

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
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Redwood Furniture Company Ltd., ) ASBCA Nos. 54944, 55420, 55421  
Tuncay Ticaret, and Estetik Mobilya )  
 )  
Under Contract No. ----- )

APPEARANCES FOR THE APPELLANT: Robert G. Watt, Esq.  
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APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF  
Chief Trial Attorney  
MAJ Michael A. Sumner, USAF  
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OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON THE GOVERNMENT’S MOTION TO DISMISS  
FOR LACK OF JURISDICTION

Redwood Furniture Company Ltd. (Redwood), Tuncay Ticaret (Tuncay), and Estetik Mobilya (Estetik), appellants herein, request payment of \$266,000, the balance allegedly due for furniture purchased by government personnel at Incirlik Air Base (AB), Turkey. A Governmentwide Purchase Card (GPC) was cited as payment. The government moves to dismiss for lack of jurisdiction on the grounds that there is no express or implied contract between appellants and the government and that the purchases have not been ratified by anyone with authority to bind the government. We *sua sponte* questioned our jurisdiction over the allegations in the complaint relating to Tuncay and Estetik.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. AIR FORCE INSTRUCTION (AFI) 64-117, entitled AIR FORCE GOVERNMENT-WIDE PURCHASE CARD PROGRAM (6 DECEMBER 2000), provided, in part, as follows:

2.1.2. The [GPC] may be used to purchase authorized supplies, equipment, and non-personal services up to . . .

\$2500 an occurrence. . . . Splitting a requirement . . . to use the [card] is not permitted.

2.1.2.1. Warranted Contracting Officers . . . may use the [GPC] as a method of payment on a contractual document up to [his or her] warrant limit . . . .

. . . .

2.5.1 . . . Overseas cardholders . . . may [be authorized to] use the [GPC] to make commercial purchases up to \$25,000 .

. . .

. . . .

4.3.5.1. . . . The government shall be liable for use of [GPCs] by authorized cardholders.

4.3.5.2.1. Cardholders are prohibited from making repeat buys of the same item to avoid the \$2500 limitation for purchasing and the \$25,000 limitation for ordering using the [GPC].

. . . .

4.3.5.3.1.1. [Cardholders must d]ocument all . . . purchases in a log [showing] . . . the date the merchandise or service was ordered, the requestor's name, office symbol and phone, the supplier's name, point of contact address and phone, a description of the item or service, quantity, unit price and total price, estimated delivery date, actual delivery date [and] amount billed. . . . Receipts and other supporting documentation shall be maintained on file and available for [inspection].

. . . .

4.3.5.3.1.6. Ensure that a reasonable price is obtained. Comparing prices offered by other vendors for the same or similar item or service is the preferred method to determine prices as being fair and reasonable.

(Gov't letter dated 17 February 2006, attach. 3 at 5-6, 11, 30, 32-33)

2. CAPT Eric D. Wozniak, a member of the 39<sup>th</sup> Maintenance Operations Squadron (39<sup>th</sup> MOS) stationed at Incirlik AB, became an authorized GPC cardholder for OPERATION NORTHERN WATCH (ONW) in June 2001 (gov't letter dated 17 February 2006, attach. 1 at 1 of 26). Initially, CAPT Wozniak had a single purchase limit of \$2,500. Although the government denies that LT COL Roger Fogleman, CAPT Wozniak's commanding officer, was an authorized cardholder, appellants assert that LT COL Fogleman and other officers at the base were authorized to make GPC purchases and ratify unauthorized commitments (compl. ¶ 5; answer ¶ 5; mot. ¶¶ 19, 32; opp'n ¶¶ 6, 7, 8).

3. Following a visit by distinguished visitors, CAPT Wozniak began purchasing replacement furniture on 2 March 2002 (gov't letter dated 17 February 2006, attach. 1 at 7 of 26, appendix A at A-1 of 1, appendix B at B-10 of 12). In addition, the base planned a major reorganization that was to be complete by 5 August 2002 (gov't letter dated 17 February 2002, attach. 1 at attach. 10 at 1 of 3).

4. From 7 through 30 July 2002, CAPT Wozniak was on temporary duty (TDY) to Kirtland, AFB, New Mexico (mot. at ex. 3). LT COL Fogleman was TDY to Langley AFB from 7 through 17 July 2002 (mot. at ex. 4).

