



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 3, 2009

CBCA 1465

RANDY PRESTON,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Randy Preston, pro se, Shelton, WA.

Gabriel Steinberg, Office of Regional Counsel, General Services Administration,
Atlanta, GA, counsel for Respondent.

Before Board Judges **POLLACK**, **DRUMMOND**, and **KULLBERG**.

KULLBERG, Board Judge.

Mr. Randy Preston (Mr. Preston or appellant) appeals the denial of his claim by the General Services Administration's (GSA's) contracting officer for the refund of the purchase price of three paddle boats that he purchased at a GSA online auction. This appeal is being

decided on the basis of the parties' record submissions.¹ For the reasons stated below, the appeal is denied.

Facts

On October 28, 2008, the Illinois State Agency for Surplus Property listed for sale three paddle boats (lot 035) on the GSA website, GSAAuctions.gov. Appeal File, Exhibits 2, 15.² The description of the paddle boats was the following:

ONE LOT TO CONSIST OF APPROX 3 EA PADDLE BOATS, 2 AND 4 PERSON, SERIAL #CAQJE11293F101, MFG: FUTURE BEACH, MDL: BK 100. REPAIRS MAY BE REQUIRED. PARTS MAY BE MISSING.

Exhibit 2.

By registering with GSA and submitting a bid, a bidder became subject to the terms and conditions of sale at GSA auctions. Exhibit 3 at 2. The terms and conditions advised prospective bidders that they should not rely on photographs of bid items and that such items were available for inspection. *Id.* at 3-4. Bidders were advised of the following warranty provision:

The Government warrants to the original purchaser that the property listed in the GSAAuctions.gov website will conform to its written description. If a misdescription is determined by the Contracting Officer of the sale, before payment, the contract will be cancelled without any liability to the bidder. If a

¹ The Government elected to have this appeal decided on the record. Although Mr. Preston elected a hearing of this appeal and requested that he appear by video conference from a location near his home, he failed to appear for the hearing. A hearing was scheduled for September 23, 2009, and arrangements were made for Mr. Preston's appearance by means of video conference at the GSA office in Auburn, Washington. Conference Memorandum at 2 (July 24, 2009). At the hearing, the Board went on the record briefly in order to establish that Mr. Preston had failed to appear at the hearing and that his absence was unexcused. Transcript at 3-11. The Board's subsequent order dated September 30, 2009, determined that Mr. Preston was deemed to have submitted his case on the record in light of his unexcused absence from the hearing. Rule 20(c) (48 CFR 6101.20(c) (2008)).

² All exhibits are found in the appeal file, unless otherwise noted.

misdescription is determined by the Contracting Officer of the sale before removal of the property, the Government will keep the property and refund any money paid. If a misdescription is determined by the Contracting Officer of the sale after removal, the Government will refund any money paid if the purchaser takes the property at his/her expense to a location specified by the Sales Contracting Officer. The Refund Claim Procedure described below will be strictly followed for filing a claim. No refunds will be made, after property is removed, for shortages of individual items within a lot. **This warranty is in place of all other guarantees and warranties, expressed or implied.**

The Government does not warrant the merchantability of the property or its purpose. The purchaser is not entitled to any payment for loss of profit or any other money damages - special, direct, indirect, or consequential.

Id. at 5. The procedure for submitting a claim in the event of a misdescription was the following:

If items have been awarded but not paid for and the successful bidder feels that the property is misdescribed, he/she must follow these procedures: A written claim needs to be submitted to the Sales Contracting Officer within 15 calendar days from the date of award requesting release of contractual obligation for reasons satisfying that of a mis-description. No verbal contact with the custodian or the Sales Contracting Officer will constitute a notice of misdescription.

When items are awarded but removal may or may not have occurred, the successful bidder must (1) submit a written notice to the Sales Contracting Officer within 15 calendar days from the date of award prior to removal that the property was mis-described, (2) if removed, maintain the property in the purchased condition until it is returned, and (3) [i]f your mis-description claim is accepted by a Contracting Officer and if the property has already been removed, return the property at your own expense to a location specified by the Sales Contracting Officer.

