

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Catel, Inc.) ASBCA No. 54627
)
Under Contract No. DAAB08-01-D-0012)

APPEARANCES FOR THE APPELLANT: Christopher K. Williams, Esq.
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Newark, NJ

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
LTC Thomas C. Modeszto, JA
CPT Geraldine Chanel, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE KETCHEN

The appeal arises from an agreement between Catel, Inc. (Catel or appellant) and an employee of the U. S. Army (government or respondent) at Ft. Monmouth, NJ for storage of Catel's equipment in return for government use of the equipment. Catel seeks reimbursement based on an agreement for use of its boat in return for future contract work, the cost to replace an outboard motor and damage to Catel's equipment during government use. The appeal followed from a contracting officer's final decision (COFD) denying Catel's claims due to lack of a valid contract with the government. Both parties waived a hearing and elected to proceed under Board Rule 11.

FINDINGS OF FACT

1. In February 2000, Catel moved its office from one location in New Jersey to a new location near Ft. Monmouth, NJ. At the time, Catel did not have adequate storage space for its construction equipment. Catel also was marketing itself to government personnel at Ft. Monmouth, attempting to obtain contract work as an 8(a)¹ contractor (R4, tabs 139, 142, 146). In February 2000, Catel's president, Mr. Pires, and Mr. Terry Matthews, a government representative who worked within the Department of Public Works (DPW) at Ft. Monmouth, agreed verbally that Catel could store its equipment at

¹ "8(a)" refers to § 8 of the Small Business Act, 15 U.S.C. § 637 (a).

the Fire Training Center located on Ft. Monmouth in return for government use of the equipment (storage/use arrangement) (R4, tab 142; Pires dep. at 108-09, 113-14; Matthews dep. at 112-15). The record identifies Mr. Matthews as the construction official and construction manager for the director of DPW and as a construction inspector (R4, tabs 9, 18; Matthews dep. at 5; ex. G-20). Mr. Matthews did not hold a warrant as a contracting officer (CO) authorized to enter into contracts on behalf of the government at the time of the storage/use arrangement with Catel in February 2000 or thereafter during the term of the captioned contract.² Thus, as of February 2000, Mr. Matthews had no official contracting responsibilities, although as a practical matter he functioned as a construction representative and construction inspector for DPW. (Matthews dep. at 5, 14, 22; ex. G-20; *see* finding 6) The government subsequently appointed Mr. Matthews an alternate contracting officer's representative (ACOR) on 11 December 2002 and a contracting officer's representative (COR) in December 2003 with respect to the captioned contract (Matthews dep. at 240-41; *see* finding 5).

2. The government took possession of Catel's equipment in February 2000 in accordance with the storage/use arrangement and transported it to the Fire Training Center located on Ft. Monmouth, NJ (Pires dep. at 106, 108-09, 113; Matthews dep. at 24). The equipment stored at Ft. Monmouth under the storage/use arrangement included a white, 1994 Carolina 20' outboard skiff (skiff) and an excavator (compl. at unnumbered p. 2; Pires dep. at 108-09). Mr. Pires did not know whether a CO or COR in February 2000 was aware of the storage/use arrangement (Pires dep. at 109-10). The equipment transported to Ft. Monmouth in February did not include a 1994 "Evenrude" (correctly spelled "Evinrude") E15RLER horsepower motor (Evinrude motor) (R4, tabs 138, 142; ex. G-20).

3. On 29 September 2001, the government awarded captioned Contract No. DAAB08-01-D-0012 (contract) to Catel for the base-year period of 27 August 2001 to 26 August 2002. The contract was a firm fixed-price delivery order (indefinite quantity, indefinite delivery) contract for repairs, modifications, alterations and additions to real property facilities at Ft. Monmouth, NJ and elsewhere. The contract contained various standard FAR clauses for this type of contract, and provided the government would issue delivery orders (task orders) to Catel for specific work. The contract included detailed provisions concerning the pricing, issuance and performance of task orders. Mr. Pires conceded that the government did not issue task orders under the captioned contract that required use of a skiff (Pires dep. at 105). The government exercised contract options

² Contracting officers who served during the period of February 2002 through June 2003 included Mr. James Bannister, Ms. Gloria Embry-Jones and MAJ Robert Backman. MAJ Backman served as CO for the period of 12 March 2003 through 30 June 2003 (gov't br. at 9; R4, tabs 139-42).

extending the contract for an additional two years. The second option year ended on 31 March 2004. (R4, tabs 1, 2)

4. The contract provided that the government could appoint a COR to act on the CO's behalf. The contract incorporated the FAR 252.201-7000 CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991) clause, which stated, in pertinent part, at FAR 252.201-7000 (B) that "if the [CO] designates a [COR] . . . "[t]he COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract" (R4, tab 1 at 79 of 89). The government fully explained to Mr. Pires at the time of award of the captioned contract in September 2001 the limits of a COR's authority and an ACOR's authority and that only the CO had authority to make commitments or changes to the contract affecting price, quality, quantity, delivery, or any other term or condition of the contract (Matthews dep. at 54-56).

