

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Brooke Enterprises) ASBCA No. 53993
)
Under Contract No. 91-1295-06)

APPEARANCE FOR THE APPELLANT: Mr. Ronald M. Brooke
Sole Proprietor

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
MAJ Jennifer S. Zucker, JA
CPT Scott N. Flesch, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the Army and Air Force Exchange Service (AAFES) contracting officer's (CO) final decision that denied appellant's \$90,400 claim under the captioned concessionaire contract for the alleged wrongful conversion of his 12 storage containers at Augsburg, Germany. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 602(a), 607. After a three-day hearing at Orlando, FL, and at the Board's offices, the parties submitted additional documentary evidence and post-hearing briefs. Appellant submitted a reply brief. The Board is to decide both entitlement and quantum (tr. 1/8-9).

FINDINGS OF FACT

1. On 6 April 1995 AAFES awarded concession contract No. 91-1295-06 (the contract) to Brooke GmbH, Industriestr. 62, 67063 Ludwigshafen, for mini-warehouse storage services to authorized patrons on an "as needed" or "periodic" basis upon temporary space assigned at four military installations, including Quartermaster Kaserne, Augsburg Exchange, Germany, for the period ending 30 June 1995 (R4, tab 1 at 1-2).

2. The parties stipulated that Mr. Ronald M. Brooke, sole proprietor, doing business as Brooke Enterprises, notified the CO that Brooke Enterprises was taking over the performance of the contract from Brooke GmbH (tr. 1/90). Hereafter we refer to the appellant as "Brooke."

3. The contract included the following pertinent provisions:

12. . . . b. Phase-out/Changeover Period:

(1) The 30-day period following expiration of this contract is a phase-out/changeover period during which the contract[or] will continue operations and remove storage units to correspond to the phase-in of a follow-on contract as directed by the [CO]

(2) The contractor will remove all storage units within the 30-day phase-out/changeover period as approved by the [CO]. . . .

. . . .

EXHIBIT A GENERAL PROVISIONS

. . . .

8. TERMINATION (JUN 94). . . .

. . . .

c. This contract is automatically terminated upon . . . written notice to the contractor in the event the exchange is inactivated. If this contract covers services to be performed at various exchanges or installations and only one or more of the exchanges or installations is inactivated, then only that portion of the contract being performed at the inactivated exchange or installation is terminated.

. . . .

11. DISPUTES (FEB 95).

a. This contract is 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.

. . . .

EXHIBIT C . . . SPECIAL PROVISIONS

....

3. EQUIPMENT, FURNITURE AND MOVABLE TRADE
FIXTURES (DEC 1988)

....

b. Concessionaire Furnished: Concessionaire will provide and install all equipment, furniture, and movable trade fixtures required by this contract. . . . Concessionaire will not sell or remove any equipment, furniture or fixtures from the concession premises without the prior written approval of the [CO]. . . . Title to concessionaire furnished equipment, furniture and fixtures remains with the concessionaire. . . .

....

17. CONCESSIONAIRE AND CONCESSIONAIRE
EMPLOYEES . . . (DEC 1988)

a. Responsible management will be provided during all hours of operation at the concession activity. The manager or designated representative will . . . have authority to conduct business as required by this contract. . . . The concessionaire will provide written notice to the [CO] naming the person appointed manager or representative.

....

18. ACTIONS TO BE TAKEN UPON TERMINATION
(INCLUDING EXPIRATION) (MAR 90)

a. AAFES will have the option and first right to purchase any or all of the concessionaire furnished property, including storage units . . . used by concessionaire to perform this contract. In the event AAFES exercises this option, the price of the property will be a negotiated amount acceptable to the concessionaire and AAFES. If the concessionaire and AAFES can't agree on an amount, AAFES will select an appraiser to evaluate the property, and the purchase price will be the appraised market value.

....

c. Concessionaire will promptly remove all concessionaire furnished property not purchased by AAFES Property will be removed consistent with the phase out plan approved by the [CO]. Upon failure to yield up the premises or remove concessionaire’s property, the [CO] may enter the premises, have concessionaire’s property removed and stored in a warehouse at concessionaire’s expense If concessionaire is indebted to AAFES, concessionaire authorizes and empowers the [CO] to take possession of concessionaire’s property and dispose of same by public or private sale without notice, and out of the proceeds of sale, satisfy all . . . indebtedness to AAFES.

....