Id. at 6. A misdescribed property was defined as “a gross omission regarding the functionality of an item, failure to cite major missing parts, and/or restrictions with regards to its use after purchase or removal are omitted in the description.” *Id.* at 5-6. In the event of a default by a bidder, the following procedures applied:

If you are awarded an Item on GSA Auctions®, you have a responsibility to pay for the item or lot that you were awarded within 2 business days from the date & time the award email notification was sent and promptly remove it before 10 business days from the date & time the award email notification was sent, unless otherwise specified in the contract. If you fail to meet either of these two conditions, you will be in violation of the online sale terms and conditions of your contract with the Government and will be considered “In default.”

As a defaulted bidder, you will be responsible for the payment of liquidated damages, an administrative fee for the processing and re-handling of the item for which you neglected to pay for and/or remove. The charge will total 20% of the purchase price of the award amount or \$200, whichever is greater. The Government shall be entitled to retain (to collect) this amount of the purchase price of the item(s) as to which the default occurred.

Id. at 6.

Mr. Preston registered with GSA and submitted a bid in the amount of \$954 for the paddle boats. Exhibit 7. On November 4, 2008, GSA notified Mr. Preston by an electronic mail message that his bid had been accepted and that he had been awarded contract GS04F09FBE0930 for sale lot number 41QSCI09064035. Exhibit 6. The notice also advised him that he must make payment within two business days and remove the property within ten business days of the date and time of the notice. *Id.* Mr. Preston paid the bid price of \$954 for the paddle boats, which was received by GSA on November 7, 2008. Exhibit 15. The receipt for his purchase, which was issued by GSA, instructed him to remove the paddle boats from the Springfield, Illinois, location by November 19, 2008. Exhibits 8, 15.

In a telephone call on November 17, 2008, Mr. Preston advised GSA’s contracting officer, Ms. Victoria Knotts, that he had driven to Springfield, Illinois, to pick up the paddle boats, and he wanted a refund of the bid price because the condition of the paddle boats had not been accurately represented. Exhibit 15. In an electronic mail message dated

November 25, 2008, Mr. Preston submitted to Ms. Knotts his claim in the amount of \$954. Exhibit 9. He stated the following:

In this case[,] the product description and pictures were not close to actual product condition. They had the usual description of parts may be missing and repairs may be needed. The description should have been “scrap”, “severe damage”, “unusable” or some other wording to describe the actual condition. A lot of the damage appears to be from handling, for example, [the] boats were put on the ground without protecting the propellers.

I left the boats there and am asking for a refund on my credit card.

Id.

Ms. Knotts’ decision dated November 28, 2008, denied Mr. Preston’s claim and directed him to remove the paddle boats before December 31, 2008. Exhibit 1. Ms. Knott’s decision further stated the following:

If you do not remove this property by the specified due date listed above, you will be placed in default. As a defaulted bidder, you will be responsible for the payment of liquidated damages, an administrative fee for the processing and re-handling of the item for which you neglected to pay for and/or remove. The charge will total 20% of the award price or \$200.00, whichever is greater. The liquidated damages for this item will be \$200.00.

Id. Mr. Preston filed a notice of appeal with this Board on December 12, 2008. In his notice of appeal, Mr. Preston increased his claim to \$3932. In addition to his claim for a refund of his bid of \$954, he also asserted, for the first time, a claim for travel expenses to and from Springfield, Illinois, in the amount of \$2418.

A joint status report, which was submitted to the Board on April 29, 2009, represented that Mr. Preston was reimbursed the amount of \$754, and \$200 was withheld in liquidated damages.

Discussion

Mr. Preston contends in his notice of appeal that the photograph of the paddle boats on the GSA auction website did not show the damage to the boats' propellers, and he first saw the extent of that damage when he arrived at the Springfield, Illinois, site to pick up the boats. GSA contends that the website put bidders on notice as to the possibility of missing parts or the need for repairs, and the terms and conditions of the online auction only provided for a warranty in the event of a misdescription and not a warranty as to the condition of the boats.

