

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Dunyami Karakoc) ASBCA No. 58304
)
Under Contract No. RAMS 08-546)

APPEARANCE FOR THE APPELLANT: Dirk Polishuk, Esq.
Kaiserslautern, Germany

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Anthony F. Schiavetti, JA
CPT M. Aaron Lee, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PAUL ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is a timely appeal of a contracting officer's (CO's) decision terminating appellant Dunyami Karakoc's (DK's) concessionaire contract for default. The Contract Disputes Act, (CDA), 41 U.S.C. §§ 7101-7109, is applicable. The government filed a motion for summary judgment, appellant filed an opposition brief as well as a cross-motion, and the government filed a reply brief. We grant the government's motion and deny the appellant's cross-motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 26 January 2009, the Army and Air Force Exchange Service (AAFES) awarded concessionaire Contract No. RAMS 08-546 to appellant for clothing alteration services under the AAFES trademark "Stripes—The Alterations Place" at Ramstein Air Force Base, Germany (R4, tab 1 at 1, Schedule at 1).

2. Performance under the contract was to begin on 24 February 2009. The contract also provided: "In no event will the contract period exceed five (5) years from the date established above for commencement of service." (R4, tab 1, Schedule at 1)

3. The contract also stated that gross sales for alterations had averaged \$21,198 per month for the past year. It contained an estimated average of approximately \$21,300 per month for alterations during the contractual period. The contract also estimated that "[c]lothing alterations accomplished under the exchange's 'no charge'

alteration services, which is free to the customer but paid by AAFES” would average “approximately \$4,000 per month,” which was over and above the \$21,300 figure. In addition, the contract stated: “AAFES makes no warranty, express or implied, of the gross sales to be realized.” (R4, tab 1, Schedule at 1)

4. The contract contained several provisions identified as Exhibit A, “GENERAL PROVISIONS [GP] (AUG 08)” (R4, tab 1, ex. A at 1). GP 8, entitled “TERMINATION (JUN 94),” provided:

Relative to 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.

c. This contract is automatically terminated upon the dispatch of written notice to contractor in the event the exchange is inactivated or the installation at which the exchange is located 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.

(*Id.* at 3) GP 11, styled “DISPUTES (FEB 95),” stated:

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.

b. “Claim” as used in this clause means a written demand or written assertion by one of the contracting parties seeking the payment of money in a sum certain or other relief arising under or relating to this contract. A

voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Contract Disputes Act.

c. A claim by the contractor shall be made in writing and submitted to the contracting officer for a written decision. A claim by AAFES against the contractor shall be made by a written decision by the contracting officer.

d. For contractor claims exceeding \$100,000, the contractor shall submit with the claim a signed certification that:

(1) The claim is made in good faith;

(2) Supporting data are accurate and complete to the best of the contractor's knowledge and belief, and

(3) The amount requested accurately reflects the contract adjustment for which the contractor believes AAFES is liable.

e. The claim must be executed by an individual with authority to bind the contractor.

f. The contracting officer will mail or otherwise furnish a written decision in response to a contractor claim, within the time periods specified by law. Such decision will be final and conclusive unless:

(1) Within 90 calendar days from the date of contractor's receipt of the final decision the contractor appeals the decision to the Armed Services Board of Contract Appeals (ASBCA), or

(2) Within 12 months from the date of contractor's receipt of the final decision the contractor brings an action in the United States Court of Federal Claims.

g. Pending final resolution on any request for relief, claim, appeal, or action arising under or relating to this contract, contractor will proceed diligently with the

performance of this contract and will comply with the contracting officer's decisions.

h. Submission of false claims to AAFES is a violation of federal law and may result in civil and/or criminal penalties. If contractor cannot support all or part of its claim as a result of fraud or misrepresentation of fact, then in addition to other remedies or penalties provided for by law, contractor will pay AAFES an amount equal to the unsupported part of the claim and all AAFES' costs attributable to reviewing that part of the claim.

(*Id.* at 3-4) Finally, GP 12, entitled "NON-WAIVER OF DEFAULTS (MAY 89)," provided:

Any failure by AAFES at any time, or from time to time, to enforce or require strict performance of any terms or conditions of this contract will not constitute waiver thereof and will not affect or impair such terms and conditions in any way or AAFES' right at any time to avail itself of such remedies as it may have for breach or breaches of such terms and conditions.