5. Mr. Tansel Estetik, Redwood's owner, provided a statement to the government which provided, in part, as follows:

Capt Wozniak . . . told me he was leaving for a month [and] that Lt Col Fogleman could place orders on his account while he was gone and he would take care of payment when he returned. . . . Because of the [reorganization that was scheduled for 5 August 2002], they told me units could continue to order only if Lt Col Fogleman approved the purchase. . . . During the time Capt. Wozniak was gone in Jul 02, there was more work than my business could handle. I suggested [to] Lt Col Fogleman [that he] use extra shops to meet the requirement. . . .

(R4, tab 1 at 1-43)

6. When CAPT Wozniak returned from TDY, Redwood presented him with a bill for \$521,420. The bill showed a balance of \$157,620 through 20 March 2002 and new purchases of \$363,800 through the end of July 2002. (Mot. at ex. 3; R4, tab 1 at 1-3, 1-4)

7. Appellants allege that government personnel purchased several hundred thousand dollars' worth of furniture from Redwood, Estetik and Tuncay during the summer of 2002 (opp'n at ¶¶ 4, 5, 8). The government admits only that it purchased some furniture in 2002 (answer ¶ 5). According to appellants, the furniture was delivered and accepted (compl. ¶6). The government denies taking delivery of the furniture (answer ¶ 7).

8. In August 2002, CAPT Wozniak, whose GPC limit had been increased to \$25,000, attempted to pay off the bill by making multiple repeat buys with his GPC card (gov't letter dated 17 February 2006, attach. 1 at 7 of 26).

9. In January 2003, the contracting office at Incirlik initiated an investigation into allegations of abuse of the GPC program (gov't letter dated 17 February 2006, attach. 1 at 2 of 26).

10. By 18 February 2003, CAPT Wozniak and TSgt Lorenzo Streeter, another cardholder acting on his behalf, had allegedly reduced the debt to \$266,000 (compl. ¶ 7; gov't letter dated 17 February 2006, attach. 1 at 7 of 26). The government admits only that it has made payments for furniture (answer ¶ 7).

11. CAPT Wozniak's GPC card was canceled on 18 February 2003 (gov't letter dated 17 February 2006, attach. 1 at 6 of 26).

12. After CAPT Wozniak's GPC card was canceled, Mr. Estetik contacted LT COL Brian Bellacicco, the Contracting Squadron Commander (39 CONS/CC), for payment. Mr. Estetik described his communications with LT COL Bellacicco as follows:

Col Bellacicco came to my shop and asked me some question about Capt Wozniak's purchases. I told him what had happened and that Capt Wozniak could not make payments with card. He promised I would get paid. I asked him if he could pay by 15 Feb, which was a Turkish holiday. We did not receive payment. He called me in early March. He said the hardest part was done. They had money from Germany and they would pay soon. On 27 Mar he told me to bring the invoices and they would pay in two days. . . .

(R4, tab 1 at 1-45; Bellacicco affidavit dated 28 February 2006)

13. On 27 March 2006, Redwood delivered three invoices totaling \$266,000 to LT COL Bellacicco (R4, tab 1 at 1-45). Redwood's invoice was for \$75,600; Estetik's

invoice was for \$94,800; and Tuncay's invoice was for \$95,600. Each invoice was itemized. (R4, tab 1 at 1-59 through 1-63)

14. On 6 May 2003, the Air Force issued the results of the investigation (gov't letter dated 17 February 2006, attach. 1). The report concluded that CAPT Wozniak and TSgt Streeter made unauthorized commitments of \$491,000 from 21 March through 20 December 2002 and that CAPT Wozniak was responsible for \$368,000 of those commitments (gov't letter dated 17 February 2006, attach. 1 at 1 of 26). An inventory of the furniture on the base revealed that many items could not be located (gov't letter dated 17 February 2006, attach. 1 at 1, 19-20 of 26). Finally, the report concluded that cognizant officials in CAPT Wozniak's chain of command failed to oversee the GPC program as required by AFI 64-117 (gov't letter dated 17 February 2006, attach. 1 at 14-17 of 26).

15. The Air Force Office of Special Investigations (OSI) also investigated the GPC program at Incirlik. The OSI report, dated 24 November 2003, concluded that four ONW GPC cardholders, including CAPT Wozniak, misused their GPC cards in connection with furniture purchases totaling \$820,667 from July 2001 to January 2003. (Gov't letter dated 17 February 2006, attach. 2, Installation Report of Audit F2004-0011-FDE000 at 2)

16. On 6 August 2004, appellants submitted a combined certified claim in the amount of \$266,000 to the contracting officer (R4, tab 1). Redwood claimed \$75,600; Estetik claimed \$94,800; and Tuncay claimed \$95,600 (R4, tab 1 at 1-61 through 1-63). The owners of Redwood and Estetik signed the claim (R4, tab 1 at 1-2). Mr. Estetik signed the claim on behalf of Tuncay under authority of a power-of-attorney (R4, tab 1 at 1-2, 1-33).

