ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
International Hair	)	ASBCA Nos. 50948, 51053
	)	
Under Contract Nos. 95-039-96-257	)	
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

The above contracts were awarded to appellant, International Hair (IH) by the Army and Air Force Exchange Service (AAFES) for operation of beauty shop concessions in various base exchanges in Germany. In ASBCA No. 50948, IH seeks to recover concession fees owed to IH which were paid by AAFES to a judgment creditor of one of the principals of IH pursuant to a garnishment order issued by a German court. ASBCA No. 51053 involves monetary claims by IH for concession fees allegedly owed to IH and remaining unpaid and damages for breach of contract associated with the default termination of the contract. At this juncture, only entitlement is for decision. A hearing was held. IH was represented by counsel who filed a posthearing brief on its behalf. IH now appears *pro se*.

FINDINGS OF FACT

ASBCA No. 50948

1. On 18 July 1996, AAFES awarded Contract No. 95-039-97-257 to IH for operation of the beauty shop concession in the base exchange at Pendelton Barracks, Giessen, Germany. The proposal form included in the contract solicitation asked the offeror to indicate whether it operated as an "individual," "partnership," or "corporation." IH indicated that it operated as an "individual." The proposal was signed by Mrs. Debra Santos as "President" and by her husband, Mr. Candido Santos, as "Vice President." The contract was awarded for a two year term beginning on 4 August 1996 and ending on 3 August 1998. (ASBCA 50948, R4, tab 1 at 1)

2. The FEE PAYMENT (JAN 1987) clause of the contract provides in part as follows:

> a. AAFES shall pay to the concessionaire the fee percentage of the total combined sales of all locations included in the contract in accordance with the Fee Schedule in the contract. Not later than twenty (20) calendar days after the end of the AAFES fiscal month, AAFES shall submit to the concessionaire, in the appropriate currency equivalent specified in the contract, the full amount due and payable to the concessionaire, less any amounts used to satisfy customer claims and debts due AAFES under the contract.

The contract provided for payment of a 67 percent concession fee to IH for beauty service and a 95 percent fee on sales of concession-owned merchandise.

3. On or about 12 May 1997, the AAFES European Regional Office in Mainz-Kastell, Germany received a garnishment order and remittance request ("pfändungs-und überwelsungsersuchen") from an attorney representing Mr. Mabrouk Gueblaoui who had obtained a default judgment against Mr. Candido Santos from a German state court in Giessen, Germany in the amount of US $9,000.00 relating to an automobile purchased by Mr. Santos for his personal use. The garnishment order and remittance request, which was directed to AAFES as "granter of a concession," sought collection of the principal amount of the judgment plus interest of US $1,442.65 for a total of US $10,442.65. (ASBCA 50948, R4, tab 7)

4. The contracting officer sent a copy of the garnishment order and remittance request to Mr. and Mrs. Santos on 13 May 1997 with a forwarding letter requesting them to "[r]espond to the German agency named in this order and attempt to mutually resolve this matter within ten (10) calendar days from receipt of this letter." The letter also contains the following notice:

> In the event that you are unable to resolve this matter, AAFES is legally obligated to cooperate with the German authorities and will comply with the garnishment order from funds owed to you from your concession operation. You will be advised of any collective [sic] action that AAFES takes in regards to the imposed garnishment action.

(ASBCA 50948, R4, tab 6)

5. Article 35 of the Supplementary Agreement to the NATO Status of Forces Agreement with respect to forces stationed in the Federal Republic of Germany, August 3,

1959, 23 U.S.T. 531, 481 U.N.T.S. 262 (hereinafter the "Supplementary Agreement") provides, in part, as follows:

> Where a judgment, decision, order and settlement . . . of a German court or authority is to be enforced against a debtor to whom a payment is due . . . in respect of direct deliveries or services to a force or a civilian component, the following provisions shall apply:
>
> . . . .
>
> (b) (i) Where such a payment is not made through a German authority, the authorities of the force or of the civilian component shall, upon request by an enforcing agency and insofar as the law of the sending State concerned permits, deposit with the competent agency out of the sum admitted to be owing to the debtor the sum specified in the request. Such deposit shall operate as a discharge of the force or the civilian component from its obligation to the debtor to the extent of the amount deposited.
>
> (ii) Insofar as the law of the sending State concerned does not permit the procedure prescribed in item (i) of this sub-paragraph, the authorities of the force or of the civilian component shall take all appropriate measures to assist the enforcing agency in the execution of the judgment, decision, order and settlement in question.

