



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: March 18, 2010

CBCA 1751

DAVID M. HOFFMAN,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David M. Hoffman, pro se, Mechanicsville, MD.

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

Before Board Judges **STERN**, **VERGILIO**, and **KULLBERG**.

**VERGILIO**, Board Judge.

On October 6, 2009, the Board received from David M. Hoffman (purchaser) a notice of appeal, timely-filed pursuant to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (2006) (CDA). The purchaser successfully competed in an auction, obtaining a vehicle. The purchaser did not pay for the vehicle. The contracting officer determined that the vehicle was not misdescribed, issued a notice of termination for default, and assessed liquidated damages. Asserting that the vehicle was misdescribed, the purchaser disputes the default determination and assessment of damages. The Board concludes that the vehicle was not misdescribed. The purchaser's failure to pay constitutes a default. The assessment of damages was in accordance with contract provisions. The Board denies the claim.

Findings of Fact

1. The Government conducted an on-line auction with a closing date of June 3, 2009. The item description for one lot, a "2006 CROSSROAD RV," states:

B/C 1373573, keys, internal, all units are worn/used, some have missing parts and components, external, some units may have small holes/dents, some units are missing windows and roof vents, other parts may be broken or missing from what is listed in the description. Repairs are required. All length measurement[s] include the tongue. Property must be removed within 10 days from end of sale. Please be advised that the photos listed are sample photos and should not be relied upon in place of the written description. . . .

The condition of the property is not warranted.

Exhibit 2 at 1 (all exhibits are in the appeal file, as supplemented). Although not listed in the bid material, the Government possessed the vehicle identification number (VIN) for the item, Exhibits 1 at 2, 2 at 4, which was also ascertainable upon an inspection of the vehicle.

2. Regarding photographs, a clause of the sale and of the resulting contract provides: "Photographs may not depict an exact representation of the bid item(s) and should not be relied upon in place of written item descriptions or as a substitute for physical inspection. Please contact the custodian for inspection dates and times." Exhibit 3 at 3.

3. A clause of the sale and the resulting contract addresses oral statements and modifications:

Any oral statement or representation by any representative of the Government, changing or supplementing the offering or contract or any condition thereof, is unauthorized and shall confer no right upon the bidder or purchaser. Further, no interpretation of any provision of the contract, including applicable performance requirements, shall be binding on the government unless furnished or agreed to, in writing by the Contracting Officer or his delegated representative.

Exhibit 3 at 3.

4. The terms of the sale and of the resulting contract contain provisions dealing with the description warranty, misdescribed property, and claims of misdescription:

**Description Warranty.**

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 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. . . . The Refund Claim Procedure described below will be strictly followed for filing a claim. . . . **This warranty is in place of all other guarantees and warranties, express 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.

#### **Mis-described Property.**

Prior to the closing of the sale, if any item has been determined to be inadequately described for example, 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, the property may be considered as mis-described. If GSA is aware of this missed information prior to the close of a sale, the item may be pulled from the sale and resubmitted with the information or re-offered at a later date.

#### **Claims of Misdescription.**

If items have been awarded but not paid for and the successful bidder feels that the property is mis-described, 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 contract with the custodian or the Sales Contracting Officer will constitute notice of misdescription.

Exhibit 3 at 5.

5. The Default clause includes the following provisions:

If you are awarded an item on GSA Auction®, 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.

....

In the event of a default, a bidder will lose all rights to place bids for other items for sale on GSA Auction® until liquidated damages have been paid and the payment processed . . . .

Exhibit 3 at 5-6.

6. On June 3, 2009, the Government provided this purchaser with email notification of award, specifying that payment of the bid price, \$5601, must be made by June 5, and the property must be removed by June 26, the dates determined in accordance with the contract. Exhibit 5 at 2.

7. On June 5, 2009, by written message to the contracting officer, the purchaser asserted: “The VIN and correct model were not listed properly in the listing. Therefore this contract is incomplete and invalid.” Exhibit 7 at 1. The purchaser voiced further dissatisfaction in other email messages to the Government. Exhibit 7. Without specifics of the VIN, model, and condition, the purchaser was aware that he did not know details of what he was purchasing and what he had purchased. Purchaser’s Exhibit 4.

8. The purchaser did not pay for (or remove) the purchased property. By letter dated June 11, 2009, the contracting officer notified the purchaser of the termination of the contract because of the purchaser’s failure to pay. The notice required the purchaser to remit \$1120.20 in liquidated damages, and indicated that late charges will be assessed if payment is not made within thirty days. Additionally, “Until this default is cured you may be found non-responsible and ineligible to receive future contracts.” Notice of Appeal, Attachment.

9. By letter dated June 16, 2009, the purchaser requested that the contracting officer either cancel the contract and restore his account or provide the vehicle pictured in the sale advertisement, because of a misdescription. Exhibit 8.

10. The contracting officer issued a decision dated July 7, 2009, referencing the clauses of the terms and conditions of the auction noted in the above findings. Because the purchaser was in default for non-payment, the Government assessed liquidated damages of \$1120.20 (twenty percent of the purchase price), with reference to the Default clause. The contracting officer denied the purchaser's request to cancel the default and provided the purchaser with notice of his appeal rights. Exhibit 9.

### Discussion

The purchaser contends that the sale is unenforceable because the listing failed to provide a VIN number, description, or correct pictures of this item. The purchaser has not demonstrated that the lack of a VIN number or picture in a description makes a sale unenforceable. The sale included a description of the item in question. The record does not demonstrate that the description is inaccurate. The purchaser bid on and won the vehicle identified with the given lot. Any oral communications and/or assurances the purchaser may have received regarding the particular model of vehicle in the lot are not relevant.

The sale material informed the purchaser prior to the sale of the conditions and terms of the sale. The purchaser opted to participate in the auction, for which the Government had established the terms and conditions. The purchaser bid on the vehicle in question without viewing the vehicle, while knowing that he lacked the information and written assurances that he now claims were pertinent to his bid price. The purchaser was awarded the vehicle in question. The purchaser has not demonstrated that the vehicle is other than that described. The lack of description regarding model type (e.g., slideout) does not constitute a misdescription. The purchaser has not established a misdescription or a basis either to alter the terms and conditions of this sale or to invalidate the contract. *Kenneth G. Hanke v. General Services Administration*, GSBCA 14097, 97-2 BCA ¶ 29,247.

The contract dictates the obligations of the parties. Given the non-payment, the contracting officer properly terminated the contract for default and assessed liquidated damages in accordance with the contract. The purchaser has not established a basis for relief.

### Decision

The Board **DENIES** the appeal.

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JOSEPH A. VERGILIO  
Board Judge

We concur:

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JAMES L. STERN  
Board Judge

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H. CHUCK KULLBERG  
Board Judge