17. In reply to a 30 November 2004 e-mail from Redwood, LT COL Bellaccio stated as follows:

Yes, I did tell you that you would be paid. That was given the assumption there was documentation to support the ordering and delivery of all the furniture you say was provided . . . As we gathered the information necessary to make the payment to you, it became clear that there was not any paperwork showing that the U.S. Government ordered furniture from your company or received it. . . . I am very sorry for this situation but I . . . must follow the rules of the U.S. Government which clearly state that there must be proof that a U.S. Government employee received merchandise ordered.

(R4, tab 5 at 2 of 4).

18. On 30 November 2004, the contracting officer issued a final decision denying the claim (R4, tab 6). The decision was addressed to Messrs. Tansel Estetik and Yilmaz Estetik, owners of Redwood and Estetik respectively, and Mr. Tuncay Osgayoglu, a representative of Tuncay (R4, tab 1 at 1-60). On 2 December 2004, the government hand-delivered the decision to two of the individuals, one of whom had a power-of-attorney for the third (R4, tab 6 at 2). The final decision stated that “[w]e have received and reviewed your combined . . . claim for unpaid furniture in the amount of \$266,000 . . .” As grounds for the denial, the contracting officer stated that “there was poor or unreliable documentation of requirements, no documentation of delivery, and no [proper] invoices.” (R4, tab 6)

19. On 28 February 2005, counsel appealed the denial to this Board, where it was docketed as ASBCA No. 54944. The notice of appeal stated, in part, as follows:

Pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, Redwood Furniture Co. Ltd (“Redwood”) hereby appeals the Final Decision of the Contracting Officer related to a large amount of furniture ordered by the United States Air Force and delivered by Redwood to the U.S. Air Base in Incirlik-Adana, Turkey. Specifically, Redwood appeals the Contracting Officer’s decision to deny Redwood’s claim for payment for such furniture.

The Contracting Officer issued its Final Decision on this claim on November 30, 2004 (enclosed). Accordingly, this Notice of Appeal is timely filed.

20. Counsel filed a complaint on 4 May 2005, seeking \$266,000, the total claimed by Redwood, Estetik and Tuncay. In a footnote, Redwood stated that the term “Redwood” referred to itself, Estetik and Tuncay. (Compl. at n.1)

21. The government moved to dismiss for lack of jurisdiction, alleging that there is no express or implied contract between Redwood and the government and that no authorized government employee ratified the purchases (mot. at 2-3).

22. On 8 February 2006, the Board directed counsel to show cause why the amounts included in the complaint for Tuncay and Estetik should not be stricken. On 22 February 2006, counsel responded to the show cause notice and amended his original

notice of appeal to specifically name Tuncay and Estetik. The Board docketed the appeals as to them as ASBCA Nos. 55420 and 55421 respectively.

23. On 23 February 2006, the Board asked the parties to state their positions regarding LT COL Bellacicco's authority to ratify unauthorized commitments. The government submitted an affidavit from LT COL Bellacicco, which provided, in part, as follows:

2. On or about 6 Jul 2002, I became the . . . Squadron Commander (39 CONS/CC), Incirlik AB, Turkey. I served as the 39 CONS/CC from 6 Jul 2002 to 30 Jul 2003. . . . I possessed an unlimited warrant and was authorized to ratify unauthorized commitments [of] less than \$25,000.00. . . . The authority to ratify unauthorized commitments in excess of \$25,000.00 resided with . . . with the Chief, Contracting Division, Directorate of Logistics (HQ USAFE/A4C).

(Bellacicco affidavit dated 28 February 2006)

24. The government also submitted a copy of paragraph 602-3(b)(2)(A)(ii) of subpart 5301 of the United States Air Forces in Europe (USAFE) FAR supplement. The provision limits the authority of the CONS/CC to ratify unauthorized commitments to \$25,000 or less (gov't letter dated 2 March 2006 at ex. 3). On 4 May 2006, the government advised that the provision contains internal agency guidance and does not have to be published in the Federal Register.