(*Id.* at 4)

5. The contract also contained Exhibit C, "SPECIAL PROVISIONS [SP] (CONCESSION CONTRACTS) (DEC 07). SP 13, "INTERNAL CONTROLS (JAN 05)," provided in pertinent part:

Concessionaire will keep a complete and accurate accounting of all transactions including, but not limited to, facility sales, route sales, organization sales, etc.

....

(2) All sales (cash, charge card or deposit) will be recorded on the cash register when the transaction is made. Service and merchandise sales will be recorded separately on the designated keys of the cash register. The customer will be given a cash register receipt for the sale.

....

f. Cash Control. Cash (including checks) received by the concessionaire from sales becomes the property of AAFES at time of receipt from customers. Misappropriation or use other than as authorized by AAFES is prohibited and may result in prosecution. Concessionaire shall be financially liable for loss of cash receipts regardless of cause until such receipts are deposited with and receipted for by authorized AAFES personnel at the designated cash collection point or a deposit receipt is obtained from the financial institution designated by AAFES. In the event of loss of receipts, the concessionaire shall reimburse AAFES the amount established by AAFES audit.

(R4, tab 1, ex. C at 5, 8)

6. Exhibit D, "PRICE SCHEDULE," was also included in the contract. Clause 5, Pricing, provided:

All services and merchandise will be priced in Local Currency and customers have the option of paying for their purchase in either U.S. Dollars or local currency. Change will be given in currency used for payment. The sell price must provide customer savings of at least 20 percent in comparison to local commercial pricing, excluding all taxes.

a. Sales made in U.S. dollars: The Local Currency amount will be converted to U.S. dollars at the Daily Exchange Rate (DER) in effect the day the sale is made. (Example: EUR 100.00 is divided by daily exchange rate of EUR 0.77 = \$1.00 = \$129.87, rounded to the nearest \$0.05 = \$129.85 sell price.) For sales made on Saturdays and Sundays, the rate quoted Friday for the following Monday will be used. For local holidays, the rate quoted for the day following the holiday will be used. The daily exchange rate will be obtained from the installation banking facility.

b. Sales made in Local Currency: When accepting local currency for payment, local currency sales will be recorded in U.S. Dollars on the cash register. Conversion

to U.S. Dollars will be made at the DER in effect the day the sale is made.

c. At the end of each business day, all local currency and U.S. Dollar sales receipts will be listed on the Salesclerk Daily Report (AAFES Form 7200-12) in U.S. Dollars. All local currency sales receipts will be listed in U.S. Dollars using the Daily Exchange Rate in effect the day of the sale on the Salesclerk report. Both local currency and US Dollar sales receipts will be turned into AAFES, in accordance with the contract Special Provisions.

(R4, tab 1, ex. D at 3)

7. From 9 August 2011 through 13 August 2011, employees of AAFES conducted a video surveillance of appellant's alteration shop (R4, tab 12). The surveillance camera recorded several occasions in which appellant's manager, [REDACTED], and one of his employees, [REDACTED], violated the "INTERNAL CONTROLS" provision of the contract by failing to ring sales into the cash register (R4, tab 1 at 1, tabs 10-12; SOF ¶ 5).

8. On 16 August 2011, [REDACTED] was interviewed by AAFES personnel and signed a written statement in which he admitted pocketing at least \$2,170 which was not recorded in the cash register (R4, tab 10 at 2, tabs 12-13).

9. On 18 August 2011, [REDACTED] was similarly interviewed by AAFES personnel and signed a written statement in which he admitted failing to report sales in a total amount of 760 Euros (R4, tab 11 at 1, 4, tabs 12-13). In paragraph 1.a of his complaint, appellant admitted that he failed to record sales as required by the contract.

10. Over nine months later, on 7 June 2012, the CO, Ms. Valerie Dixon, terminated appellant's contract for default. She wrote, in pertinent part:

Reference is made to Concession Contract No. RAMS 08-546 between Dunyami Karakoc and Army and Air Force Exchange Service (Exchange) for Alteration service to Exchange patrons at Ramstein, GE.

A video surveillance operation was conducted at your facility from August 9th through the 13th, 2011. Surveillance by the Exchange Loss Prevention Department observed your company:

- a. Failed to record sales or recorded sales amounts incorrectly.
- b. Failed to ring up euro sales transactions using the Average Daily Rate (ADR) of .68 (rate for that time period). In several instances the amount of the sale was rung in U.S. dollars, or incorrectly causing an incorrect fee due/paid to the Exchange.

