ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| GMS Hawaii Corporation | ) | ASBCA No. 58195 |
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| Under Contract No. 140-100-99-C-0017 | ) | |

APPEARANCES FOR THE APPELLANT: Mr. Werner Gerst
President

Mr. Wiley Moore
Secretary-Treasurer

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Michael D. Rigg, Esq.
Trial Attorney
Navy Exchange Service Command
Virginia Beach, VA

OPINION BY ADMINISTRATIVE JUDGE GRANT

Appellant GMS Hawaii Corporation (GMS) seeks compensation for the termination of its concession contract to provide gourmet coffee at the former U.S. Army Field Station in Kunia, Hawaii. GMS asserts its contract was terminated for convenience, entitling it to recoup $18,868.03 in unamortized depreciation costs it would have captured had the contract run for 10 years as GMS anticipated. The government argues GMS is not entitled to compensation based on several theories, each of which in the government's view would defeat recovery. We have jurisdiction pursuant to the Disputes Clause of the contract.[1] The parties elected to proceed under Rule 11, submitting the matter for decision on the record. For the reasons stated below, the appeal is denied.

FINDINGS OF FACT

1. The Navy Exchange Command (NEXCOM) is a non-appropriated fund instrumentality under the purview of the United States Navy. NEXCOM manages the worldwide system of Navy Exchange (NEX) retail stores, which offer goods and services

[1] The contract incorporated by reference NEXCOM Publication No. 61 (Pub. 61), 5 September 1997 (R4, tab 1 at 18). Pub. 61 contained a Disputes Clause giving this Board jurisdiction over contract disputes (R4, tab 1, Pub. 61 at Sec. E.1.a, g).

to authorized patrons, primarily military members, retirees, and their families. (R4, tab 1 at 3; gov't br., Statement of Undisputed Facts (SUF) ¶ 1)

2. In 1996, the U.S. Navy entered into an Inter-Service Support Agreement and Land Use Permit with the U.S. Army for use of the Kunia facility. In 2005, the Army and the Navy agreed to extend the Land Use Permit, thereby allowing the Navy to continue using the Kunia facility through 30 September 2011. (R4, tabs 2, 16; SUF ¶¶ 3, 4, 21) The inability of the Navy to renew this arrangement in 2011, outlined below, created the circumstances underlying the claim at issue here.

3. Contract No. 140-100-99-C-0017 was entered into between GMS and NEX Pearl Harbor effective 23 November 1999 (R4, tab 1). GMS is a franchise operation for Seattle's Best Coffee, LLC (R4, tab 41 at 2). Under the contract, GMS was to provide an Espresso/Cappuccino Coffee Concession in the mini-mart operated by the NEX in Building 150, Pearl Harbor Naval Base, Hawaii (R4, tab 1 at 3). The contract as modified authorized other locations to be added in addition to the one specified originally (R4, tab 13).

4. At the time of award, the contract covered one five-year base period with five one-year options (R4, tab 1 at 4). This was altered by Modification No. M-004 (Mod. M-004) (incorrectly labeled as M-012), issued on 4 November 2002. Mod. M-004, mutually agreed to by the parties, changed the option period to one five-year option. (R4, tab 6)

5. The real Modification No. M-012 (Mod. M-012), effective 31 May 2005, exercised the five-year option period for the contract. It also added four new sites for espresso/cappuccino coffee concession operations, including the Kunia facility at issue here. It specifically stated that the "dates of performance for these locations will be the same as the subject contract with contract being activated on the first day of operation (5 years plus one (5) year extension)," noting that the final expiration date of the contract at the Kunia location was thus extended to 24 October 2012. Mod. M-012 also stated that "[e]quivalent space for each facility will be provided if the current facilities are renovated or relocated." (R4, tab 14)

6. Modification No. M-016 was issued 12 September 2007 and clarified that the "date the Kunia Mini Mart location opened for business is August 1, 2005. Therefore the period of performance for this location commences August 1, 2005 and ends July 31, 2010." (R4, tab 20) Modification No. M-023 exercised the option for the Kunia location only, from 1 August 2010 to 31 July 2015 (R4, tab 27).

7. There are two contract termination clauses relevant to this dispute. Clause H.9., **LICENSE AGREEMENT TERMINATION/REVOCATION**, addresses both no cost termination for base closure or discontinuance of the operations of the Exchange (subsection a.) and termination for convenience (subsection d.):

> a. *This License Agreement will be automatically terminated in the event of base closure or other discontinuance of the operations of the Exchange, without cost or liability to either party.* In all other instances, the provisions of this Agreement covering termination/revocation, and as set forth in the General Provisions, Pub. 61, shall apply.
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> d. *In the event the Agreement is terminated for the convenience of the Government, the amount recoverable by the Licensee shall be limited to the depreciated value of improvements* (excluding Licensee-owned removable property as previously defined herein) as of the effective date of revocation of this Agreement, less projected operational losses. The depreciated value of improvements shall be calculated based upon a straight-line amortization schedule no longer in duration than the term of this Agreement or such accelerated depreciation schedule as is permitted by the federal tax code, whichever results in a lower value of the improvements....

(R4, tab 1 at 21-22) (Emphasis added)

8. The contract also contained the "**Adverse Business Impact**" clause, which stated in part that:

> a. Neither the Exchange nor the U.S. Government shall be liable to the Contractor (or [any] Licensee) for revocation of license, or any costs incurred or revenue lost due to any business interruptions, reduced business activity, sovereign acts, or any other causes, including but not limited to: (i) disruption of utilities, (ii) changes in access routes, (iii) changes in safety/security processes, (iv) reductions in personnel in the area, and/or (v) closure/reorganization of bases, whether or not beyond the control, fault, or negligence of the Exchange or the U.S. Government; without limitation.

This clause was added to the contract bilaterally by Modification No. M-019, replacing a similar clause, entitled "Sovereign Act Immunity." (R4, tab 23, tab 1 at 18)

9. In 2011, the Land Use Permit ended, and responsibility for the Kunia facility apparently reverted back to the U.S. Army. The National Security Agency (NSA) was given the right to use and control the Kunia facility (R4, tabs 34, 42, 43). NEX Pearl Harbor learned in August 2011 that NSA had given a permit for food and vending operations at the Kunia site to Ho'opono, the Hawaii State Licensing Agency under the Randolph-Sheppard Act (RSA), requiring NEX Pearl Harbor to cease further operations at Kunia (R4, tab 33). We find that this constitutes "discontinuance of the operations of the Exchange" under Clause H.9.a.

10. Effective 30 September 2011, Modification No. M-028 terminated the part of the GMS contract concerning the Kunia site (R4, tab 54). Earlier, a proposed modification had been sent to GMS, citing both parties' agreement to termination for "convenience" without additional cost or liability (R4, tab 37). This earlier version was not used as GMS disagreed that the termination was based on mutual convenience (R4, tab 39 at 3). The final termination notice did not refer to a convenience termination, but stated that it was in accordance with Clause H.9.a. of the contract and was "without cost or liability to either party." Both parties signed the modification without reserving any claims. (R4, tab 54)

11. GMS negotiated an arrangement with Ho'opono and/or the authorized RSA permit holder under which GMS continued to operate a coffee concession at the NSA Kunia location using the same equipment used for the NEX Pearl Harbor concession contract (R4, tab 49; app. br. at 4).

12. On 23 January 2012, GMS filed a claim with NEXCOM, seeking compensation of $32,000, the unamortized portion of GMS's investment, based on the termination for convenience provisions of the contract[2] (R4, tab 60 at 5). In subsequent correspondence about the claim, GMS asserted that the termination modification was "hastily forced upon GMS" (R4, tab 60 at 2). The contracting officer denied the claim on 9 April 2012 citing the government's right to terminate without cost or liability to either party under Clause H.9.a. and expressly noting that the action was not a termination for convenience (R4, tab 63). GMS appealed this decision to the Board on 23 June 2012 (R4, tab 64).

[2] GMS later reduced the claim amount to $18,868.03 (app. br. at 4).

## DECISION

GMS primarily argues that the government's action was effectively a termination for convenience, and that the portion of Clause H.9. concerning terminations for convenience allows recovery of unamortized depreciation. GMS contends that depreciation over a 10-year period is allowed because the contract did not mandate any other period for depreciation, and this period is consistent with the 10-year period of performance created by the option exercise. GMS also asserts that recovery is warranted because equivalent space was required to be provided under the contract if current facilities were renovated or relocated, and such equivalent space was not provided. (App. br., *passim*)

The government argues that GMS's claim is precluded because the Clause H.9.a., License Agreement Termination/Revocation, applies due to discontinuance of the operations of the Exchange and thus authorizes termination without cost or liability to either party. The government further argues that the Adverse Business Impact clause (or its predecessor) bars recovery, or alternatively, the Sovereign Acts doctrine. The government also disagrees with GMS's assertion the action was effectively a termination for convenience, and further contends that even if it could be viewed as such, recovery would still be precluded because the base year period only ran for five years, thereby giving GMS no automatic right to recoup unamortized depreciation extending past that, and because of subsequent business arrangements made by GMS. (Gov't br. at 9-16)

With regard to the government's arguments, we need only address one – that recovery is barred by the License Agreement Termination/Revocation clause. As the government notes, Clause H.9.a. provides for termination without cost or liability to either party "in the event of base closure or other discontinuance of the operations of the Exchange" (finding 7). The situation present here does not constitute a base closure, but NEX Pearl Harbor could not continue operations at Kunia after its authority to do so ended in 2011 and NSA was given right to use and control the Kunia facility. We have found that this constitutes "discontinuance of the operations of the Exchange" under Clause H.9.a. (finding 9), and thus the government could terminate the contract on this basis, without liability. Neither the exercise of the option nor the termination for convenience rights overrides the categorical no-cost termination authority contained in Clause H.9.a. for discontinuance of operations of the Exchange.

As to GMS's arguments, they are unpersuasive. The government's termination was not a termination for convenience of the government. Subsection d. of Clause H.9., which concerns terminations for convenience, was not cited in the termination notice as the authority for the action, nor can it be viewed as implicitly applicable since other authority was specifically referenced (subsection a.) and previous language about convenience termination in the proposed modification was specifically dropped from the final (finding 10). With regard to GMS's argument that equivalent space was required to

be provided under the contract if current facilities were renovated or relocated (finding 5), the clause to this effect does not apply here because the Kunia facility was not either renovated or relocated. We have considered GMS's other arguments and do not find that they alter the conclusion reached here.

## CONCLUSION

For the reasons stated above, the appeal is denied.

Dated: 30 July 2013

ELIZABETH M. GRANT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

OWEN C. WILSON
Administrative Judge
Acting 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. 58195, Appeal of GMS Hawaii Corporation, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals