

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of)	
ALPHA OMEGA AMUSEMENTS, INC.)	
)	
Under Towson State University)	MSBCA Docket
Contract No. TSU-RP-0132-92)	Nos. 1887 & 1951
)	
)	

December 19, 1998

Breach of Contract - Implied Obligations

Where the State took actions which would necessarily prevent a pre-existing contract from being performed as bid and as planned, the State breached the implied obligation not to prevent or hinder performance by the other party.

Breach of Contract - Assumption of Risk

While the Contractor assumed some risk (that interest in computer games would wane, etc.) by entering into a contract which contained a minimum guarantee, it did not assume the risk regarding interference with performance of the contract by the State. This limitation on the assumption of risk by the contractor was specifically accepted by the State by its inclusion of limiting language (drafted by the contractor) in the contract.

APPEARANCES FOR APPELLANT

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APPEARANCE FOR APPELLEE

Jennifer L. Forrence
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OPINION BY BOARD MEMBER STEEL

These consolidated appeals arise out of a dispute between Towson State University (TSU) and Alpha Omega Amusements, Inc. (Alpha Omega) over a shortfall in minimally guaranteed commission and revenues generated by Alpha Omega's coin-operated amusement games provided by contract to the University. At issue is the responsibility for the shortfall, and thus, whether an adjustment to that minimum guarantee under the contract is appropriate.

Findings of Fact

1. On October 4, 1991, TSU issued Request for Proposal No. TSU-RP-0132-92 for provision of coin-operated entertainment and amusement machines. In its proposal, TSU asked that bidders include in their proposals a 50% annual net percentage of machine revenues as TSU's commission from machine operations as well as a minimum guarantee of revenue to TSU of at least \$70,000 per year. Thus, if the annual commission from the games was less than the amount minimally guaranteed by the contractor in its proposal, then the contractor would be responsible for paying the difference between the commission and the minimum guarantee.
2. In its October 28, 1991 proposal, the incumbent Alpha Omega proposed that it would pay TSU 50% net machine revenues (after refunds and Maryland tax) or a minimum of \$90,100 per year, whichever was greater. Alpha Omega qualified its proposal with the following language:

The minimum guarantee is based on the following: 1) The client will keep the game's area open and operational during regular building hours hours [sic] and operate the gameroom in a similar manner as in 1991. The number of machines is not reduced below 50.
3. TSU chose Alpha Omega's proposal, and on December 6, 1991, a contract was signed between TSU and Alpha Omega for a term of three years beginning January 1, 1992, with an option for two additional one year periods. The Contract incorporated by reference the terms, conditions and specifications in the Request for Proposals and Alpha Omega's October 28, 1991 response thereto including the qualification noted above.
4. In 1992, the first year of the contract, the 50% commission paid to TSU exceeded the minimum guarantee of \$90,100; Alpha Omega's revenues were \$203,334¹. In 1993, TSU's 50% commission was \$14,060 less than the \$90,100 minimum guarantee. In 1994, Respondent lowered the minimum guarantee amount to \$83,850 to account for closures made necessary by renovations to the game room areas, but Alpha Omega provided only \$61,025, resulting in a shortfall of \$22,825. In 1995, Alpha Omega actually paid \$55,154 to Respondent, failing to pay \$2,770 in commissions, and \$32,175.64 to cover the minimum guarantee.
5. Procurement Officer's decisions were issued on March 31, 1995 (for 1993 & 1994) and April 29, 1996 finding that Alpha Omega owed \$14,059 for 1993, \$22,825 for 1994, and \$34,946 for 1995. The balance of 1995 commissions have since been paid, leaving a minimum guarantee balance of \$32,176. Thus Respondent's claim against Alpha Omega Totals \$69,060.
6. There were two game rooms at TSU operated by Alpha Omega under the Contract. The principal game room was located on the first floor of the University Union, the TSU student center. This gameroom is located directly next to the University's bowling lanes, and the only access to the bowling area was through the game room. A second smaller game room was located in Newell Hall.

¹For ease of reading, the Board has rounded these figures to the nearest dollar.