5. At Ft. Monmouth, the Acquisition Center is the procurement organization and is separate from the DPW. Specific Acquisition Center personnel had contracting authority as COs to enter into contracts on behalf of the government, although the government appointed representatives within DPW to serve as CORs or ACORs for the captioned contract. (R4, tabs 12, 84, 110, 119, 133, 138)

6. DPW operated under a long-standing agreement with the Acquisition Center with respect to task order contract work. Mr. Matthews would negotiate with Catel with respect to needed work, draft proposals for task order work, and submit copies to Catel and to the CO. The CO would place a cover letter on a task order proposal and send it to Catel for execution and return to the government for approval. The CO also prepared proposals for task order work that were transmitted directly to Catel for execution and return to the government for approval. (Matthews dep. at 16-17, 35-36, 39-42)

7. According to Mr. Matthews, once the CO approved a task order he was the lead person for the task order. He advised Catel with respect to resolution of problems that arose during task order performance and performed inspections of completed work. (Matthews dep. at 16-17, 35-36, 39-42) Mr. Matthews pointed out that Mr. Pires would have dealt almost exclusively with him and ordinarily would not have contacted the CO or COR concerning task order performance or problems that arose (Matthews dep. at 39). In the fall of 2002, Mr. Pires expressed to CO Embry-Jones, during their discussion of a roof repair dispute under a contract task order, his understanding of Mr. Matthews' lack of contracting authority in that Mr. Matthews "is really not supposed to be giving all this direction" of work under the captioned contract. He complained to her that Mr. Matthews was not on the list of those authorized to direct contract work. (Pires dep. at 232-33, 242-44)

8. By letter dated 15 February 2002, COR Michael R. Maier, who worked within the DPW as the Chief, Contract Management Division, directed Catel to remove from Ft. Monmouth by 1 March 2002 the equipment Catel had stored at the Fire Training Center, or the government would impound the equipment and dispose of it. Mr. Ott, Director of DPW, who was Mr. Maier's supervisor and also a COR, ordered Mr. Maier to send this letter to Catel. COR Maier's letter to Catel did not list the skiff because it was not located at the Fire Training Center. (R4, tab 138; Maier dep. at 64) Other than the reference in Mr. Maier's 15 February 2002 letter that he had furnished a copy by "cc" to CO Geiss, the record does not contain evidence that CO Geiss, or those who served subsequently as COs for the captioned contract, had actual knowledge of the verbal storage/use arrangement that continued from February 2000 through 1 March 2002. There is no evidence that CO Geiss in February 2002 was aware that the storage/use agreement included the skiff.

9. Mr. Pires did not know whether a government representative with contracting authority had actual knowledge of the storage/use arrangement during the period of February 2000 to February 2002 (Pires dep. at 104, 109-10). We find that a government representative with contracting authority did not have actual knowledge of the storage/use arrangement.

10. In compliance with COR Maier's directive of 15 February 2002, Catel removed the stored equipment, except for the skiff, from Ft. Monmouth prior to the 1 March 2002 deadline (R4, tab 139; Pires dep. at 107). Although Mr. Pires stated in his deposition that he noticed leaks in the excavator's hydraulic system and damage to its tracks when he took possession of the equipment, Catel did not notify the government of any damage to its excavator at that time (Pires dep. at 110).

11. The government did not return the skiff to Catel when Catel removed the other equipment from Ft. Monmouth prior to 1 March 2002 in compliance with Mr. Maier's directive. Mr. Matthews wanted to continue to use the skiff for dock repair work at the Ft. Monmouth marina (Pires dep. at 107-08; R4, tab 146). Mr. Matthews did not agree to provide future contract work to Catel in return for the government's continued use of the skiff (Matthews dep. at 10-16, 23-25; ex. G-20).