34. CHOICE OF LAW (JUL 1996) This contract will be interpreted and governed by U.S. Government contract law as applied by the Armed Services Board of Contract Appeals and the United States Court of Federal Claims.

....

EXHIBIT H
OPERATING STANDARDS AND SPECIFICATIONS

....

1. Storage Unit Specifications

a. Concessionaire will provide and install at its expense relocatable storage units in the quantity and sizes specified below. . . . [The specification did not state any quantity of storage units (tr. 1/25, 2/11), but specified sizes:]

....

- 5' x 8' x 8'
- 10' x 8' x 8'

(R4, tab 1 at 4-5, ex. H at 1) As testified by CO Jean Kirkland, the contract did not require the contractor to submit a “phase-out plan” to the CO; the CO was to provide a “phase-out

plan” to the contractor (tr. 3/64). The contract included no Changes clause giving the CO the right to issue unilateral changes.

4. Brooke provided 13 or more modular storage units, designated “MSU-2,” at the Augsburg Exchange, which he obtained in 1990-91 in used condition from “Lease Trend,” a prior storage concessionaire (tr. 1/21-22, 27, 70, 79-80, 144). Each MSU-2 measured 20' x 8' x 8' and had two storage modules (tr. 1/170-72; R4, tab 10 at 156).

5. Contract Amendment No. 1 on 12 May 1995, extended the Augsburg portion of the contract term to 30 April 1997 (R4, tab 2 at 1). Amendment No. 2 on 17 December 1996, extended the contract term to 30 April 2000 (R4, tab 3 at 1). Amendment No. 3 on 27 January 1998, updated standard AAFES clauses and revised the contractor’s name and address to “Ronald Brooke, 4632 Warrington Dr., Orlando, FL 32826” (R4, tab 4 at 1). Brooke’s 4 February 1998 letter asked CO Margaret Kerr-Santy to send correspondence to Brooke’s foregoing Orlando address, and stated his telephone/facsimile number, (407) 282-0851 (app. supp. R4, tab C).

6. After the Augsburg facility was designated in March 1998 for closure and return to the host nation, Germany, U.S. military activities developed an “action plan” in April or May 1998 for Augsburg facilities (tr. 2/74, 3/83, 118-20). On 1 April 1998 the Deputy Commander, U. S. 7th Army designated Mr. Carroll Furnish as Augsburg’s base closure officer (BCO) (tr. 2/73). The Augsburg action plan scheduled closure of all AAFES facilities and turn-over of their keys to BCO Furnish by 31 October 1998 (tr. 2/75, 3/120), and was not shown to Mr. Brooke (tr. 3/121).

7. In the spring of 1998 at the Augsburg AAFES facilities: (a) Mr. Ashraf Mankarious was the Exchange Store Manager, who was AAFES’ point of contact for base closure and who contributed to the Augsburg 180-day “action plan” (tr. 3/117); (b) the Service Manager was Mr. James Malone, who was the CO’s representative (COR) responsible for oversight of concessionaires (tr. 2/52, 3/86); and (c) the Assistant Service Manager was Patricia Maureen Rivera, who prepared the part of the “action plan” dealing with concessionaires (tr. 3/83, 117; interogs. 2 Feb. 2004 (hereafter “interogs. I”), ¶ 2.A).

8. After Mr. Brooke left Augsburg, AAFES’ Mr. Malone supposedly managed Brooke’s containers (tr. 1/156). The record contains no written notice to the CO naming Mr. Brooke or anyone else as Brooke’s appointed manager or representative at Augsburg.

9. An AAFES CO’s 13 May 1998 e-mail message indicates that Brooke’s address was “4632 Warrington Dr. 32828 [sic] Orlando Fl” (R4, tab 10 at 11; tr. 2/47-48). A handwritten note of unidentified authorship on the foregoing 13 May 1998 message stated Brooke’s telephone number as 407-282-0851 and, to the extent legible, stated—

Note: Informed Jim Malone ^w will take over responsibility of containers; move ½ to Stuttgart Kelley Bks opposite car d
Advise contract officer Dallas I have been overseeing use of for [sic] two years & will assume responsibility for moving this ~~abandoned~~ property abandoned by Brooke to Stuttgart & gr ing costs. will also try to contact Ron Brooke

29.5.98 per Jim Malone

(App. Supp. R4, tab D)

10. On 28 May 1998 CO Yvonne Finch sent Brooke at 4532 (sic) Warrington Dr. Orlando, Fl 32826, unilateral Amendment No. 5, stating: “In accordance with . . . General Provisions, paragraph 8.c, all reference to mini-storage service provided at Augsburg . . . is deleted in its entirety effective 31 Jul 98 due to base closure” (R4, tab 6 at 1, tab 10 at 144). The appeal record contains no CO’s phase-out plan for Brooke’s Augsburg concession.

11. In late June or early July 1998, Ms. Rivera became AAFES’ Augsburg Service Manager and COR, with the duty to ensure that concessionaires removed their property by the base closure date (interrog. I, ¶ 4.A; tr. 2/52). If the Service Manager could not get such compliance, she turned it over to the CO to store the property (tr. 3/14-21, 28-29).

12. Mr. Brooke went to Augsburg for three days in June 1998. He spoke with CPT Weyler of BCO Furnish’s base closure team (tr. 3/87), and Ms. Rivera, who told him that the Augsburg base was to close by 31 December 1998, and he had to remove his containers. Mr. Brooke told them that he planned to move the containers to Kapaun, at Kaiserslautern, after obtaining “signing approval” (an unexplained term), and if the containers had to be removed earlier than 31 December, they should call Brooke. CPT Weyler and Ms. Rivera told Mr. Brooke that they wanted the containers out as soon as possible. (R4, tab 10 at 120; tr. 1/31-33, 35-38)

13. Mr. Brooke met with Mr. Jim Pappas at Augsburg, where they jointly viewed the containers, opened some of them and found furniture and furnishings of Mr. Pappas and possessions of “Heather” and of “Altum Bradley” (tr. 1/153-54, 156). Mr. Pappas showed Mr. Brooke an e-mail with handwriting which Mr. Brooke described as a scheme to declare the containers abandoned and to give them to Pappas, who would remove them from Augsburg at no cost to the U.S. Government (tr. 1/39-40; R4, tab 10 at 120). Mr. Brooke identified the document as AAFES’ 13 May 1998 e-mail (R4, tab 10 at 5, 11). The handwriting thereon mentions “property abandoned,” but does not mention Mr. Pappas (see finding 9).

14. Mr. Brooke phoned Ms. Rivera in June 1998 and told her that “he knew that Mr. Pappas wanted to hurt his business and . . . wanted to buy his containers,” and “Mr. Pappas had absolutely no authority to represent him” (interrogs. I, ¶ 3.A; answer at 25).

15. On the afternoon after his meeting with Mr. Pappas, Mr. Brooke and Mr. Porschitzer met with Mr. Mankarious and CPT Weyler (tr. 1/38-40, 3/86-87). Mr. Brooke introduced Mr. Manfred Porschitzer as his representative in charge of removing the containers from Augsburg (tr. 3/95-96). Mr. Brooke showed Mr. Mankarious the 13 May 1998 e-mail and told him not to let “this fraudulent conspiracy” to declare the containers abandoned take place (tr. 1/40).

16. According to Mr. Mankarious’ 10 February 1999 statement:

In Jul 98, Mr BROOKS [sic] came to the Main Exchange to see me about the storage containers. Mr BROOKS asked me when the Main Exchange would close since the whole military community of Augsburg would be leaving. I told Mr BROOKS that he needed to move his storage containers because the building and area would be turned back over to the German community. Mr BROOKS said he would make arrangements with a transportation company to move the containers prior to the closing of Augsburg, Germany. There were approximately 12 storage containers that were under contract to be rent [sic] to US servicemembers [sic]. The storage containers contained customer property and all were locked. Mr BROOKS said he was going to the United States but did not say when he would return. . . .

(R4, tab 10 at 116)

17. At the 2003 hearing: (a) Mr. Mankarious testified that he told Brooke that he had until 15 August 1998 to remove the containers, and Brooke said the containers would be picked up before such date (tr. 3/87, 114), and (b) Mr. Brooke testified that he gave Mr. Mankarious “three conditions” for moving the containers from Augsburg: (1) remove them as soon as Brooke got “signing approval,” (2) if earlier removal was required, let Brooke know and he would have Mr. Porschitzer move the containers across the road to Reese Kaserne, or (3) “if push came to shove” let Brooke know and Mr. Porschitzer would arrange with the Germans to leave the containers in place at Augsburg (tr. 1/40-41, 47, 138-39). Mr. Mankarious’ foregoing testimony conflicts with the 30-day period stated in contract ¶ 12.b(2) (which, based on Amendment No. 5, expired 30 August 1998) and his 1999 statement (which does not refer to a deadline) (findings 3, 16). Mr. Brooke’s

testimony is consistent with his statements to Weyler and Rivera (finding 12). Thus, we ascribe no probative weight to Mr. Mankarious' foregoing testimony.