Decision

Appellant disputes the dollar amounts of the shortfalls and disputes the accuracy of the figure claimed by the State at \$71,830 to the extent that it maintains the 1995 50% commission balance of \$2,770 has been paid. The Board finds that the \$2,770 has been paid. Thus, at issue is an outstanding amount of \$69,060. The Respondent has borne the burden of its affirmative claim setting forth the shortfalls in payments made by Appellant. The burden therefore shifts to Appellant to show that Alpha Omega has a defense under the Contract, i.e., that acts of TSU impact Alpha Omega's ability to perform, and excuses its failure to satisfy the minimum guarantee.

Appellant claims that the Contract was breached by the State in several respects, resulting in the loss of business and the concomitant drop in funds available to pay the minimum guarantee. It asks to be excused from payment of the shortfalls, claiming that Respondent is responsible for the reduction of revenues because of several actions taken by Respondent during the life of the Contract, in contravention of the parties' agreement that TSU would keep "the game's area open and operational during regular building hours [sic] and operate the gameroom in a similar manner as in 1991." Respondent, by contrast, denies that it took any actions to which could be attributed a loss in revenues, and states that even if it had taken such actions, they were because of ambiguity in the language of the parties' agreement proposed by Appellant. As such, argues TSU, the ambiguity should be charged against the drafter, in this case, Appellant.

At issue in this case is the ability of the contractor to attract students to play coin-operated amusement games such as pinball and arcade games. The Board finds that the contractor lost revenue through no fault of its own², and that a large portion of the loss of revenue flowed from subsequent proprietary actions taken by TSU. TSU acknowledged during the course of the hearing that the contractor did not materially breach the contract in any way (save failure to honor the minimum guarantee), and that it was "a very good contractor".

Mr. Seninsky, President of Alpha Omega, who was qualified as an expert in gamesroom facilities, operation and management testified that there were several factors to be considered when setting up a college game room, most of which are designed to maximize "impulse play" by students. Location is one of the most important factors; the game room must be appealing, it must be well-lit, and it must be central to traffic flow through the building. Customer service and supervision is also very important, because games must be maintained in working order, refunds must be readily available, and game promotions must be maintained. Layout of the games is also important for attracting players. Ability to attract impulse play is critical. Regarding the impulse to play, Mr. Seninsky stated,

Impulse play would be these games or certain games where you have an attraction to certain people. You know, colors, lights, blinking lights or the

²Excepting, as discussed below, some unquantifiable revenue lost resulting from its failure to maintain the contractual number of games (50) at the site.

cleanliness of a game or the brightness of it. Their eye would catch it or a sound. Sound could be an attraction. They might look that way and see something. Oh! That's interesting. Let's go see what that is.

You know, that's really what you want to do. You don't want to put these games in corners where nobody can see them or turned so that you see the sides or the backs. You want to make it as appealing as possible, and, maybe, the simplest way is you put the games where the people are. Where the people are is what you would do if you could have the best of all worlds.

In a college game room, you go into the student union because that's where you would expect the people to be, and if they pass through the game room or pass by the game room, that is the ultimate position that you want to be in.

I might add that Towson . . . I would consider that set-up of that student union -- its location on the campus as it existed with the traffic flow at that time [1985] was one of the best. Probably, one of the best in the country as far as having the kids roam back and forth on that first floor in and out of the building from different directions and in and out of the game room across that corridor.

When Alpha Omega responded to the RFP in question, therefore, it took into account the traffic patterns of the proposed game rooms, and included in its response to the RFP the proviso, accepted by TSU, that

The minimum guarantee is based on the following: 1) The client will keep the game's area open and operational during regular building hours [sic] and operate the gameroom in a similar manner as in 1991. The number of machines is not reduced below 50.

Appellant alleges that the following actions taken by TSU caused the operation of the game rooms to no longer be "in a similar manner" as existed in 1991, and negatively impacted Alpha Omega's ability to perform the contract:

1) TSU changed staffing patterns for both game rooms in 1993. Initially, in addition to full-time staff positions in Auxiliary Services which directly or indirectly supported the needs of the game rooms, student workers performed various customer service tasks such as providing refunds and repair service notice. In 1993, the number of full time staff positions was reduced, and the number of student workers at the recreation Center dropped from 69 to 46. In addition, student workers were no longer provided to supervise the game room at Newell Hall.