12. In a letter dated 26 March 2003 sent to CO MAJ Robert Backman, Mr. Pires requested the government to return Catel's skiff and expressed that Catel intended to seek reimbursement for the government's use of the skiff and damage to Catel's excavator. Catel did not notify the government of the alleged damage to the excavator until the 26 March 2003 letter, over a year after Catel removed the excavator from Ft. Monmouth. Mr. Pires' letter did not mention an Evinrude motor. (R4, tab 139; Pires dep. at 111)

13. Other than Catel's unsupported allegations in Mr. Pires' email transmittals to the government in 2003 and Mr. Pires' uncorroborated deposition statements, the record does not contain evidence of damage to Catel's excavator. (R4, tabs 139-40, 146) We find that the government did not damage Catel's excavator during government use.

14. In response to Catel's 26 March 2003 letter, CO Backman emailed Catel on 17 April 2003 that he did not know ". . . how and why Catel has a [skiff] on Fort Monmouth. This has nothing to do with the Contracts [sic]. . . ." (R4, tab 140) CO Backman informed Catel that DPW had been directed to return the skiff (*id.*). Catel responded to CO Backman with a request for reimbursement for the government's use of the skiff from 15 February 2002 until the date the government returned the skiff to Catel (R4, tabs 141, 142).

15. CO Backman responded to Catel on 2 May 2003 that "[a]s I previously advised you on April 17th, this matter is not part of any contract that Catel has with Fort Monmouth. . . ." (R4, tab 142). In his email response to CO Backman on 2 May 2003, Mr. Pires agreed with CO Backman's determination that the government's use of the skiff did not fall under the captioned contract. Mr. Pires' 2 May 2003 email also stated that the government had possession of an Evinrude motor that belonged to Catel. (*Id.*) Catel was informed on 14 May 2003 that the government was undertaking an investigation of how the skiff came to be located at the Ft. Monmouth marina (R4, tab 143). DPW returned the skiff to Catel on 3 June 2003. The skiff did not have a motor attached when returned to Catel on 3 June 2003. (R4, tab 145; ex. G-20)

16. The government's investigation of the skiff matter that began in 2003 determined, *inter alia*, that the skiff was not part of any government contract and it did not have a motor attached when provided to the government in February 2000 (ex. G-20). We find the skiff did not have an Evinrude motor attached. The "Action by the Appointing Authority," subject: "AR 15-6 Investigation: Catel Boat Investigation" dated 5 April 2004 (Action Memorandum) concluded that Mr. Matthews improperly accepted use of Catel's skiff to repair the marina docks at Ft. Monmouth. The Action Memorandum, authored by the Chief of Staff, Ft. Monmouth, referred the matter to the Garrison Commander to consider administrative action with respect to Mr. Matthews based on violations of standards of ethical conduct regulations; directed the Acquisition Center to review DPW's contracting process; directed DPW to use only contracting procedures authorized by the Acquisition Center and directed DPW to cease immediately all informal arrangements with contractors. (Ex. G-20)

17. On 17 October 2003, Catel submitted a claim to the CO in the amount of \$78,422.52, for the government's use of the skiff from 15 February 2002 until 5 June 2003, the cost to purchase a replacement for the Evinrude motor, damage to its excavator and markups (R4, tab 146). Catel's claim letter repeated the statement Catel made to CO

Backman in its letter of 26 March 2003 that “. . . Terry Matthews advised me at that time [February 2002] that the skiff was still being used at the marina. Wanting to be the recipient of additional contract work, I agreed to allow the DPW to continue using the skiff, and fully expected to have it returned to me at some future date.” (R4, tabs 139, 146) The CO issued a COFD on 6 May 2004 that denied Catel’s claim and stated that “[t]his claim is not part of any contract, therefore it is denied in total” (R4, tab 80, attach. 5). Catel filed a timely appeal and now seeks an equitable adjustment in the amount of \$71,887.31, consisting of reimbursement for government use of the skiff for 458 days (\$43,510); the cost to purchase a replacement for the Evinrude motor (\$2500); repairs to its excavator (\$8000) and markups for overhead and profit (app. br. at 17).

DECISION

Catel contends it “agreed to allow DPW to use the equipment with the expectation of future work” (app. br. at 17-18) and “[it] is entitled to recover all damages incurred when the government used its Carolina Skiff without compensation” (app. br. at 36). Catel maintains entitlement for use of its skiff on the basis of implied-in-fact contract. The government contends that the Board lacks jurisdiction over Catel’s claim because the government did not enter into an express or implied contract with Catel for use of the skiff (govt. br. at 59).³ Both parties addressed the issue of jurisdiction based on the theory of implied-in-fact contract. Catel has the burden to prove by a preponderance of the evidence that the Board has jurisdiction over the appeal under the CDA. *Karen S. Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,919-20, *recon. denied*, 03-1 BCA ¶ 32,130, *aff’d*, *Hai v. Brownlee*, 82 Fed. Appx. 226 (Fed. Cir. 2003) (table).