18. Brooke's 30 June 1998 memorandum to "86 CES/CECB" requested permission to move 10 containers from Augsburg Quartermaster Kaserne to "our current site behind Bldg 2807 – Kapaun" Kaserne (R4, tab 10 at 2).

19. After Ms. Rivera had assumed Mr. Malone's duties, Mr. Brooke asked her if he could pick up his containers before the termination date. She replied:

[I]t was not possible because military members still had their personal belongings in some of the containers and since they had paid rent through the termination date, they were entitled to have their property in the containers.

(Interrogs. I, ¶ 5.A) In July 1998 Mr. Pappas called Ms. Rivera—

to talk about the containers – he was upset because a German man had come to pick up the containers while the military members still had their belongings inside. I do not know why he called, how he got my number, or why it was any of his concern. I told him that I would call Mr. Brooke because it was his business. Mr. Pappas then put the German man on the phone who further explained (in German) that he was there to pick up all the containers. I told him that he could not pick up the containers without Mr. Brooke's permission and that he should have Mr. Brooke call me with confirmation.

A couple of days later, Mr. Brooke called and told me that the German man was sent their [sic] on his behalf. I said he should have called me prior to his arrival and I would have approved of an early departure for the empty containers. . . .

(Interrogs. I, ¶¶ 6.A, 7.A) Brooke documented that container patrons paid rent through June 1998; those documents did not address July 1998 rentals (app. rebuttal docs. RE-7 to SD-3/7).

20. Ms. Rivera left Augsburg in July 1998, and Mr. Mankarious took over responsibility for the AAFES concessionaires (tr. 3/88). Ms. Rivera remained at her office in Stuttgart (interrogs. 21 Feb. 2004 (hereinafter "interrogs. II"), ¶ 3.A).

21. CO Jeanette Nix's 22 July 1998 letter to Brooke regarding the termination of the Vogelweh portion of contract 91-1295-06 stated: "Request you coordinate your final departure from the location with the General Manager" (app. supp. R4, tabs F, G). AAFES' CO John Griger described such request as a standard procedure applicable to all contract locations, by which Brooke was to coordinate container removal with the Service Manager (tr. 2/64-65). CO Kirkland described the Service Manager as subordinate to the General Manager, and the individual who oversaw a terminated contractor's removal of equipment (tr. 3/18-20). Based on CO Yvonne Finch's testimonial demeanor, her explanation why she did not send such a letter to Brooke regarding the Augsburg termination -- because contract 91-1295-06 had three other locations -- was contradictory and not credible (tr. 1/196-200). Brooke followed the foregoing standard procedure.

22. In July or August 1998, Mr. Mankarious telephoned Mr. Brooke in the U.S. and told him "this German man [presumably Mr. Porschnitzer] didn't come or contact me" and mentioned the 15 August 1998 deadline. By that time Brooke did not remove the containers. By the end of August Mr. Mankarious left Augsburg. His duties were assumed by AAFES' Angel Marquez, to whom Mr. Mankarious gave the contact numbers for Messrs. Brooke and Porschnitzer. (Tr. 2/73, 3/88-91)

23. BCO Furnish found Brooke's containers on site on 7 August 1998 and assigned that date to start the 45-day period "in accordance with . . . Title 10, Section 2575" (tr. 2/76). 10 U.S.C. § 2575(a) in effect in 1998 provided in pertinent part:

The Secretary of any military department, and the Secretary of Transportation, under such regulations as they may respectively prescribe, may each by public or private sale or otherwise, dispose of all lost, abandoned, or unclaimed personal property that comes into the custody or control of the Secretary's department However, property may not be disposed of until diligent effort has been made to find the owner [That] diligent effort . . . shall begin, to the maximum extent practicable, not later than seven days after the date on which the property comes into the custody or control of the Secretary. The period for which that effort is continued may not exceed 45 days. If the owner . . . is determined but not found, the property may not be disposed of until the expiration of 45 days after the date when notice, giving the time and place of the intended sale or other disposition, has been sent by certified or registered mail to that person at his last known address. When diligent effort to determine the owner . . . is unsuccessful, the property may be disposed of without delay, except that if it has a fair market value of more than \$300, the Secretary may not dispose of the

property until 45 days after the date it is received at a storage point designated by the Secretary.

