



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 6, 2015

CBCA 4380

MYKOLA SHCHUPAK,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Nicholas W. Kowalchyn, Staten Island, NY, counsel for Appellant.

Charles G. McCarthy, Office of Regional Counsel, General Services Administration, San Francisco, CA, counsel for Respondent.

DANIELS, Board Judge (Chairman).

Mykola Shchupak purchased an automobile from the General Services Administration (GSA) through an on-line auction. Mr. Shchupak claims that he is entitled to a refund of the purchase price and the costs he incurred to have the vehicle shipped to him because the car he received is not the one pictured in the auction catalog. Under the terms and conditions of the auction, this contention cannot prevail. The appeal is denied.

Mr. Shchupak elected to have this case considered under the Board's small claims procedure. Board Rule 52 (48 CFR 6101.52 (2014)); *see* 41 U.S.C. § 7106(b) (2012). Consequently, this decision is being rendered by a single judge. The decision is final and conclusive; it may not be set aside except for reason of fraud and has no value as precedent. *Id.*; *Mitchell Enterprises, Inc. v. General Services Administration*, 03-2 BCA ¶ 32,403, at 160,354 (citing *Palmer v. Barram*, 184 F.3d 1373 (Fed. Cir. 1999)). The Board convened

a telephonic conference with counsel for the parties to discuss proceedings in the case. Counsel outlined their positions orally and agreed to have the case decided on the basis of the written record, supplemented only by the oral statements made in the conference. Board Rule 19(a).

Findings of Fact

On August 1, 2014, GSA advertised for sale numerous crash-test vehicles which were located in Adelanto, California. Two of the automobiles were 2013 Lexus RX350 sport utility vehicles (SUVs). They were designated as item numbers 029 (later designated as 429) and 030 (later designated as 430). Lot number 429 was described as follows:

Year: 2013 Make: Lexus Mileage: unknown
Model: RX350 VIN [vehicle identification number]: 2T2ZK1BA8DC087635
Report number: 693-42163-4213-0029
2013 Lexus, RX350, SUV, VIN: 2T2ZK1BA8DC087635, crash test vehicle, not repairable for highway use, salvage only non revivable title, agrees not to attempt to repair this vehicle for highway use, successful bidder agrees to notify any subsequent purchaser of this NRHU stipulation. Engines and components in separate location at the facility, it is suggested the successful bidder have a flat bed truck to remove this lot (693163-4213-0029) (DTNH22-09-D-00122).

Lot number 430 was described identically, except that the VIN was stated to be 2T2ZK1BA3DC087297, the report number was stated to be 693163-4213-0030, and the lot number was stated to be (69316304231-0030) (DTNH22-09-D-00122).

GSA also provided photographs of the vehicles in its on-line auction catalog. The agency admits that the photographs of the vehicle in lot 430 were posted for lot 431, which was another crash-test vehicle. The photographs posted for lot 430 show a car in apparently good condition, except for the driver's side doors, with the VIN stated for lot 429. The photographs posted for lot 431 show a car in considerably worse condition, with the entire driver's side and the front of the car badly damaged, as well as the VIN stated for lot 430.

The auction sale was subject to various terms and conditions, among which were the following:

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 before payment, the

contract will be cancelled without any liability to the bidder. If a misdescription is determined before removal of the property, the Government will keep the property and refund any money paid. If a misdescription is determined 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. . . . **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.

Photographs. 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. . . .

Inspection. Bidders are invited, urged and cautioned to inspect the property prior to bidding. . . .

GSA informed Mr. Shchupak on September 6, 2014, that he was the successful bidder on lot 430. He paid \$13,510 for the vehicle on September 12. With his authorization, BS Express Company picked up a vehicle from the GSA facility in California and delivered it to him in New Jersey.

BS Express Company delivered to Mr. Shchupak on September 17 the car it had received from GSA. He immediately contacted the Sales Contracting Officer and reported that this car was not the one shown in the photographs for lot 430 in the on-line catalog. He asked for a refund of the purchase price and payment of the delivery fee, or alternatively the vehicle which was represented as lot 430 in the auction catalog's photographs.

The contracting officer responded by electronic mail, "The terms and conditions state, do not go by the photos, the written descriptions are what you go by. . . . I am sorry but you bid on the vehicle that was described in the written description and the Vin number was correct which would give you all the specifics regarding the vehicle." On September 23, she issued a decision denying Mr. Shchupak's claim. She reasoned that because the VIN on the car which was delivered was the same VIN noted for lot 430 in the catalog, and because the catalog's terms and conditions state that "[p]hotographs . . . should not be relied upon in place of written item descriptions or as a substitute for physical inspection," he was not entitled to a refund of the purchase price.

Discussion

When bidding on lot 430, Mr. Shchupak relied on the photographs in GSA's on-line auction catalog. Although he was the high bidder for this lot, and was therefore awarded the contract for it, he did not receive the vehicle depicted in the photographs as the lot 430 vehicle. He asserts that because the photographs depict a different car from the one he received, GSA may not require him to purchase it. He maintains that he is entitled to a refund of the purchase price.

The terms and conditions of the sale are contained in the catalog, and when GSA accepted Mr. Shchupak's bid, those terms and conditions became those of the contract between the two parties. *Darren R. Gentilquore v. General Services Administration*, GSBCA 16705, 05-2 BCA ¶ 33,117, at 164,115. The contract provides that photographs in the catalog "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." GSA does not warrant that the photographs are accurate; it warrants only that "the property listed in the GSAAuctions.gov website will conform to its written description"

The terms and conditions "invited, urged and cautioned" a prospective bidder to make a physical inspection of auction items before placing a bid. Had Mr. Shchupak made a physical inspection of the vehicle in lot 430, he would have observed that the photographs which purported to be of that vehicle were obviously of another car. The two automobiles not only were in very different condition, but also had different VINs, and the VIN of the vehicle in the photographs of what was allegedly lot 430 did not match the VIN in the written description of that vehicle. By placing a bid without making an inspection, Mr. Shchupak passed on the opportunity to determine whether the photographs were accurate, and he must accept the consequence of that decision. *Cf. MJL Enterprises, Inc. v. Department of Veterans Affairs*, CBCA 2708, 12-2 BCA ¶ 35,167, at 172,563) (where ambiguity in contract provision is patent and contractor does not inquire, contractor may not recover). The written description was correct, and therefore cannot be deemed a misdescription. *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631, at 166,572; *Wood's Auto & Truck, Inc. v. General Services Administration*, GSBCA 16600, 06-1 BCA ¶ 33,275, at 164,930; *Larry J. McKinney v. General Services Administration*, GSBCA 16720, 05-2 BCA ¶ 33,119, at 164,128.

Decision

The appeal is **DENIED**.

STEPHEN M. DANIELS
Board Judge