### DECISION

Appellants seek \$266,000, the balance allegedly due for unauthorized purchases of furniture made by government personnel in reliance on a GPC card. According to appellants, the government personnel who ordered the furniture had express actual authority or, in the alternative, implied actual authority. Alternatively, appellants assert that the purchases were ratified by authorized government personnel. In any event, appellants assert that AF 64-117 makes the government liable for the unauthorized use of a GPC card. We *sua sponte* questioned our jurisdiction over the allegations in the complaint relating to Tuncay and Estetik.

In response to the Board's order, appellants state that "[a]lthough not explicitly naming the other two appellants, Redwood intended to appeal the denial of the entire Combined Claim on behalf of all three Appellants" (app. resp. dated 22 February 2006 at 2). The government argues that appellants are separate companies and that the allegations as to Estetik and Tuncay should be stricken.

As we found above, appellants submitted a combined claim for \$266,000. The contracting officer issued a single final decision on that “combined claim” which Redwood appealed. In its complaint, Redwood explained that the term “Redwood” referred to itself, Estetik and Tuncay. Under these circumstances we permit amendment of the notice of appeal to correct a technical misnomer. *Jardinieria Iglesias, S.L.*, ASBCA No. 42967, 93-3 BCA ¶ 26,244 (denying motion to dismiss where appellant had appealed under the wrong name); *Cresci Electric, Inc.*, ASBCA No. 34305, 87-2 BCA ¶ 19,794 (denying motion to dismiss where appellant had appealed under the wrong contract number). The caption in ASBCA No. 54944 shall be amended henceforth to show all three appellants. As a result, we dismiss without prejudice the protective appeals of Tuncay (ASBCA No. 55420) and Estetik (ASBCA No. 55421) as duplicative.

With respect to the government’s motion to dismiss for lack of jurisdiction, we are guided by the following principles:

To determine whether we have jurisdiction in a case of an alleged implied-in-fact contract, we in effect rule on the merits of the appeal as we would on a motion for summary judgment. See *Reynolds Shipyard Corp.*, ASBCA No. 37281, 90-1 BCA ¶ 22,254 at 111,827; *Choe-Kelly, Inc.*, ASBCA No. 43481, 92-2 BCA ¶ 24,910 at 124,221 (where an implied-in-fact contract has been alleged, jurisdiction is intertwined with determining the merits of the allegation. The ASBCA has jurisdiction to entertain the appeal, at least to the point of establishing the existence of an implied contract. A Government motion to dismiss for lack of jurisdiction would cut off that claim in the same manner as a motion for summary judgment); *Balboa Systems Co., Inc.*, ASBCA No. 39400, 91-2 BCA ¶ 23,715 at 118,702 (Government motion based on contention of no implied-in-fact contract, is more accurately one for summary judgment . . . .)

*Ortiz Enterprises, Inc.*, ASBCA No. 52049, 01-1 BCA ¶ 31,155 at 153,894. Thus, we treat the government’s motion as one for summary judgment.

The principles governing resolution of a motion for summary judgment are established. Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See *Mingus Constructors, Inc. v. United States*, 812 F.32d 1387, 1390 (Fed. Cir. 1987). The moving party bears the burden of establishing the absence of any genuine issue of material fact



and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

There are numerous disputed issues of material fact that preclude summary judgment in this case. For example, appellants allege that during the summer of 2002, various Air Force officers stationed at the base purchased several hundred thousand dollars' worth of furniture from appellants and that these officers were fully authorized to enter into contracts on behalf of the government (findings 2, 7). The government admits only that it purchased some furniture in 2002 (finding 2). Appellants allege that they timely delivered the furniture to the base and that the government accepted delivery and took possession of the furniture (finding 6). The government denies that it accepted delivery and took possession of the furniture (finding 6). Appellants allege that the government has paid for some of the furniture and that the government still owes appellants approximately \$266,000 (finding 7). The government admits only that it has made some payments for furniture (finding 7). Appellants allege that LT COL Fogleman was an authorized GPC cardholder (finding 2). The government denies that assertion (finding 2). Appellants allege that LT COL Bellacicco ratified the purchases (finding 13). The government denies that LT COL Bellacicco had the authority to ratify unauthorized commitments in excess of \$25,000 (finding 13). These and other disputed issues can only be resolved through a hearing.

ASBCA Nos. 55420 and 55421 are dismissed as duplicative. The government's motion to dismiss for lack of jurisdiction is denied.

Dated: 13 June 2006

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ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures Continued)

I concur

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

I concur

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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 Nos. 54944, 55420, 55421, Appeals of Redwood Furniture Company Ltd., Tuncay Ticaret, and Estetik Mobilya rendered in conformance with the Board's Charter.

Dated:

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