

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
International Hair) ASBCA No. 51053
)
Under Contract No. 96-006-96-521)

APPEARANCE FOR THE APPELLANT: Mrs. Debra Santos
President

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Charmaine Betty-Singleton, JA
CPT Gregg M. Schwind, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE MOED
ON THE GOVERNMENT'S MOTION FOR RECONSIDERATION

The Government has asked for reconsideration of the initial decision in this appeal, dated 25 April 2001. That decision, together with the decision on the appeal of International Hair (IH) in ASBCA No. 50948, has been published at 01-1 BCA ¶ 31,393. All references herein to findings relate to the initial decision.

Concession Statements of Earnings and Deductions (concession statements) for this contract were prepared and issued monthly by the Army and Air Force Exchange Service (AAFES). In the initial decision, we found that if the amounts shown on the concession statements for November 1996 through April 1997 (the month in which the contract was terminated for default^{*}) were correct and accurate and all deductions taken were proper, the result would be a net amount of concession fees owed to IH but unpaid (finding 24). Accordingly, we sustained the appeal to that extent and referred that matter back to the parties for negotiation of the amount of the unpaid fees.

In the present motion, the Government asserts that the fact finding of an unpaid balance of concession fees was erroneous inasmuch as the subsequent concession statements, contained in the record, show that the entire owed amount of concession fees had been properly paid to the judgment creditor under the garnishment order (findings 3, 4,

* The default termination was upheld in the initial decision. 01-1 BCA ¶ 31,393 at 155,099. IH does not contest that disposition.

8). The Government asks that the findings in the initial decision be modified to that effect and, accordingly, that the appeal be denied in its entirety.

These assertions are corroborated by the concession statements in the record (ex. G-9). The statement for April 1997 shows \$897.07 owed by AFEES to IH (termed an “unliquidated liability”). The statement for May 1997 shows an unliquidated liability totaling \$2,319.31 apparently consisting of gross receipts in May 1997 of \$2,123.90 plus \$897.07 carried over from April 1997, less deductions of \$701.66 which included a \$530.98 commission due AAFES on those gross receipts. The concession statement for June 1997 shows that the entire \$2,319.31 amount was paid out by AFEES for “garnishment.” In our decision relating to ASBCA No. 50948, we denied the claim of IH for recovery of the amounts paid pursuant to the garnishment order. 01-1 BCA ¶ 31,393 at 155,098. IH has not asked for reconsideration of that decision. The other concession statements in the record, for July and August 1997, show an absence of concession income and, hence, no further accrual of concession fees.

In response to the motion for reconsideration, IH has submitted, without any comment, a copy of a letter sent by its former attorney to Government counsel on 29 July 1998, prior to the hearing in this appeal. The letter sets forth the positions of IH as to the amounts of revenue, earned concession fees, payments received by, and amounts allegedly owed to, IH under this contract. The compilation also includes data relating to three other concession contracts between IH and AAFES. None of the data in the letter is more recent than April 1997. The stated purpose of the letter was to propose a “global settlement under all of [IH’s] contracts with AAFES” in consideration of an additional payment of \$25,415.61.

The above letter is not part of the present record in this appeal. Admission of the letter into the record is governed by the Board’s Rule 13(b) which provides, in part, that “[e]xcept as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing.” Among the several prerequisites to exercising discretion in favor of receiving additional evidence is that the evidence be “of sufficient consequence that its admission would probably produce a different result.” *AEC Corp.*, ASBCA No. 42920, 99-1 BCA ¶ 30,181 at 149,322, *rev’d on other grounds sub nom. Danzig v. AEC Corp.*, 224 F.3d 1333 (Fed. Cir. 2000). The data in the letter pertaining to the present contract would not affect the outcome of either this motion or the appeal. None of such data is more recent than April 1997. As such, the same cannot overcome the Government’s showing that its entire liability for unpaid concession fees was satisfied in June 1997 by payment of the remaining balance to the judgment creditor under the garnishment order and that no additional amount of concession fees have accrued for IH under the contract. Accordingly, the proffered letter is not eligible for addition to the record in this appeal.

DECISION

Upon reconsideration, based on consideration of the data of record noted above, the initial decision is modified so as to: (a) delete the fact finding that there is an amount of unpaid concession fees (finding 24) and substitute a fact finding that in June 1997, the entire amount of concession fees then owed to IH was paid to the judgment creditor under the garnishment order and that no amount of concession fees due IH accrued thereafter; (b) delete the portion of the "DECISION" section which provides for recovery of any unpaid concession fees; and (c) modify the "CONCLUSION" section so as to deny, in all respects, the appeal in ASBCA No. 51053.

Dated: 15 February 2002

PENIEL MOED
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

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. 51053, Appeal of International Hair, rendered in conformance with the Board's Charter.

Dated:

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