24. Mr. Mankarious told Ms. Rivera that BCO Furnish had given approval that Brooke's containers could stay on post (Augsburg) until 31 October 1998 (R4, tab 10 at 47). In September 1998, Ms. Rivera told Brooke that the BCO was willing to extend the date for removing containers to 31 October 1998, until all customers were notified to empty them (interrogs. II, ¶ 13.A; app. supp. R4, tab S), and Brooke "assured me [Rivera] that he would send somebody to pick up his containers and also told me not to sell them to Mr. Pappas" (interrogs. I, ¶ 10.A). Ms. Rivera informed AAFES CO Tina Corley of the foregoing facts not later than 27 January 1999 (app. supp. R4, tab S).

25. Brooke authorized Mr. Porschnitzer to sell one of the 13 containers at Augsburg for DM 3,000. In September 1998 Mr. Porschnitzer removed one container from the Augsburg exchange area. (Tr. 1/41-42, 86; R4, tab 10 at 8, 30, 122)

26. BCO Furnish was aware of Mr. Brooke's contact with CPT Weyler and that Mr. Mankarious attended monthly base closure meetings on behalf of AAFES (tr. 2/73-74, 91). BCO Furnish stated that during the Augsburg base closure, Mr. Marquez was the AAFES point of contact, and that, according to Mr. Marquez, AAFES contacted Brooke by contract amendment and subsequent attempts to contact Brooke had failed (tr. 2/74, 76, 82). BCO Furnish himself did not attempt to contact Mr. Brooke during the time of the Augsburg base closure because he "didn't have time" (tr. 2/97).

27. A 23 September 1998 message from James Hale, Community Support Flight Chief, Ramstein Air Base, told Brooke to "work with Jack [Stephens] in getting the [storage] units put at Kapaun" (R4, tab 10 at 14; app. supp. R4, tab H).

28. In the third week of October BCO Furnish had the container locks cut to prepare them for removal by truck on 27 October 1998, so he could return the Augsburg facility to the host nation by 28 October 1998. Personal belongings were found in a container, which required BCO Furnish to try to locate the owner, so he obtained an extension for turning over the Augsburg Quartermaster Kaserne to 8 November 1998. (Tr. 2/78-79, 88)

29. Brooke's 27 October 1998 letter authorized Mr. Porschnitzer to control, manage, maintain, collect overdue rents, clear out, cut any locks on, sell at prices previously discussed or otherwise dispose of, and to move to Kapaun Kaserne, Kaiserlautern, the 12 containers at the Quartermaster Kaserne, Augsburg, and stated:

If by chance anyone should give you a problem such as Jim Pappas, the following applies: Mr. Jim Pappas has never paid any rent and any use of our containers by him is totally

unauthorized and illegal. He may correct this situation by paying a minimum of 6 months past due rent. That is 6 X \$60.00 = \$360.00 per space occupied. These figures are only valid for occupancy during the month of OCT 1998. No occupancy is authorized after Oct 1998.

(App. Supp. R4, tab I).

30. On 27 October 1998, Mr. James Pappas came to BCO Furnish's office, said he was interested in the containers, and showed identification and papers purportedly authorizing him to contract with "USAREUR" (U.S. Army, Europe, tr. 2/104). BCO Furnish found that Mr. Pappas was not on any USAREUR debarred list and that to "provide . . . these containers to [Mr. Pappas] in return for the cost of removing them" from the base would not violate German law or the U.S.-German Status of Forces Agreement. He decided to dispose of Brooke's containers to Mr. Pappas. (Tr. 2/79-81) Mr. Pappas removed the containers on about 28 October 1998 (R4, tab 10 at 49). BCO Furnish signed a paper documenting his decision on 29 October 1998 (see finding 34).