(ASBCA 50948, ex. G-2)

6. In a letter to AAFES, dated 20 May 1997 (ASBCA 50948, R4, tabs 9, 11), Mr. Michael Kluck, a German attorney representing Debra and Candido Santos, protested against payments by AAFES pursuant to the garnishment order and remittance request.

7. Mr. Kluck's position was as follows:

> 1. There exists between . . . the married couple Santos, a civil law partnership per § 705 of the German Civil Code. Pursuant to § 719 of the German Civil Code there exists joint liability for liabilities of the partnership; that means only both partners together can create liabilities. The individual partner cannot create or demand a liability of the partnership.

> 2. Accordingly, a writ of execution[*] against the civil law partnership is only valid when there is an enforceable judgment against all of the partners [citations omitted]. This is clearly not the case.
>
> 3. It follows from the above that payments due the married couple Santos from you cannot be validly seized by a creditor from one of the partners. The seizure is legally incorrect, since the legal requisites do not exist, and is therefore not to be considered by you.

8. Mr. Kluck's letter ended with a demand that AAFES immediately remit payment of outstanding invoices directly to Mr. and Mrs. Santos. (ASBCA 50948, R4, tabs 9, 11) The contracting officer did not honor that demand. Instead, she complied with the garnishment order and remittance request, in part, by paying a total of $6,339.19 to the judgment creditor (ASBCA 50948, ex. G-5 at 3).

9. On 23 June 1997, Mr. Kluck instituted a third party suit, on behalf of Mrs. Santos, against the judgment creditor, Mr. Mabrouk Gueblaoui, in the German state court in Giessen, Germany. The complaint asked that enforcement of the garnishment order be suspended and that the default judgment be declared unenforceable for reasons of German law. (ASBCA 50948, ex. G-3)

10. On 13 February 1998, the suit brought by Mrs. Santos against Mr. Mabrouk Gueblaoui was settled by the parties, which included Mr. Santos who had been joined for the purpose of becoming a party to the settlement agreement. That agreement, as incorporated in the order of the German court disposing of the suit, contained the following:

> 2. The parties and the joining Candido Santos further agree that the defendant's [Mabrouk Gueblaoui] claims, based on the default judgment . . . are satisfied with the money collected in execution up to this date. This also applies to the garnishment filed with AAFES, which also hereby settled.
>
> . . . .
>
> 4. The parties agree that all mutual claims between the parties, regardless of the legal ground, are hereby settled.

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[*] Based on the term "pfändungsersuchen" in the German original of Mr. Kluck's letter (ASBCA No. 50948 R4, tab 9), this appears to be a reference to the garnishment order received by AAFES (finding 3).

(ASBCA 50948, ex. G-4) The CHOICE OF LAW (JAN 1987) clause of the contract is as follows:

> 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 U.S. Claims Court.

11. By letter dated 12 June 1997, IH submitted a claim to the contracting officer for unpaid concession fees under the contract in the total amount of $3,056.71 (ASBCA 50948, R4, tab 4). On 1 August 1997, in conformity with the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, the contracting officer issued a written decision denying the claim in its entirety on the ground that the amount claimed had been paid out pursuant to the garnishment order and that such payment was proper inasmuch as AAFES was "required by treaty to cooperate with host country authorities and comply with the garnishment order" (ASBCA 50948, R4, tab 5). A timely appeal from that decision was taken and docketed as ASBCA No. 50948.

ASBCA No. 51053

12. On 7 November 1996, AAFES awarded contract No. 96-006-96-521 to IH for operation of the beauty shop concession in the exchange located in Benjamin Franklin Village (BFV), Mannheim, Germany. As stated on the award page and in the CONTRACT PERIOD clause, the contract was for a 5 year term beginning on 21 November 1996. (ASBCA 51053, R4, tab 1) Under the contract, AAFES was to pay IH a fee for operation of the concession in the amount of 75 percent of the total combined sales at BFV Mannheim.

