

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Home Entertainment, Inc.) ASBCA No. 52741
)
Under Contract No. PA6-104)

APPEARANCES FOR THE APPELLANT: Scott M. Heimberg, Esq.
Andrea T. Vavonese, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Karl W. Kuhn, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES

Home Entertainment, Inc. (HEI) submitted a \$1,633,256.87 claim under the captioned Army and Air Force Exchange Service (AAFES) contract (contract 104). Our August 1999 entitlement decision sustained the appeal, except for one element not under contract 104. We held that HEI was entitled to recover: (1) lost profits from 10 September to 7 October 1989; (2) costs for terminating HEI employees without 30 days prior notice required by local law; (3) the September 1989 market value of 9,058 VHS tapes and other property HEI sold to AAFES in September 1989, but whose sales price was void for duress, and of other HEI property that AAFES lost; and (4) the value of about 500 HEI videotapes damaged on 15 August 1989 due to AAFES' negligence. *Home Entertainment, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550 at 150,862-63.

After remand, the parties did not succeed in resolving damages. We reinstated and redesignated the appeal as ASBCA No. 52741 on quantum. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 602(a) and 607. Pursuant to the Board's 26 April 2000 order, HEI filed a "Statement of Costs," and respondent replied thereto. On 11 July 2000 the Board advised the parties that it would not rule on HEI's 31 January 2000 EAJA application in ASBCA No. 50791 until quantum was decided in ASBCA No. 52741. The parties elected a record decision pursuant to Board Rule 11, and submitted documentary evidence and briefs. We assume familiarity with our August 1999 entitlement decision, and cite only those findings and holdings in ASBCA No. 50791 that are useful to decide quantum.

FINDINGS OF FACT

1. HEI's 26 May 2000 Statement of Costs alleged that HEI incurred the following damages due to respondent's breaches of contract 104:

(a) Lost profits from 10 Sep. to 7 Oct. 1989:	\$ 20,952
(b) Videotape inventory, including:	
16,000 tapes at \$40/tape	\$640,000
3 mos. profits AAFES "gained"	\$ 62,856
Cost to get store running	<u>\$ 32,000</u>
Tape inventory:	\$734,856
(c) Inventory, Equipment, Improvements:	\$128,448
(d) Employee termination costs:	\$197,582
(e) 519 water-damaged tapes at \$40/tape:	<u>\$ 20,760</u>
Subtotal:	\$1,102,598
(f) Less: amount AAFES previously paid:	<u>-\$132,306</u>
Total:	\$970,292

HEI's "Statement of Costs" also included CDA interest and EAJA attorneys' fees.

2. Respondent's 26 June 2000 response to HEI's "Statement of Costs" alleged that the "proper" HEI costs incurred due to Government breaches were:

(a) Lost profits:	\$ 9,750
(b) Tape inventory:	
1,040 Beta tapes at \$50/tape	\$ 52,000
7,080 VHS tapes at \$12/tape	\$ 84,960
2,971 Beta tapes at \$5/tape	<u>\$ 14,855</u>
Tape inventory:	\$151,815
(c) Inventory, Equipment, Improvements:	
Equipment	\$39,340
Furniture & Fixtures	\$10,000
Subtotal:	\$ 49,340
(d) Employee termination costs:	\$ 0
(e) Water-damaged tapes, 34 new @ \$50/ tape, 298 used VHS @ \$12 tape, and 187 used Beta @ \$5/tape:	<u>\$ 6,211</u>
Subtotal:	\$217,116
(f) Less: amount AAFES previously paid:	<u>-\$132,306</u>
Total:	\$ 84,410

Respondent admitted CDA interest liability on \$84,810.

3. ASBCA No. 50791 held that AAFES was liable for HEI's lost profits for the 27 days from 10 September 1989, when respondent terminated contract 104, to 7 October 1989, 30 days after the notice of termination. 99-2 BCA at 150,861-62.