31. Mr. Porschnitzer's 4 November 1998 letter to Brooke stated that—

Since last week I try to get to the premises to look at the containers, without any success, the premises is always closed. Today I finally received through the German Police a . . . POC of the American forces or American police. This person, obviously German, Mr. Kohl, just informed me that the containers were picked up last week and were transported to an unknown location. . . . I than also called James Pappas, he also had no knowledge of the whereabouts of the containers, however, he had his belongings timely removed as agreed on. I will now try to find out what happened

(R4, tab 10 at 135-36)

32. Mr. Porschnitzer's 16 November 1998 letter to Brooke stated—

Mr. Kohl . . . gave me a phone number in Augsburg where I could reach the agent responsible for removal of the containers. The Clou [sic, clue]: this number belongs to our acquaintance James Pappas!!

I spoke with James 2 weeks ago about the removal of the containers. He knew nothing. Today I can not get hold of him. . . .

(R4, tab 10 at 137-38)

33. Brooke's 17 November 1998 letter to AAFES CO Kirkland stated:

The containers, which had been used to satisfy the Augsburg portion of contract No. 91-1295-06, are still missing! After our telephone conversation on 4 Nov, I called Maureen Rivera the next day What was very interesting . . . was her comment: "I'll have to call Jim Pappas to find out what happened." I immediately reminded her that Jim Pappas has never had any authority . . . concerning the containers

A Herr Kohl who has a responsibility for Augsburg base closure has just told Manfred [Porschitzer] that James Pappas had the containers moved! UNDER WHOSE AUTHORITY?

. . . Result, AAFES and the US Military apparently allowed Jim Pappas to orchestrate the disappearance of the containers.

I need your help to correct this apparent theft and unauthorized release of a contractor's property.

(R4, tab 10 at 133)

34. On 1 December 1998, AAFES CO Kirkland sent Brooke Mr. Furnish's 29 October 1998 letter, which stated:

TO WHOM IT MAY CONCERN

The Purpose of this correspondence is to pass ownership for 12 ea twenty foot containers from the US Government to Mr. Pappas of the Alexander Group Corporation.

Subject containers are considered abandoned property in excess of ninety (90) days and therefore become property of the U.S. Government.

Ownership of subject containers is passed to Mr. Pappas in return for the incurred expense of removing same from Government Property located at Quartermaster Complex, Augsburg, Germany.

(App. Supp. R4, tab K) Ninety days prior to 29 October 1998 was 31 July 1998.

35. Ms. Rivera never sent Mr. Brooke an official notice of non-compliance for not removing his containers. (Interrog. ¶ 12 of 21 Feb. 2004).

36. All responsible AAFES and Army personnel had the contact information for Mr. Brooke (answer at 11). There is no evidence that appellant ever owed money to AAFES, nor has AAFES contended such (answer at 8).

37. Brooke's 28 April 2000 and 26 May 2000 letters to CO John Griger claimed \$90,400 for the 12 containers that AAFES declared abandoned, allegedly in violation of the contract and without prior notice to Brooke of the impending conversion (R4, tab 11 at 14, 17). We find that the CO received Brooke's 28 April letter on 1 May 2000.

38. CO Tina Corley's 1 August 2002 final decision denied Brooke's 26 May 2000 claim in its entirety. Her decision stated:

11. AAFES operations in Augsburg ceased in July 1998. Thereafter, removal of Claimant's storage containers from Augsburg fell under the jurisdiction of the Army's base closure officer.

....

15. By letter dated October 29, 1998, the base closure officer declared Claimant's property abandoned and arranged for it to be removed by a third party.

(R4, tab 11) Brooke timely appealed that decision to the Board, which docketed the appeal as ASBCA No. 53993. CO Corley conceded that the contract did not provide for transfer of storage container removal authority from AAFES to the BCO (tr. 2/70-71).

39. Based on the September 1998 sale of one container for DM 3,000 (see finding 25), respondent stated to Brooke in September 1999: "DM 3000 was the fair market value (FMV) of one MSU. Multiplying the FMV times twelve, your total loss was approximately DM 36,000 or \$19,150." (R4, tab 10 at 29-31)

40. On 15 April 1999 a firm named “ADtranz” sent Brooke a cost estimate of U.S. \$6,800 plus U.S. \$1,400 per unit to transport an “a.m. container” from Sines, Portugal to Kaiserslautern, Germany. That estimate did not identify whether the unit was new or used. (R4, tab 10 at 153) The sum of \$6,800 plus \$1,400 is \$8,200 per unit, which, times 12 equals \$98,400, which Brooke included in its back-up documents to the AAFES CO.

41. On about 23 October 2001 Brooke sold 10 MSU-2s to the government for \$39,000. Those MSU-2s were of the same kind, and among those obtained at the same 1990-91 time, as the 12 containers in dispute under this contract. (Tr. 1/143-45)

42. Based on the foregoing evidence, we find that the fair market value of Brooke’s containers was \$3,900 per unit, because the sale of 10 MSU-2s to the same purchaser (respondent) of the same kind and age as the 12 containers in dispute, most nearly approximates their fair market value in October 1998. Moreover, the 10 containers sold in October 2001 most likely depreciated in value from October 1998. We further find that the fair market value of Brooke’s 12 containers was \$46,800 (12 x \$3,900).

DECISION

Since this AAFES contract did not contain a Changes clause (finding 3), we are to decide whether respondent’s 28 October 1998 disposal of appellant’s 12 containers was a breach of contract. To recover for a breach of contract, a party must allege and establish: (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach. *San Carlos Irrigation and Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989).

Appellant argues that government representatives had actual notice of Brooke’s address and telephone number, and hence their efforts to notify him of their intent to declare the 12 containers abandoned were unreasonable and ineffective; the government failed to adhere to the due diligence requirements of 10 U.S.C. § 2575 to locate and notify Brooke of the purportedly abandoned containers; the BCO allowed Brooke until 31 October 1998 to remove the containers from the Augsburg base, but disposed of them to Jim Pappas on 28 October 1998, before expiration of the removal period whose extension he had approved; the measure of damages to place Brooke in the same position he would have been if the breach had not occurred, is the containers’ market value; and Brooke’s \$8,200 per unit valuation of the containers was reasonable. (App. br. at 37-47)

Respondent argues that the CO provided appellant proper notification of the unilateral termination of the Augsburg portion of the concession contract; AAFES did not breach its common law bailment obligation to safeguard appellant’s property with ordinary care and without negligence; AAFES gave appellant unfettered access to remove its containers; appellant’s negligent failure to remove its containers in accordance with ¶ 12.b

and Special Provision ¶ 18.c was the sole cause of its loss; and the fair market value of the containers is measured by the DM 3,000 price for the one container sold in September 1998, which value should be reduced by the cost, if AAFES had purchased the containers, of removing them from the Augsburg installation. Respondent's argument does not mention the 10 U.S.C. § 2575 statutory rationale for BCO Furnish's disposal decision. (Gov't br. at 28-42)

With respect to Brooke's duty to remove its property after contract termination or expiration, the contract required Brooke to remove all storage units within the 30-day phase-out/changeover period as approved by the CO (¶ 12 b.(2)) and promptly to remove all concessionaire furnished property not purchased by AAFES consistent with the phase-out plan approved by the CO (EXHIBIT C, ¶ 18.c). The contract did not require Brooke to submit a "phase-out plan" to the CO; rather, the CO was to provide a phase-out plan to the contractor. (Finding 3) The appeal record contains no CO's phase-out plan for Brooke's Augsburg concession (finding 10).

AAFES issued Amendment No. 5, terminating the Augsburg concession effective 31 July 1998 (finding 10). Contract ¶ 12 b.(2) established Brooke's date for removing his containers as 30 August 1998, while EXHIBIT C, ¶ 18.c required Brooke to remove the containers "promptly" and consistent with the phase-out plan approved by the CO. Ms. Rivera, Augsburg Service Manager and COR, refused to allow Brooke to remove any containers before 31 July 1998 (finding 19). Brooke followed the standard procedure described by AAFES COs for coordinating his removal of containers and final departure from Augsburg with the AAFES Service Manager, who was the COR (findings 11, 21). In August 1998 BCO Furnish gave his approval that Brooke's containers could stay on post until 31 October 1998, which approval Ms. Rivera, the COR, communicated to Brooke in September 1998 (finding 24). Before the 31 October 1998 deadline to remove Brooke's containers, on 28 October 1998 Mr. Furnish decided to dispose of those containers to Mr. Pappas, who removed Brooke's containers on that same date (findings 24, 30).

The AAFES Service Manager had authority to assure that Brooke removed its property by the base closure date (finding 11). Ms. Rivera's communication to Brooke of the BCO-approved, 31 October 1998 container removal deadline extended the 30 August 1998 deadline and provided her interpretation of EXHIBIT C, ¶ 18.c's phrase "promptly" in the absence of a CO's phase-out plan and interpretation of the phrase "promptly." Liability for actions of a government agent who carried out what she was ordered to do, cannot be avoided by labels such as "mere technical representative" acting in a "noncontractual capacity." *See Centre Manufacturing Co. v. United States*, 392 F.2d 229, 236 (Ct. Cl. 1968).

Respondent's contention that it gave Brooke unfettered access to remove its containers before 31 October 1998 is unsound. Respondent forbade their removal before

31 July 1998, fettered removal during the week of 25-31 October 1998, and made removal impossible after 28 October 1998 (findings 19, 30-31). The CO's final decision stated that after July 1998, removal of Brooke's "storage containers from Augsburg fell under the jurisdiction of the Army's base closure officer" (finding 38). We decline to draw the inference that AAFES was not contractually responsible for the actions of the Army BCO, because the contract plainly specified AAFES' post-termination rights and duties (finding 3). We reject respondent's argument that Brooke's conduct was the sole cause of the lost containers. Respondent ignores that AAFES' COR gave Brooke the right to remove the containers by 31 October 1998.

We also note that, even if Brooke had failed to meet the contractually specified deadlines for removal of this property, AAFES was not entitled to sell the property to a third party. Rather, AAFES was entitled to have the storage units removed and stored in a warehouse at Brooke's expense (finding 3).

That respondent's brief may have abandoned its statutory defense of adherence of 10 U.S.C. § 2575 is understandable. BCO Furnish wrongly selected 7 August 1998 to start the statutory 45-day period (finding 23), since the contract gave Brooke at least 30 days after the 31 July 1998 termination, *i.e.*, until 30 August 1998, to remove the containers. More critically, BCO Furnish ignored his own approval of the extension to 31 October 1998 (finding 24), which would start the date for making diligent efforts to find the owner on 1 November 1998. Since BCO Furnish knew that Brooke owned the 12 containers at Augsburg, the statute required him to notify Brooke by registered mail to his last known address of the intended disposition of "abandoned" property (finding 23). If BCO Furnish himself did not have Brooke's address and telephone number (which was not his explanation for failing to contact Mr. Brooke; his explanation was that he "didn't have time" (finding 26)), the AAFES managers who dealt with BCO Furnish (Mr. Mankarious, Ms. Rivera) well knew Brooke's address and telephone number (findings 5, 22, 24, 26). Respondent admitted that all responsible AAFES and Army personnel had the contact information for Mr. Brooke (finding 30). BCO Furnish's decision of 29 October 1998 to dispose of Brooke containers violated the requirements of 10 U.S.C. § 2575.

With respect to proof of breach of contract, the parties raised no question of the validity of contract 91-1295-06. Respondent had the duty to provide appellant a phase-out plan and the opportunity to remove its containers from Augsburg within a prompt time, which it interpreted to be 31 October 1998. Respondent breached both those duties. Such breaches caused the premature disposal of appellant's containers to Mr. Pappas on 28 October 1998, and hence the loss of their fair market value. We hold that appellant satisfied its burden of proof of breach of contract.

Appellant has the burden of proving its quantum claim.* *See Lockheed Martin Corp.*, ASBCA No. 45719, 00-2 BCA ¶ 31,025 at 153,225. Special Provision 18.a of the contract provided that the price of the storage units, if purchased by AAFES and if the parties could not agree on an amount, would be their appraised market value (finding 3). AAFES did not obtain an appraiser to appraise their market value, but rather decided to transfer title to the containers to a third party, Mr. Jim Pappas (findings 30-31). Under these circumstances, we hold that appellant is entitled to recover the October 1998 market value of those containers.

The market value in October 1998 of Brooke's 12 containers was \$46,800 (finding 42). Respondent argues that the cost of removing the containers from Augsburg should be deducted from that amount. Respondent cites no legal authority requiring such a deduction, nor does the contract provide for any such deduction (finding 3, EXHIBIT C, ¶ 18.a). We hold that appellant is entitled to recover \$46,800 plus CDA interest thereon from 1 May 2000 (finding 37).

We sustain the appeal.

Dated: 3 November 2004

DAVID W. JAMES, 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

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

* Appellant's complaint seeks treble damages, fees and costs and other relief. Appellant has not shown a basis for the Board to award treble damages. If appellant seeks attorney's fees and other expenses, he must file a separate application in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504.

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. 53993, Appeal of Brooke Enterprises, rendered in conformance with the Board's Charter.

Dated:

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