2) Between 1991 and 1995, there was a drop in underclass full-time equivalent student enrollment of almost 10%, a factor listed on page 1 of the technical specifications of the RFP³. Freshman and sophomores make up a disproportionate number of game room customers, and Alpha Omega maintained that a drop in their numbers caused a decline in game revenues.

³Appellant relied on these factors, such as square footage, when preparing its proposal.

3) In early 1993 TSU changed the layout and control of the Newell Hall game area from Auxiliary Services to the Dinning Services arm of the college. Dinning services opened a pizzeria in the Newell Hall space, impacting the number of games that could be place in the Newell Hall game room, as well as the customer service that would be provided by TSU.^{4,5}

4) In 1994 TSU decided to redesignate a room (which had been a computer access room for students located off of the University Union game room) as an office for TSU's student government. The tenants of the room complained about the noise of games and players outside of their new office, and TSU required that Alpha Omega reorganize the games in the games room so as to lessen traffic and noise from games near the student government room.

5) TSU created and advertised a debit card permitting students to purchase many products and services on the campus without resorting to cash, but did not agree to allow Alpha Omega (at its own expense) to make its machines accessible to both coins and debit cards.

6) TSU opened an upscale gourmet coffehouse ("Sweet Sensations") on the second floor of the University Union. Prior to the opening of this coffehouse, the primary gathering spot at the Union was the bowling center coffee machine, accessible only through the game room. The opening of the coffehouse diverted large numbers of students away from the game room.

⁴Respondent argued that Alpha Omega concurred in this decision and provided as evidence a memorandum countersigned by Alpha Omega's representative which stated as follows:

University Union East Recreation Center (Newell Hall) Changes to operations effective January 22, 1993.

Whereas the University Union has decided to cease its recreation operations at the University Union East (Newell Hall) Rec Center, the following changes in operations will be made.

1. There will no longer be an attendant for the games area. Refunds will be administered through the Recreation Center in the University Union.
2. Access to and from the area will be controlled by Dinning Services. The alarm system will continue to be activated during non-activated hours.
3. Dinning Services personnel are not responsible for monitoring games in the area or change making.
4. Operating hours for the area will be determined by Dinning Services. Games maintenance and collections will take place during these operating hours.
5. Maintenance and housekeeping for the are will be coordinated by Dinning Services.
6. The University Union Staff will continue to assist and monitor regularly scheduled collections.

Mark A. Ennis /S/
Alpha Omega Representative

1/29/93
Date

The Board finds that Mr. Ennis' testimony was credible, that he had no authority to bind Alpha Omega, and was signing the document merely as acknowledgment of receipt of the memorandum.

⁵Appellant also advanced two further occurrences that it asserts caused a decline in revenue. First, non-student teenagers had historically been permitted to use the game rooms, and constituted a significant portion of Alpha Omega's customers, particularly on the weekends. In the fall of 1992, TSU decided to enforce a long-standing policy to exclude these customers because of vandalism events occurring elsewhere on campus. Although the signs announcing the reestablishment of the policy were removed within a couple of months, Alpha Omega maintains that the reduction in non-student population continued to be felt, and that their revenues dropped as much as \$1,000 per weekend. Second, Alpha Omega relied on the proximity of the bowling center to the University Union game room on the way to the bowling center to get coffee and, in the afternoons, beer. The beer license, Alpha Omega's experts testified, was a crucial factor in maintaining not only the numbers of players available to plya Alpha Omega's games, but in those players' impulse to play the games. TSU allowed the beer license to lapse for several months in 1994. The Board declines to find that TSU was responsible under the Contract for any drop in revenue attributable to either of these occurances.

While the evidence does not lend itself to a clear quantification of impact on the games contract, it is clear that TSU's focus changed over the life of this contract. For example, TSU determined to open a coffeehouse in the University Union, a successful move which happened to change the traffic patterns of the union. TSU changed the use of the computer room in the University Union game room itself by designating the room as a student government office, generating complaints about the noise of the games and their players, and requiring that Alpha Omega change the character of the games placed near this room. TSU converted the game room area in Newell Hall from recreation to a pizza service area which also impacted on Alpha Omega's ability to perform the contract.

When TSU made changes that unequivocally impacted Alpha Omega's ability to perform the contract, such as when it shut down the game room for a week to install carpeting, TSU allowed a reduction in the minimum guarantee required. The Board believes that the changes noted in the previous paragraph, while not as quantifiable, likewise had a direct impact on Alpha Omega's ability to perform the contract, and that therefore, the minimum guarantees should be reduced.

Where either party to a State contract has materially breached the contract so as to cause damage, the non-offending party is entitled to recover the damages caused by the breach. As this Board has stated in Calvert General Contractors Corp., Docket No. MSBCA 1004, 1 MICPEL ¶5 at p. 25,

. . . as in every contract, there is an implied obligation that neither party will do anything to hinder the performance of the other party. Deweey Jordan, Inc. v. The Maryland-National Capital Park and Planning Commission, 258 Md. 490, 265 A.2d 892 (1970); Continental Massonry Co., Inc. v. Verdel Construction Co., Inc., 279 Md. 476, 369 A.2d 566 (1977). If the SAA breached this obligation, Appellant will be entitled to recover its increased costs in the form of damages.

* * *

In order for Appellant to prevail however, it must show that the award of [a subsequent] contract necessarily hindered or prevented [the completion of its own contract]. If it appears to this Board that the [performance of the contract] was impacted by Appellant's own conduct, or that Appellant otherwise assumed the risk of such disruption under the terms of its [own] contract, recovery may not be permitted. Restatement of Contracts, §315; Williston On Contracts, §1296.

Alternatively, the Board will now consider whether Appellant assumed the risk of interference by another contractor. . . . The Board interprets these provisions reasonably to preclude claims against the SAA due to interference beyond the control of the SSA and caused by a contractor who was on the site prior to award of Appellant's contract. . . . Accordingly the Board finds that Appellant assumed no risk that [the performance of its own contract] would be rendered inutile by work under a subsequently issued contract.

* * *

In summary, the Board finds that Appellant upon entering into [its] contract, had a right to anticipate that subsequent contracts would not be awarded in a manner so as to hinder or prevent [performance of its contract]. . . . This constituted a breach of the implied obligation not to hinder or prevent the Appellant's performance and the Board finds.

* * *

We next consider damages. In this regard, Appellant has the burden of establishing the increased costs it incurred as a result of a change in [procedure]. Although Appellant's damages need not be proven with mathematical certainty, a reasonable basis for determining the amount must be established.

The burden therefore rests to Alpha Omega to show that their failure to meet the minimum payment is due to breaches of the contract by TSU. In analyzing the circumstances of this case the Board notes that the qualifying proviso drafted by Appellant and agreed to by TSU that the gameroom would be maintained in a similar manner means that Appellant does not assume the risk of negative impact, and the minimum guarantee must be adjusted accordingly.

While the Board is persuaded that many of the changes instituted (for good managerial reasons) by TSU contributed to the decline in revenues experienced during the life of the contract, it finds that not all the decline can be attributed to these actions. For example, the Board notes, and Appellant conceded during the hearing, that the increased use of personal computers for games playing may have contributed to a decline in use of the games. In addition, Alpha Omega at various times did not maintain the contractual number of games (50) at the site. We thus conclude that Appellant itself is responsible for a portion of the shortfall experienced.

The Board finds that the amendment regarding maintenance of "similar conditions" made by Alpha Omega and accepted by TSU is not ambiguous -- it is clear from the contract documents themselves that Alpha Omega was agreeing to a minimum guarantee of funds only so long as there was no significant changes which had a negative impact on the manner in which that the game rooms were operated.⁶ Further, the parties had already completed six years of contractual relationship for the same provision of services/games, in the same location as was proposed in this RFP.

The record, however, does not admit of quantification of the shortfall that each party is responsible for. The Board determines that a jury verdict approach is permissible, given the facts

⁶It is interesting to note that the contract contained the following provisions drafted by TSU: "Minor Interruption of Services - Minimum guarantee will not be adjusted due to Act of God, civil disturbances, as well as temporary outages of utilities and strikes." By implication, other potential, non-minor reasons for voiding the guarantee were contemplated by TSU and Alpha Omega when they entered into the contract.

herein⁷ to more fully promote the purpose and policies of the General Procurement Law as set forth in §11-201 of Division II of the State Finance and Procurement Article. It is clear from the record that Appellant did suffer a loss of revenues, a loss which in large part can be ascribed to actions taken by TSU, and pursuant to Calvert General Contractor, Corp., *supra*, the Board finds there is reasonable basis under the jury verdict approach to determine such loss.

In 1992, the first year of the contract, Alpha Omega's revenues were \$203,334, and the 50% commission paid to TSU exceeded the minimum guarantee of \$90,100. Therefore, the Board need not concern itself with commission paid for 1992.

In 1993, Alpha Omega's revenues were \$152,082, and the resultant 50% net commission was \$14,059 less than the \$90,100 minimum guarantee. The Board finds that administrators at TSU noted by hand at the bottom of a March 8, 1994 letter demanding the balance, "nothing that Alpha did, head counts down". The changes to operations effective January 22, 1993 for the Newell Hall game room had significant impact on Alpha's ability to meet the minimum guarantee (as evidenced by the TSU memorandum set forth in footnote 1). Therefore, the Board finds that Appellant may reduce its minimum guarantee to \$83,000, leaving a balance to be paid to Respondent for 1993 of \$6,959.

In 1994, Respondent lowered the minimum guarantee amount to \$83,850 to account for closures made necessary by renovations to the game room areas, but Alpha Omega provided only \$61,025, resulting in a shortfall of \$22,825. The Board finds that Appellant may reduce its guarantee beyond the reduction granted by the State because of the introduction of a student government office in the game room area, the continuation of the conversion of Newell Hall to a pizza parlor, and the introduction of the debit card, to \$78,000.00. Thus, Appellant's remaining balance for 1994 to be paid to Respondent is \$10,725.

In 1995, Alpha actually paid \$57,924 to Respondent, failing to pay \$32,176 to cover the minimum guarantee.⁸ The Board finds that Appellant may reduce to \$75,000 its minimum guarantee for calendar year 1995 because of the contribution of the presence of a student government office in the University Hall game room, continuation of a pizza parlor in Newell Hall, and the diversion of student traffic from the first floor to the new Sweet Sensations Coffee shop on the second floor. Thus, Appellant's remaining balance for 1995 to be paid to Respondent is \$17,076.

The total due to the State on its affirmative claim, therefore is \$34,760.

⁷The Board notes that the shortfall sought by Respondent is, in some respects, a quantification of damages.

⁸Alpha Omega and TSU extended the Contract for calendar year 1995 by mutual agreement. Paragraph 5 of a proposed modification (not yet signed by the State in Appellant's exhibit 39) noted

5. Other

All other terms and conditions remain the same as stated in the current agreement, RFP #TSU-RP-0132-92. [sic] with the exception of the minimum guarantee which is being negotiated for past periods.

The Board is aware that a final, State-signed copy of Exhibit 39 is not in evidence.

Wherefore, it is Ordered this 18th Day of December, 1996 that Appellant shall pay to Respondent \$34,760 in satisfaction of its minimum guarantee obligations.

Dated: December 18, 1996

Candida S. Steel
Board Member

I concur⁸:

Robert B. Harrison III
Chairman

⁸Board Member Randolph B. Rosencrantz did not hear this appeal.

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1887 and 1951, appeals of Alpha Omega Amusements, Inc., under Towson State University Contract No. TSU-RP-0132092 Together with the pertinent Amendments and Modifications Thereto.

Dated:

Mary F. Priscilla
Recorder