Under the provisions of Clause Number 8a Termination, Exhibit A, General Provisions of the Contract, the contract is hereby terminated for default, effective at close of business **June 15, 2012**. Specifically, you:

- a. Failed to comply with Exhibit C, Special provisions, clause 13 which states, "Concessionaire will keep a complete and accurate accounting of all transactions including, but not limited to, facility sales, route sales, organization sales, etc."
- b. Failed to comply with Exhibit C, Special Provisions, clause 13.f which states: "Cash (including checks) received by the concessionaire from sales becomes the property of the Army and Air Force Exchange Service (Exchange) at the time of receipt from customers. Misappropriation or use other than as authorized by the Exchange is prohibited and may result in prosecution."

The Exchange does not intend to exercise its option to buy your equipment.

Before your final departure from this installation:

- a. Pay all fees due Exchange for full fiscal months.
- b. Pay all invoices for telephone service in full.
- c. Return all Exchange-owned equipment.

- d. Surrender all installation passes for yourself and your employees to the installation provost officer.

(R4, tab 8) This timely appeal followed.

DECISION

Summary judgment is appropriate when a movant demonstrates that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that might affect the outcome of a case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). With respect to the default termination, it is a drastic sanction which may be imposed only when there are good grounds and solid evidence. In addition, the government bears the burden of proving that the termination is justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764-65 (Fed. Cir. 1987). The government has clearly met its burden with respect to its summary judgment motion.

We conclude that the government has met its burden with respect to the termination for default. It is undisputed that appellant and one of his employees violated the contract by failing to record sales in the cash register (SOF ¶¶ 5, 7-9). Therefore, the only issue before us is the efficacy of the contract's "NON-WAIVER OF DEFAULTS" clause (SOF ¶ 4). We note initially that there is no evidence of an express waiver. Accordingly, we may narrow the issue further and focus upon the law of implied waivers.

Waiver is an affirmative defense, as to which the breaching party bears the burden of proof. *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1299 (Fed. Cir. 2002). Moreover, an implied waiver may be inferred by conduct or actions that mislead the breaching party into reasonably believing that the rights to a claim arising from the breach were waived. *Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1361 (Fed. Cir. 2005) (citing *Northern Helex Co. v. United States*, 455 F.2d 546, 551 (Ct. Cl. 1972)). AAFES did not engage in such conduct. Further, we give effect to the Non-Waiver of Default clause: Our appellate court has upheld similar non-waiver provisions in at least two decisions. *Westfed Holdings*, 407 F.3d at 1361; *Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234, 1252-53 (Fed. Cir. 2007).

In its cross-motion, appellant does not raise any factual issues whatsoever. It states: "Even if the appellant had breached the contract, it would be not relevant to decide this case, as AAFES was [sic] waived its right for immediate termination in

summer 2012 for an occurrence in summer 2011” (app. br. at 1). Appellant concludes that, as a matter of law, the contract’s “non-waiver clause is ineffective” (*id.*).

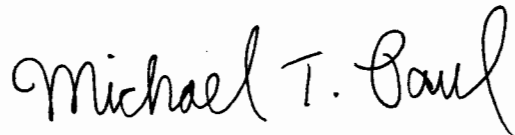
In support of its waiver argument, appellant cites a decision by the Court of Appeals of England and Wales and a decision by the U.S. District Court for the Eastern District of New York (br., *passim*). It does not cite any decisions by either this Board the U.S. Court of Federal Claims or the Court of Appeals for the Federal Circuit. In so doing, it ignores General Provision 22, of the contract, “CHOICE OF LAW AND FORUM (MAR 06),” which provides that the contract shall be construed by the laws of the United States, as applied by these tribunals among others. Thus, appellant’s citations are unavailing. Moreover, we cannot discern any prejudice to appellant from AAFES’ default decision being taken when it was.

In sum, AAFES did not impliedly waive its right to terminate appellant’s contract for default.

CONCLUSION

The government’s motion for summary judgment is granted, and appellant’s motion for summary judgment is denied. The appeal is denied.

Dated: 1 October 2014



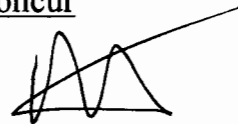
MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



RICHARD SHACKLEFORD
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. 58304, Appeal of Dunyami Karakoc, rendered in conformance with the Board's Charter.

Dated:

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