application of the 38 percent fees for happy hours involves the difference between appellant's regular services in the dining facilities and special events. The Government maintains that the contract expressly provided for concessionaire fees for special events and the only difference between the daily food services operations and the special events was the identity of the customer. Appellant's position is that the prices at happy hours were discounted so that less than the approved menu prices were paid, gross sales were less, and after the 38 percent fees were deducted, appellant's net receipts were less.

Appellant set prices for its regular dining services, which were subject to approval by the Government. Special events pricing was set by the Government in its brochures without discussion with appellant. The Government was bound to exercise its approval authority reasonably. There was no basis for the Government to be arbitrary or unreasonable in setting prices for special events. As the "customer" for special events, the Government was obligated to cooperate and ensure that appellant received the same fair prices for its provision of services. Appellant is entitled to recovery of the difference in net receipts that would have been received by appellant if the Government had accounted for revenues from happy hours without discounted prices.

Claim 7 - The Strike

Appellant claims losses suffered during the strike. The Government argues that appellant was fully compensated for any losses and that the language in Modification Nos. P00005 and P00006 completely released the Government from any liability. During the strike appellant had insufficient net receipts to meet its payroll and the Government was concerned that appellant's employees were not being paid while other employees were receiving strike benefits. The Government entered into contract modifications that provided the amount of salaries, taxes, and insurance due from appellant. The release

language in the modifications concerns appellant's claims for equitable adjustment "by reason of the actions taken pursuant to this modification" (finding 28). The release signed by appellant was not intended to cover claims related to its operations impacted by the strike other than the salaries due employees and related expenses of taxes and insurance. Further claims for coverage of appellant's obligations to its employees would be barred by the terms of the release in these agreements. There is no indication in the record, however, that the parties discussed other losses suffered by appellant as a result of being required to remain open during the strike, but not being able to obtain foodstuffs essential for its operations. That claim was not the subject of the modifications. The modifications do not, therefore, constitute an accord and satisfaction that would bar appellant's claim for damages.

Generally, labor strikes that delay or hinder performance of a fixed price contract are considered to be beyond the control of either party and, therefore, not compensable. *Olympus Corporation v. United States*, 98 F.3d 1314, 1318 (Fed. Cir. 1996); *McNamara Construction of Manitoba, Ltd. v. United States*, 206 Ct. Cl. 1, 509 F.2d 1166 (1975); *Arnold M. Diamond, Inc.*, ASBCA No. 45072, 93-3 BCA ¶ 25,904. There is no basis found for shifting the loss to the Government where increased costs arising from labor difficulties were not caused or desired by the contracting parties and neither party could have prevented them. The contractor is deemed to have assumed the risk where the contract is silent as to the allocation of loss. *Flippin Materials Co. v. United States*, 160 Ct. Cl. 357, 371, 312 F.2d 408, 417 (1963); *Ozark Dam Constructors v. United States*, 153 Ct. Cl. 120, 288 F.2d 913 (1961). An exception to the general rule would be where the Government in some way was the cause of the strike. See *T. C. Bateson Construction Company v. United States*, 162 Ct. Cl. 145, 319 F.2d 135 (1963).

The Government submits that it had no obligation to appellant during the strike because of the provision in the contract that the contractor was required to perform "during crisis" as directed by the contracting officer (finding 5). Although the Government played no part in events leading to the strike, it could have prevented the effects of the strike on appellant. It was the duty of the Government under the contract to enable appellant to obtain food supplies from the Government commissary, but during the strike, the commissary was closed, the picket line was honored, and no supplies were delivered. The contracting officer could have prevented appellant's strike losses because he had authority under the contract to direct appellant's performance. He did not act to suspend food services during the strike, not knowing how long the strike would continue and in order to receive benefit from appellant in services of its employees rebagging garbage. As a result, appellant continued to incur costs without being able for the second half of the strike period to make any significant amount of sales. The Government was unreasonable in failing to act to suspend appellant's performance when it could not provide foodstuffs and supplies for appellant's operations. This unreasonable failure to cooperate caused appellant to suffer financial harm for which it is entitled to recover.

For the reasons discussed above, appellant is entitled to recovery in part on its claims 1 and 3 through 7. Appellant is not entitled to recovery on its claim 2. The appeal is sustained in part and otherwise denied. The matter is remanded to the parties for determination of quantum.

Dated: 9 February 2001

LISA ANDERSON TODD
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

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

¹ The date of each clause was the current date set forth in the FAR on the issuance date of the contract.

² There is no indication in the record that appellant received funds later than the dates appearing on the Government-issued checks. The record does not disclose what dates payments were made for October, November, and December 1997. The Government was not obligated to make prompt payment of advance payments, which were later authorized and are shown to have been made for January 1998 through July 1998. NAFI did not make payments to appellant for August, September, and October 1998. Beginning in February 1998, appellant was operating its business at a loss. Payment was required from appellant on a payment plan. As of October 1998, appellant owed the Government past debts for requisitions in the amount of \$1,985.85. (R4, tabs 28, 40, tab 42 at 14; ex. A-24)

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The total amount shown to have been paid according to copies of checks in the record is \$88,363.40. Three other payments were made in the total amount of \$11,800, which the record indicates were advances (R4, tab 40; tr. 217-19). The additional payment made in accordance with Modification No. P00005 was in the amount of \$12,308. The total of these payments is \$112,471.40. The record does not provide an explanation of the discrepancy between this total and Mr. Kutrubis' total of \$111,795.40. (R4, tabs 6, 40)

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. 52179, Appeal of LA Limited, LA Hizmet Isletmeleri, rendered in conformance with the Board's Charter.

Dated:

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