13. The INTERNAL CONTROLS (DEC 1987) clause of the contract required that "[a]ll sales (cash, charge card or deposit) . . . be recorded on the cash register when the transaction is made." AAFES furnished a cash register to IH for use in operating the concession. Sales were recorded on that cash register through the following actions: (a) the amount of the sale was keyed into the register, bringing up a display of that amount for the customer; (b) the appropriate "department" button on the register is pressed, causing the amount of the sale to be entered into the memory of the machine and printed on cash register tapes showing the sales made on that day; (c) the amount tendered by the customer is keyed into the machine and the "total" button on the register is then pressed; (d) the last of these actions unlocks the cash drawer, causing it to slide out for receipt of the customer's payment and disbursement of any necessary change. (Tr. 1/47-49)

14. At the end of each business day, using a special key inserted into the register, the concessionaire was required to obtain and print out, on the cash register tape, a reading of the total sales for the day (the "X" reading). Thereafter, another special key would be inserted which would cause the register to again print out the daily total sales and also a

zero establishing and confirming the starting point for the next day's transactions (the "Z" reading). (Tr. 1/32-33, 44) Under the INTERNAL CONTROLS (DEC 1987) clause of the contract, IH was required to turn in the cash register tape, together with the "Sales Clerk's Daily Report," to the cognizant AAFES accounting office.

15. The INTERNAL CONTROLS (DEC 1987) clause, provides further, in ¶ d.(1) ("Cash Control"), as follows:

> Cash (including checks) received by the concessionaire from sales becomes the property of AAFES at the time of receipt from customers. Misappropriation or use other than as authorized by AAFES is prohibited and may result in prosecution. . . . In the event of loss of receipts, the concessionaire shall reimburse AAFES the amount established by AAFES audit.

16. The INSPECTIONS (OCT 1995) clause of the contract authorized the contracting officer or her designee to:

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

17. During March 1997, AAFES received reports of unrecorded sales by IH in the course of operating the concession. Thereafter, by means of hidden cameras, covertly installed in the shop premises, AAFES conducted video surveillance of the activities of IH personnel in the vicinity of the cash register during the period 7-17 March 2000. (Tr. 1/112-14)

18. The record contains so-called "composite" tapes which were composed of extracts from the full length tapes taken during the video surveillance (ex. G-7). The composite tapes contained several instances in which Mr. Candido Santos and Mr. Jonathan Torres, an employee of IH, were shown keying in sales and then opening the cash drawer with a key inserted in the lock rather than by pressing the "department" button. The failure to press that button prevented the recording of the sale in the machine memory. The payment received from the customer would then be placed in the cash drawer and any necessary change disbursed. The drawer was then closed and the key in the lock of the drawer withdrawn. In most instances, Messrs. Santos or Torres would then press the "Clear" button on the register thereby erasing any indication of the transaction from the machine. (Tr. 51, 178-79)

19. In a written, signed statement given to AAFES investigators, Mr. Torres asserted that he had been instructed in the above procedures by Mr. Santos (ASBCA 51053, ex. G-2 at 10). In his own written statement to the AAFES investigators, Mr. Santos denied ever having failed to record a sale at any AAFES beauty shop concession operated by IH or instructing an employee to take such action. He was unable, however, to explain the surveillance tapes showing his failure to record sales at the BFV Mannheim shop. (ASBCA 51053, ex. G-2 at 8) Mr. Santos was present throughout the hearing held for these appeals in Heidelberg, Germany. He was not called as a witness.

20. The TERMINATION (JUN 1994) clause of the contract provides, in part, as follows:

> Relative to the termination of this contract, it is mutually agreed:
>
> a. This contract may be terminated in whole or in part by either party immediately upon written notice to the other party in the event of breach of this contract by the other party.
>
> b. This contract may be terminated in whole or in part by either party upon thirty (30) days notice (ninety (90) days for vending contracts) in writing to the other party.

21. By letter dated 1 April 1997 (ASBCA 51053, R4, tab 5), the contracting officer terminated the contract for default effective as of 12 April 1997 for failure to record sales during the period 7-17 March as required by the INTERNAL CONTROLS (DEC 1987) clause of the contract (finding 15). The contracting officer stated also that if the termination for default were not effective, the letter would constitute the required notice under ¶ b. of the TERMINATION (JUN 1994) clause.

22. The contracting officer's letter of 1 April 1997 asserted that IH owed AAFES the amount of $4,182.75 as liquidated damages pursuant to ¶ c. of the INSPECTIONS (OCT 1995) clause of the contract which is as follows:

> c. Concessionaire is liable and will pay AAFES for losses under this contract detected by surveillance or otherwise discovered. In the event actual losses cannot be determined, the concessionaire will be liable for liquidated damages under this contract computed as follows:
>
> (1) The concessionaire will pay an amount equal to fifty percent (50%) of the highest one month's dollar sales, less fee

> paid to the concessionaire, during the most recent 12 months for each employee contributing to the loss;
>
> (2) In the event the concessionaire contributes to the loss, wholly or in part, the concessionaire will pay an amount equivalent to the highest one month's dollar sales, less fee paid to concessionaire, during the most recent 12 months in addition to any amounts paid under subparagraph c.1.; and
>
> (3) In no event will concessionaire be liable for more than an amount equal to two hundred percent (200%) of the highest month's dollar sales, less fee paid to concessionaire during the most recent 12 months.

23. In computing the amount of $4,182.75 assessed against IH under the above clause, the contracting officer used the amount of $11,154 as the highest one month's dollar sales. That was the total amount of sales for March 1996 which was prior to the award of the present contract, during the tenure of the previous contractor for this concession (ASBCA 51053, R4, tab 5). The contracting officer collected the amount of $4,182.75 by deducting the same from the concession fees owed to HI for March 1997. (ASBCA 51053, R4, tab 5) The letter of 1 April 1997 was not designated as a written decision of the contracting officer and the same did not contain the notification of appeal rights required by the Contract Disputes Act (CDA). 41 U.S.C. § 605(a).

24. IH responded to the contracting officer's letter of 1 April 1997 with a letter dated 23 June 1997 (ASBCA 51053, R4, tab 11) presenting monetary claims totaling $85,184. The first of the claims was for unpaid concession fees for February, March, and April 1997 in the net amount of $12,393.99 The Government disputes that claim. The record contains the "Concession Statement of Earnings and Deductions" (ASBCA 51053, ex. A-3) prepared by AAFES and furnished monthly to IH for November 1996 through April 1997. For the purposes of this decision as to entitlement, it is sufficient to find that if the amounts shown in those statements are correct and accurate and all deductions taken were proper, the result would be a net amount owed to IH, but unpaid.

25. The other claim submitted by IH was for breach of contract based upon the contention that the default termination of the contract for failure to record all sales was improper (ASBCA 51053, complaint at 3). On that basis, IH seeks payment of $20,000 for its unamortized capital investment in the BFV Mannheim beauty shop concession which allegedly would have been recovered over the full five year term of the contract and also the amount of $52,790 for lost profits which allegedly would have been earned by IH during the 54 months of the contract period remaining after termination of the contract (ASBCA 51053, R4, tab 11). As to the former, ¶ b. of the EQUIPMENT, FURNITURE AND MOVABLE TRADE FIXTURES (DEC 1988) clause of the contract contains the following:

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

26. The contracting officer entirely denied IH's claims in a written decision issued pursuant to the CDA, dated 26 August 1997 (ASBCA 51053, R4, tab 12). A timely appeal was filed and docketed as ASBCA No. 51053.

DECISION

ASBCA No. 50948

In its proposal for this contract, IH represented that it operated as an "individual." The proposal was signed by Mrs. Debra Santos and by her husband, Mr. Candido Santos (finding 1). Under the Government's interpretation of the foregoing, the resulting contract was with Mr. and Mrs. Santos as individual contractors with the result that each of them was fully responsible for contract performance and fully entitled to all contract payments (Gov't reply br. at 12). That is the basis of the Government's contention that amounts of concession fees which had accrued, and were owed to IH, under the contract were eligible for remittance to the judgment creditor of Mr. Santos pursuant to the garnishment order issued by the German court and that such action was required by Article 35 of the Supplemental Agreement (finding 5) (Gov't br. at 30-32).

IH contends, however, that its self-description as an "individual" was incorrect and that it is a business partnership under both German and United States law. Under German law, payments owed to the partnership were available for payment of jointly created debts but not for debts created by partners acting individually, such as that incurred by Mr. Santos to Mr. Mabrouk Gueblaoui (finding 3). A similar consequence obtains under United States law generally. Under § 501 of the UNIFORM PARTNERSHIP ACT (1994) (U.L.A.), "[a] partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily." Under § 502 of that Act, '[t]he only transferable interest of the partner in the partnership is his share of the profits and losses of the partnership and his right to receive distributions." Section 504 would allow that interest to be charged or foreclosed in order to satisfy a partner's judgment debt.