The warranty provision of the terms and conditions of the GSA online auction provided for reimbursement of the bid price only in the event of a misdescription. The General Services Administration Board of Contract Appeals, which was one of the predecessors to this Board, recognized the following with regard to descriptions that appear on a GSA auction website:

The terms and conditions do warrant "that the property listed in the GSAAuctions.gov website will conform to its description." The description on the website may have been incomplete, but it was not a misdescription. A misdescription is an inaccurate—meaning an erroneous or wrong—description of something with which the describer is familiar. *Webster's Third New International Dictionary* 1143 ("misdescribe," "misdescription") (1986); *see also id.* 1139 ("inaccurate"), 2642 ("wrongly").

Larry J. McKinney v. General Services Administration, GSBCA 16720, 05-2 BCA ¶ 33,119, at 164,128. It is also well established that "to the extent deficiencies could reasonably have been discerned during an in-person inspection, the purchaser cannot establish a misdescription." *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631, at 166,572.

In this case, Mr. Preston has not shown a misdescription due to the condition of the paddle boats. GSA's website stated that there were three paddle boats, and bidders were also advised that repairs may be required and that parts may be missing. Mr. Preston has not disputed the accuracy of that information. Although he argues that the website photograph did not show damage to the propellers on the paddle boats, the terms and conditions advised bidders not to rely on photographs and encouraged bidders to inspect an item before submitting a bid. Any damage to the propellers on the paddle boats was a condition that could have been determined by an inspection before bidding, and a finding of a misdescription is not warranted under such circumstances.

Mr. Preston contends that GSA's website should have described the paddle boats using terms such as "scrap," "severe damage," "unusable," or similar words describing their condition. Such an argument "does not implicate the accuracy of the description, but rather, the condition of the property." *Steven A. Groshong v. General Services Administration*, CBCA 1324, 09-1 BCA ¶ 34,104, at 168,641. "Although GSA warrants that the items purchased in its auctions are the items they are stated to be, it expressly disavows any warranty of condition." *Chris Ward v. General Services Administration*, GSBCA 16473, 05-1 BCA ¶ 32,881, at 162,922. Items sold at an auction are sold "as is." *Frances Spicer v. General Services Administration*, CBCA 1532, 09-2 BCA ¶ 34,195, at 168,994. This Board has recognized that "where the written description of the property being offered for sale is silent as to age or condition, a bidder proceeds at its peril if it chooses to bid based on its own assumptions as to either age or condition of the property." *Alliance Business Enterprises LLC v. General Services Administration*, CBCA 1101, 08-2 BCA ¶ 33,994, at 168,117.

Mr. Preston errs in his argument that the GSA website should have described the paddle boats using terms such as "scrap," "severe damage," or "unusable." Photographs of the paddle boats, which were included with Mr. Preston's notice of appeal, show damage to the propellers on all three boats. There is, however, no evidence that the three paddle boats were beyond repair or that replacement parts were not available. The website advised bidders that repairs may be needed and that parts may be missing. Such a description was sufficient to put Mr. Preston on notice of the possibility that the paddle boats might not be ready for immediate use. The condition of the paddle boats that Mr. Preston discovered at the Springfield, Illinois, site was the risk that he took when he bid on items that he did not inspect before he made payment, and neither the contracting officer nor this Board has the authority to refund the purchase price because Mr. Preston was disappointed with the results of his bid. *Chris Ward*, 05-1 BCA at 162,922.

Finally, Mr. Preston has included in his notice of appeal a claim for travel expenses in the amount of \$2418 without first submitting that claim to the contracting officer for a decision. It is well established that this Board has no jurisdiction to consider a claim that has not been submitted to the contracting officer for a decision, and, instead, is raised for the first time by an appellant in its notice of appeal. *Kenan Construction Co. v. Department of State*, CBCA 807, 08-1 BCA ¶ 33,797. This Board, consequently, has no jurisdiction over Mr. Preston's claim for travel expenses. Even if this Board had jurisdiction, the terms and conditions of the auction preclude recovery of indirect, direct, special, or consequential damages. *Frances Spicer*, 09-2 BCA at 168,994 (appellant sought damages that included travel costs, repair cost, and pain and suffering). The only issue, consequently, before the Board in this appeal is Mr. Preston's claim for his bid price of \$954, and the Board will not

exceed its jurisdiction to address any other claim that has not been properly submitted to the contracting officer.

Decision

The appeal is **DENIED**.

H. CHUCK KULLBERG
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

HOWARD A. POLLACK
Board Judge