4. HEI retained International Trade Resources LLC (ITR) to evaluate quantum data. ITR described itself as "Accountants and Management Consultants," but provided no resumé or other information alleging or showing its qualifications and expertise in public contract accounting, estimating or statistics. (R4, tab 129)

5. Special Provision 14 of contract 104 required HEI to prepare and submit to AAFES a monthly "Concessionaire Settlement Report, AAFES Form 6550-10" (R4, tab 44). Based on extra-record "Concessionaire Settlement Reports," ITR found that HEI's average monthly "net sales" from January to August 1989 were \$51,212 (R4, tab 129 at attach. 3). Based on HEI's contemporaneous revenue statements in the record, we find that HEI's 1989 monthly revenues averaged \$49,657 (R4, tabs 65, 67-72). ITR did not explain the difference between "net" and "gross" sales, or why it used the former. ITR increased the \$51,212 to \$53,517 due to 4.5% greater revenues in HEI's 1986-1988 Panamanian tax reports (R4, tabs 124-26). The record contains no HEI tax report for 1989. ITR multiplied \$53,517 by 14 producing \$749,235 for September 1989 through October 1990, and subtracted HEI's September 1989, \$15,907 revenues, as adjusted by 4.5%, from that \$749,235, yielding \$733,328. (R4, tab 129 at 2-4, attach. 1)

6. ITR calculated that \$646,675 -- comprised of a \$80,864 loss (excess of total expenses over total revenues), \$76,650 salaries of owners Gabriel Mendez, Santiago Porcell and Judith de Porcell, \$192,000 payments to "related company" Home Entertainment Panama, \$34,104 interest on bank debt, and \$442,785 in depreciation and amortization stated in HEI's tax returns -- were 40% of HEI's 1987-88 \$1,664,148 total revenues, and applied that 40% rate to HEI's September 1989 revenues (R4, tabs 125, 126, 129 at 2). ITR did not explain why owners' salaries, payments to a related company, interest, depreciation and amortization were not costs of performing contract 104. ITR multiplied \$733,328 by the 40% "lost earnings" factor, producing \$293,331, which, when divided by 14, resulted in a month's "lost cash flow" of \$20,952.23. (R4, tab 129 at 2-5, attach. 1-2) Because of ITR's unexplained bases, the Board assigns no probative weight to ITR's "lost earnings" calculation.

7. Respondent retained Alexander & Associates (A&A) to evaluate quantum data. A&A's "Statement of Qualifications" included consulting, market research, surveys and analyses in the home video industry, sampling methodologies, but no qualifications in public contract accounting, estimating or statistics (R4, tab 132 at attach. A).

8. A&A reviewed HEI's revenues, cost of goods, staff costs, and space costs, to determine "store operating cash flow" which it equated to "contribution to overhead and profits." A&A concluded that HEI's revenues were trending downwards in 1989, and projected \$45,000 revenue. A&A deducted a 25% concession fee of \$11,250, video tape purchases of \$4,000 and employee

costs of \$20,000, to yield a net profit of \$9,750 for September 1989. (R4, tab 132, March 2000 mem. at 19, 21-23, 25) A&A provided no theory or procedure for projecting revenue trends from historical data, and did not explain why it deducted only the AAFES concession fee, costs of tapes purchased, and employee costs, and disregarded the 10 or 11 other items of cost in HEI's tax reports and income statements, in calculating "overhead and profits." Because of A&A's unexplained bases and deductions, the Board assigns no probative weight to A&A's lost profit calculation.

9. Lost Profit. We find that HEI's costs exceeded its revenue for both 1987 and 1988 (R4, tabs 125-126). The record contains no evidence for projecting that HEI would realize profits in September 1989. We find that HEI has not proven any lost profit.