The Board’s jurisdiction depends on the existence of an express or implied contract for the procurement of property or services pursuant to 41 U.S.C. § 602(a). *Thai Hai*, 02-2 BCA at 157,920; *Choe-Kelly, Inc.*, ASBCA No. 43481, 94-1 BCA ¶ 26,431 at 131,486-87. The parties do not dispute that there was no express contract. Catel has the burden of proof with respect to an implied-in-fact contract as follows:

An implied-in-fact contract with the government requires proof of (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) “actual authority” on the part of the government’s representative to bind the government in contract. *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). Thus, the requirements for an implied-in-fact contract are the same as

³ The Board requested the parties in their briefs to address the Board’s jurisdiction over the appeal pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601-13.

for an express contract; only the nature of the evidence differs. An implied-in-fact contract is one founded upon a meeting of minds and “is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.” Balt. & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923)

William M. Hanlin v. United States, 316 F.3d 1325, 1328 (Fed. Cir. 2003). See *City of El Centro v. United States*, 922 F.3d 816, 820-21 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991); *United Pacific Insurance Co.*, ASBCA No. 53051, 03-2 BCA ¶ 32,267 at 159,623-24, *aff’d*, 380 F.3d 1352 (Fed. Cir. 2004); *Balboa Systems Co.*, ASBCA No. 39400, 91-2 BCA ¶ 23,715 at 118,702. See also FAR 1.602-3 RATIFICATION OF UNAUTHORIZED COMMITMENTS.

Under appropriate circumstances, an implied-in-fact contract may arise where a government representative without express contracting authority has implied actual authority to bind the government. Such authority must be “an integral part of the duties assigned to the Government employee who created the obligation.” *MTD Transcribing Service*, ASBCA No. 53104, 01-1 BCA ¶ 31,304 at 154,540 citing *H. Landau & Co. v. United States*, 886 F.2d 322 (Fed. Cir. 1989). In addition, a government representative with contract authority, who has actual or constructive knowledge of the material facts with respect to an unauthorized contract action by a government representative, may ratify the action so as to bind the government provided the authorized representative expressly or by implication adopts the unauthorized contract action. Constructive knowledge may be imputed to the government representative with contracting authority, if the government representative knew or should have known of the unauthorized action. *Real Estate Technical Advisors, Inc.*, ASBCA Nos. 53427, 53501, 03-1 BCA ¶ 32,074 at 158,508; *Reliable Disposal Co.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895 at 119,717-18. See *Balboa Systems Co.*, 91-2 BCA at 118,702 (implied-in-fact contract may result from verbal representations ratified by word or action by someone having authority to bind the government).

Catel failed to prove the requisite elements of an implied-in-fact contract. It failed to prove that Mr. Matthews had express or implied actual authority to enter into the storage/use arrangement with respect to government use of the skiff.

Catel also contends that government representatives with contracting authority had actual or constructive knowledge of Mr. Matthews’ actions with respect to government use of Catel’s skiff and a contract arose by their ratification of his actions (app. br. at 36-37). Catel failed to prove a government representative with authority to bind the government had actual or constructive knowledge of the alleged skiff agreement and expressly or by implication ratified Mr. Matthews’ actions. Catel relies on the

15 February 2002 letter by COR Maier that directed Catel to remove its stored equipment from Ft. Monmouth that was copied to CO Geiss. However, this letter reasonably would not have alerted CO Geiss with respect to government use of the skiff, since it did not list the skiff as part of Catel's equipment stored at Ft. Monmouth.

Catel otherwise failed to prove that it notified a government representative with contracting authority prior to 26 March 2003 of the circumstances surrounding use of the skiff, or that a government representative with contracting authority within the Acquisition Center knew or reasonably should have known of the alleged verbal agreement between Mr. Pires and Mr. Matthews and by action or inaction ratified the alleged agreement. Catel belatedly notified CO Backman by Mr. Pires' letter of 26 March 2003 of the government's use of the skiff when it demanded the government return the skiff, more than a year after the alleged verbal agreement between Mr. Matthews and Mr. Pires took place. CO Backman's action within a reasonable time after this notice to disavow the alleged Pires' and Matthews' agreement and to deny a government contract existed, the government's initiation of action to return the skiff to Catel and the government's immediate undertaking of an investigation of the skiff matter preclude a determination that ratification occurred by a government contracting representative with respect to government use of the skiff. In sum, ratification did not occur because Catel did not prove a demonstrated acceptance of the contract by an authorized government official with contracting authority and knowledge of the supposed agreement. *MTD Transcribing Service*, 01-1 BCA at 154,540 citing *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999).