IH, however, cannot prevail on the basis of improper use of partnership assets to pay the personal debt of Mr. Santos even if its contention is correct, which we do not decide. Partners may agree that the individual debt of one of them should be converted into a debt

of the partnership and be satisfied with partnership assets if the partnership is solvent. *Magrini v. Jackson*, 17 Ill. App. 2d 346, 352-53, 150 N.E.2d 387, 390-91 (3rd Dist. 1958). In the agreement settling the suit brought by Mrs. Santos for suspension and invalidation of the garnishment order, the parties, namely, Mr. and Mrs. Santos and the judgment creditor, declared that they were "satisfied with the money collected in execution up to this date" and that this "also applies to the garnishment filed with AAFES, which also hereby settled" (finding 10). The plain import of that provision is that Mr. and Mrs. Santos agreed to the use of the concession fees collected under the garnishment order for payment of his individual debt. That bars the claim against AAFES for having improperly paid out the fees for the same purpose in the first instance. On that basis, the appeal is denied.

ASBCA No. 51053

The first of IH's claims is for unpaid concession fees in the amount of $12,393.99 for February, March, and April 1997. Among the items in dispute in this regard is $4,182.75 deducted by AAFES as liquidated damages, pursuant to ¶ c. of the INSPECTIONS (OCT 1995) clause of the contract (findings 22, 23). That clause required AAFES to show "losses" under this contract detected by surveillance or otherwise discovered (finding 22). The evidence is sufficient to show that such losses resulted from the operation of the cash register by Messrs. Santos and Torres so as to avoid the recording of sales by the concession during the period 7-17 March 2000. The nonrecorded sales would not have appeared on the cash register tapes turned into AAFES together with the Sales Clerk's Daily Reports (finding 14). It can be reasonably assumed, and the record does not indicate otherwise, that IH remitted sales proceeds to AAFES in amounts that agreed with those tapes and reports. Those remittances would not have included the amounts of unrecorded sales, resulting in losses to AAFES. On that basis, AAFES is entitled to recover liquidated damages as provided in ¶ c. of the INSPECTION clause.

We then turn to the remainder of the claim for earned, but unpaid, concession fees. It appears that if the revenues and deductions set forth in the monthly reports by AAFES to IH are correct, accurate and proper, the result would be a net amount of unpaid concession fees owing and due to IH (finding 24). IH is entitled to payment of such balance and, accordingly, the appeal as to that claim is sustained to that extent.

In the second of its claims, IH seeks to recover damages for breach of contract in that the contract was allegedly improperly terminated for default. IH contends that the default termination was based on "unsupported default allegations of misappropriation" on the part of Mr. Santos (app. br. at 9-10). That is contrary to the record. The default termination was based on the failure of IH to record all of its sales as required by the INTERNAL CONTROLS (DEC 1987) clause of the contract. That failure, which was established by ample record evidence (finding 18), was a material breach of the contract entitling the Government, pursuant to the TERMINATION (JUN 1994) clause, to immediately terminate the contract upon written notice to IH.

Furthermore, the first item of claimed damages is in the amount of $20,000 for the capital investment in the BFV Mannheim beauty shop concession which allegedly would have been amortized over the five year term of the contract but for the default termination which occurred six months after its inception (finding 25). In the EQUIPMENT, FURNITURE AND MOVABLE TRADE FIXTURES (DEC 1988) clause of the contract, IH was warned that "[c]oncessionaire investment in equipment, furniture, and fixtures for this contract is a business risk of the concessionaire" (finding 25). One of those risks, as set forth in the same clause, was that the Government would not be liable "for costs of concessionaire's investing in equipment, furniture or movable trade fixtures in the event of termination of this contract without extension" (*id*. 25). Accordingly, in entering into the contract, IH assumed the risk that it would not be able to recover its investment in equipment for operation of the concession if the contract were terminated. That risk assumption is especially obvious where, as here, the termination resulted from of its own breach. Accordingly, recovery for the unamortized investment in facilities was properly denied. *Harry Pohl KG,* ASBCA No. 51523, 28 February 2001, slip op. at 10.

IH is also not entitled to recover for anticipated profits lost as the result of the termination. The termination for default of the contract by AAFES on a proper basis precluded recovery of any such damages. *James S. Lee & Co*., ASBCA No. 18156, 79-2 BCA ¶ 14,036 at 68,982

CONCLUSION

The appeal in ASBCA No. 50948 is denied in all respects. The appeal in ASBCA No. 51053 is sustained to the extent of unpaid concession fees owed to IH and is referred back to the parties for negotiation of the amount thereof. In all other respects, the appeal in ASBCA No. 51053 is denied.

Dated: 25 April 2001

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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 Nos. 50948, 51053, Appeals of International Hair, rendered in conformance with the Board's Charter.

Dated:

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