10. We held that HEI is entitled to recover the September 1989 market value of 9,058 VHS tapes and other property that AAFES purchased in September-October 1989. 99-2 BCA at 150,862-63. On 13 September 1989, AAFES purchased HEI's "other property" for \$17,286.69, including 9,788 plastic boxes at \$0.51 each, for \$4,991.88; 10,188 foam inserts at \$0.10 each, for \$1,018.80; and "Fixtures and Equipment, and improvements (including desks, counters, chairs, light, fixtures, plastic machines, laminating machines, fire extinguishers, customer records, sound systems)" for \$11,276.01 (R4, tab 25). On 20 October 1989, AAFES paid HEI \$306.80 for additional "clear boxes and forms [foams]" (R4, tab 75).

11. In mid-November 1988 HEI had about 11,320 videotapes (R4, tabs 123, 128 at 6, 132 at 5). We found that in mid-September 1989 HEI had approximately 5,600 Beta and 10,400 VHS tapes (99-2 BCA at finding 23), totaling 16,000 tapes, an increase of 4,680 tapes after November 1988 (5,600 + 10,400 - 11,320 = 4,680).

12. HEI retained Adams Media Research to appraise HEI's videotapes at the time contract 104 was terminated. Adams' qualifications included market and financial research, and fair-market appraisal of video retail properties. (R4, tab 128 at 1, app. A)

13. Adams appraised 16,000 tapes at a \$426,944, September 1989, market value, based on comparable videotape sales in the 1980s, and the age and category of tapes. Those tapes included: (a) *VHS*: 6,466 tapes older than one year at \$19.55 per tape, and 3,934 tapes aged under one year at \$50.00 per tape, totaling \$323,105; and (b) *Beta*: 4,289 tapes older than one year at \$8.93 per tape, and 1,311 tapes aged under one year at \$50.00 per tape, totaling \$103,839. (R4, tab 128 at 12-24, exs. 1, 4) Adams appraised plastic videotape boxes and other supplies together at \$1.00 per unit (R4, tab 128 at 3).

14. ITR valued HEI's equipment and improvements at \$128,448, comprised of:

<u>Item</u>	<u>Value</u>	<u>Source</u>
Machinery and Equipment	\$ 8,300	R4, tab 129, attach. 2
Furniture and Goods	38,876	" " "

Other Assets	28,852	“	“	“
Subtotal	<u>\$76,028</u>			
Televisions	\$26,250	R4, tab 132, attach. L		
Atari and controllers	13,090	“	“	
VCRs	13,080	“	“	
Subtotal	<u>\$52,420</u>			

(R4, tab 129 at 5; attach. 5)

15. HEI’s 1988 balance sheet did not identify whether the machinery, equipment, furniture, goods and other assets were on AAFES premises or elsewhere (R4, tab 129, attach. 2). HEI acknowledges that the \$13,080 for VCRs was included in the \$26,250 for televisions, and withdraws the \$13,080 (app. br. at 23).

16. A&A calculated that HEI added 840 new tapes to its November 1988 inventory of 11,320 tapes, removed 550 tapes in March 1989 and lost 519 damaged tapes in August 1989, producing an 11,091 tape inventory in September 1989. Like Adams, A&A considered tapes under one year old as “new,” and older than one year as “used.” A&A considered \$50 per tape as a fair and accurate value for new VHS and Beta tapes, based upon suggested wholesale prices for new tapes and upon its proprietary *Video Flash* rental market tracking data. Based on a sample of six HEI VHS videotapes, A&A opined that the market value of used VHS tapes was \$12 per tape, and on the basis of estimated daily rentals, the value of used Beta tapes was \$5 per tape, as of 10 September 1989. (R4, tab 132, March 2000 mem. at 7-9, 11, 12, 16-17, app. I)

17. A&A ascertained that HEI’s 11,091 videotape inventory included 1,040 new VHS tapes, 7,080 used VHS tapes, and 2,971 new and used Beta tapes. A&A found the September 1989 market value of those 11,091 videotapes was:

<u>Qty.</u>	<u>Item</u>	<u>Unit Value</u>	<u>Market Value</u>
1,040	New VHS	\$50	\$ 52,000
7,080	Used VHS	\$12	\$ 84,960
<u>2,971</u>	Beta	\$5	<u>\$ 14,855</u>
11,091	Tape total:		\$151,815

A&A calculated a \$5-\$10,000 cost to install new furniture and fixtures at a video store, and concluded that \$10,000 was AAFES’ “accommodation value” for HEI’s used furniture and fixtures. (R4, tab 132 at 1-2, March 2000 mem. at 12, 16-18, 27-28)

18. Property AAFES Purchased. Based on the appraisers’ qualifications in making appraisals, we accord somewhat greater probative weight to Adams’ appraisals. We find that the September 1989 market value of property AAFES purchased, the amount AAFES previously paid HEI, and the net damages HEI sustained, were:

<u>Item</u>	<u>Qty.</u>	<u>Unit Value</u>	<u>Total Value</u>
New VHS tapes	3,042	(1) \$50.00	
			\$152,100
Used VHS tapes	6,016	(2) \$15.78	
			94,932
Tape boxes	9,788	(3) \$ 0.80	
			7,830
Foam inserts	10,188	(3) \$ 0.20	2,038
Store furniture	(4)		<u>10,000</u>
Subtotal:			\$266,900
Less Amount AAFES paid HEI:			<u>-\$132,306</u>
Damages HEI sustained:			<u>\$134,594</u>

(1) $10,400 \text{ VHS} \div 16,000 \text{ total tapes} = 65\% \text{ VHS} \times 4,680 \text{ new tapes HEI acquired (see finding 11).}$

(2) 9,058 total VHS tapes - 3,042 new VHS tapes.

(3) See findings 10, 13.

(4) See finding 17.

19. Our entitlement decision held that respondent breached its common law bailment obligation not to lose HEI's property, and, hence, that HEI is entitled to recover the September 1989 market value of HEI's property that AAFES lost. 99-2 BCA at 150,862. After subtracting the 9,058 VHS tapes AAFES purchased from HEI's 16,000 September 1989 videotape inventory, we find that approximately 5,600 Beta tapes and 1,342 VHS tapes were lost by AAFES in September-October 1989.

20. A&A found a \$49,340 value for HEI's equipment, including the \$26,250 purchase price for television/VCRs (because HEI had represented to the CO on 14 July 1989 that these items to be exonerated were "50 TVCR's Combos"), and the \$13,090 purchase price for 20 Ataris (R4, tab 132, March 2000 mem. at 27-28, attach. L).

21. In September 1989 HEI had 134 TVs, recorders, VHS player/recorders and shrink wrap kits at military bases under contract 104 with a \$23,252.50 exoneration value, probably among the equipment and improvements ITR valued at \$76,028 (R4, tab 109).

22. Property AAFES Lost. Based on our foregoing findings, the same proportion of new and used tapes among those sold to AAFES, and our assessment of the appraisers' qualifications and the probative weights to be accorded to their appraised values, we find that the September 1989 market value of property AAFES lost was:

<u>Item</u>	<u>Qty.</u>	<u>Unit Value</u>	<u>Total Value</u>
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New VHS tapes	450	\$50.00	\$ 22,500
Used VHS tapes	892	\$15.78	\$ 14,076
New Beta tapes	1,638	\$50.00	\$ 81,900
Used Beta tapes	3,962	\$ 7.00	\$ 27,734
TV/VCRs	50		\$ 26,250
Atari/controllers	20		\$ 13,090
Other equipment	134		<u>\$ 23,252</u>
Total:			<u>\$208,802</u>

23. Our entitlement decision held that AAFES is liable for HEI's damages incurred as a result of its business being shut down before 7 October 1989, which date is 30 days after HEI received the CO's notice of contract termination on 7 September 1989. "Those damages include . . . liability to its employees under contract 104 under Panama's Labor Code." 99-2 BCA at 150,862.

24. The 24 July 1995 letter of Panama's "Ministry of Labor and Social Welfare" notified HEI that 127 of its workers claimed indemnity, vacation, Christmas bonus, seniority premium and interest, in the total amount of \$197,582.00, under Article 2245 *et seq.* of the Panamanian Labor Code, due to their dismissal after the cancellation of HEI's contract with AAFES, and if HEI did not discharge such obligation the Ministry would take the matter to the "Superior Labor Courts for immediate execution" (R4, tab 108).

25. The 26 May 2000 letter of Panama's "Ministry of Work and Labor Development" notified HEI that Angela Tuñon Andrion, Rosa Morales, Vielka McCollins, Judith Cedeño and Mitzi Evans and others had filed a proceeding against HEI on 14 November 1989 for back salaries, charges, and interest under Article 215 of the Labor Code, and that on 30 April 1990 that Ministry had entered a Resolution ordering HEI to reinstate the employees and pay back salaries, charges and interest as provided for in Article 170 of the Labor Code. (R4, tab 127)

26. The affidavit of HEI's Gabriel Mendez stated: "On November 14, 1989, HEI's employees filed a complaint with the Ministry of Labor to recover amounts due to them under Panamanian labor law resulting from their termination from HEI. HEI continues to be liable for the claims made against it by those employees" and considering full and part-time employees, HEI had "20-25 equivalent employees" (R4, tab 131, ¶¶ 8, 10).

27. The affidavit of Dr. Marcos Ostrander, a Panamanian labor lawyer, stated that the documents supporting the number of employees and their original calculations on which their claim was based no longer exist at the Ministry; "HEI owes 127 former employees \$197,582 plus interest, and that HEI has not satisfied this claim"; no more than 20% of the claim HEI would be obligated to pay even if AAFES had not prematurely terminated contract 106; and "at least 80% of the claim could have been avoided by HEI had AAFES not terminated the contract prematurely" (R4, tab 130).

28. HEI calculated the employee termination liability as “\$197,582 x 79% = \$156,090 x 80% = \$124,872” plus interest. HEI derived the 79% factor by the ratio of 100 employees on HEI’s operations to 127 suing employees. (App. br. at 28-29)

29. HEI’s 1988 Panamanian tax report listed 20 employees (R4, tab 126 at 7). HEI’s 1988 “Salaries Paid” list included 35 employees (R4, tab 136). The five HEI employees named in the Ministry’s 26 May 2000 letter – Angela Tuñon Andrion, Rosa Morales, Vielka McCollins, Judith Cedeño and Mitzi Evans – all appear in the “Salaries Paid” list, but none appears in HEI’s 1988 Panamanian tax report. The record does not disclose why HEI’s 1988 Salaries Paid list and tax report identify different names and numbers of employees, and which were full-time and which were part-time employees.

30. Employee Termination Liability. Deriving an 18% factor from Mr. Mendez’ estimate of 20-25 “equivalent employees” $((20+25) \div 2 \div 127)$, we find that HEI’s September 1989 employee termination liability is $\$197,582 \times 18\% \times 80\% = \$28,452$, without interest. CDA interest is addressed below.

31. Our entitlement decision held that HEI is entitled to recover for water damages to more than 500 of HEI’s video tapes destroyed on or about 15 August 1989 at the Fort Clayton outlet. 99-2 BCA at 150,863.

32. 519 HEI videotapes were damaged or destroyed by water on 15 August 1989 (R4, tab 97). Of that number, 187 were Beta and 332 were VHS. The parties agree that the 187 Beta tapes were older than one year, and that 34 of the 332 VHS tapes were newer than one year. (R4, tabs 128 at 27, tab 132, March 2000 mem. at 29)

33. Water-Damaged Tapes. Based on the same evidentiary factors described in findings 18 and 22, we find that the August 1989 market value of the 519 water-damaged tapes was:

<u>Tape Type</u>	<u>Units</u>	<u>Unit Value</u>	<u>Total Value</u>
VHS new	34	\$50.00	\$1,700
VHS used	298	\$15.78	\$4,702
Beta used	187	\$ 7.00	<u>\$1,309</u>
Total:			<u>\$7,711</u>

34. Summary Findings. By way of recapitulation, we find that the preponderance of record evidence supports the following damages:

(a) Lost Profit:	\$ 0
(b) Property AAFES Purchased:	\$134,594

(c) Property AAFES Lost:	\$208,802
(d) Employee Termination Liability:	\$ 28,452
(e) Water-Damaged Tapes:	<u>\$ 7,711</u>
Total damages:	<u>\$379,559</u>

35. In the Board’s 13 March 1998 decision on respondent’s motion to dismiss ASBCA No. 50791 for lack of jurisdiction, we held that HEI’s 8 December 1989 claim was properly certified. *Home Entertainment, Inc.*, ASBCA No. 50791, 98-1 BCA ¶ 29,641 at 146,878. Both parties calculate CDA interest starting from 8 December 1989 (app. Statement of Costs, attach. 3; Gov’t resp. at 7). The record does not show the date when the CO received HEI’s claim (R4, tab 29). The CO’s 1 February 1990 letter acknowledged receipt of that claim (R4, tab 30). The record contains no evidence of any irregularity in the mails. Considering the intervening weekend, we find that the CO received HEI’s claim on 13 December 1989.

DECISION

Appellant HEI has the burden of proving its quantum claim. *See Lockheed Martin Corp.*, ASBCA No. 45719, 00-2 BCA ¶ 31,025 at 153,225.

Most of the parties’ arguments addresses the factual support and credibility of the quantum estimates of A&A, ITR and Adams, and the probative weight to be accorded to their respective testimony, documents, calculations, appraisals, and conclusions. We have resolved those evidentiary issues by our findings of fact.

HEI’s claims the costs of three months profits that AAFES “gained” or a cost to “get store running.” Even if those costs were viewed as mere refinements of videotape damages, we are not persuaded to include them in the amount HEI is entitled to recover. AAFES had the original contract right to purchase HEI’s inventory, and unquestionably had the right to lease such videos to customers after termination of contract 104. AAFES’ breaches of contract 104 did not impair such pre-existing rights. *See Christine Turner*, ASBCA No. 26900, 84-1 BCA ¶ 17,138 at 85,382 (start-up costs not recoverable under clause 9b).

Respondent argues that HEI may not recover employee termination damages because there is no Panamanian judgment entered against HEI for such damages. Compensation for personal services, such as wages, bonuses, fringe benefits, and severance pay, “includes all remuneration paid currently or accrued.” FAR 31.205-6(a). Thus, accrued liability for employee termination charges does not require proof of a judgment. We conclude that HEI’s affidavits and the Panamanian Ministry’s entry of a resolution ordering HEI to pay back wages, charges and interest is adequate proof of accrued liability. *See Seven Sciences Industries*, ASBCA No. 23337, 80-2 BCA ¶ 14,518 at 71,556 (Board accepted testimony of *bona fide* indebtedness for unpaid salaries).

When the record does not establish the date when the CO received a contractor's claim, the Board may set a putative date of receipt of the claim, absent proof of any irregularity in the mails. *See J. W. Cook & Sons, Inc.*, ASBCA No. 39691, 92-3 BCA ¶ 25,053 at 124,865.

We hold that HEI is entitled to recover \$379,559, together with CDA interest on that amount from 13 December 1989 (finding 35) until paid.

Dated: 11 April 2001

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEPLER
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. 52741, Appeal of Home Entertainment, Inc., rendered in conformance with the Board's Charter.

Dated:

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