We have considered also whether the institutional ratification of an implied-in-fact contract occurred based on the benefits conferred from the government's use of the skiff. Institutional ratification may occur giving rise to a contract where a government agency accepts benefits followed by a promise of payment by the agency or approval of payment by a senior agency official with authority to obtain reimbursement for the one providing those benefits. *Janowsky v. United States*, 133 F.3d 888, 891 (Fed. Cir. 1998) (institutional ratification occurred where the government received benefits and senior agency officials were aware of the unauthorized agreement by a government representative and allowed performance to continue); *El Centro*, 922 F.2d at 821 (Fed. Cir. 1990) (institutional ratification argument rejected because no proof of direct benefits and no promise by an official empowered to bind the government to pay for benefits); *MTD Transcribing Service*, 01-1 BCA at 154,541 (institutional ratification rejected because there was no promise to pay for services and the agency did not receive benefits). *See Thai Hai*, 02-2 BCA at 157,922.

When the CO found out about the skiff use, he took immediate action to return the skiff to Catel and to initiate an investigation of the matter. The investigation resulted in

directives by a senior government official designed to rectify the circumstances arising out of the government's use of the skiff (finding 16). Furthermore, Catel did not show that a senior agency official with authority to approve of payment who was aware of the skiff matter promised to seek reimbursement for Catel for government use of the skiff. Under these circumstances, agency or institutional ratification of the alleged agreement did not occur. *MTD Transcribing Service*, 01-1 BCA at 154,541.

Next, Catel does not state a cause of action under the CDA with respect to its claim concerning the Evinrude motor. Catel failed to prove it furnished or the government took possession of an Evinrude motor.

As to Catel's claim for damage to its excavator during government use, Catel did not prove that an integral part of Mr. Matthews' duties included securing equipment for use at Ft. Monmouth, an essential requirement to establish that Mr. Matthews had implied authority to enter the storage/use arrangement. *MTD Transcribing Services*, 01-1 BCA at 154,540 citing *H. Landau & Company v. United States*, 886 F.2d 322 (Fed. Cir. 1989); *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1433 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999). Catel otherwise does not provide credible proof that at the time the storage/use arrangement arose in February 2000 Mr. Matthews had express or implied actual authority to enter into such agreement. He never had contracting authority thereafter or during the term of the captioned contract the government awarded to Catel in September 2001. Under these circumstances, Catel failed to prove the implied actual contract authority of Mr. Matthews to enter into a contractual agreement for use of Catel's equipment. Catel thus took the risk of dealing with Mr. Matthews without determining that he had authority to enter into a contract for storage and use of Catel's excavator. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947)

However, "[a]greements made by government agents without authority to bind the [g]overnment may be subsequently ratified by those with authority if the ratifying officials have actual or constructive knowledge of the unauthorized acts." *Harbert/Lummus Agrifuels Projects*, 142 F.3d at 1433. Catel failed to prove that a government representative with contracting authority had actual or constructive knowledge of the storage/use arrangement and ratified Mr. Matthews' actions. Just the opposite is true. When the CO in 2003 became aware of the circumstances of the storage/use arrangement based on notification by Mr. Pires, he took immediate and reasonable steps to address the matter, and he disavowed any contractual agreement by the government with respect to use of Catel's equipment (findings 14, 17).

Finally, we consider here as well the issue of institutional ratification. Catel did not produce any evidence that a government representative with contracting authority or a senior government official with the ability to approve payment or to secure payment for

use of Catel's equipment ratified Mr. Matthews action by any positive action. The opposite occurred. When authorized government officials became aware of the circumstances, they acted promptly to investigate the matter, issued a report with directives to rectify informal agreements with contractors and that administrative action be taken with respect to Mr. Matthews. Under these circumstances institutional ratification did not occur with respect to the government's use of Catel's excavator in return for its storage. We also note that Catel failed to prove by credible evidence any damage to its excavator, a necessary prerequisite for establishing liability at the entitlement stage of Board proceedings (finding 13). *Cosmo Construction Co. v. United States*, 451 F.2d 602, 605 (Ct. Cl. 1971) ("... there must be *some* evidence of damage to support a finding of liability") (emphasis by the court).

We conclude that appellant has failed to show the existence of an authorized contract for the procurement of property or services. Hence we are without jurisdiction under the CDA, and we must dismiss the appeal.

Dated: 5 May 2005

EDWARD G. KETCHEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

JACK DELMAN
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. 54627, Appeal of Catel, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals