



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 14, 2022

CBCA 7281

BADLAND TRUCK SALES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jeremy Alley, President of Badland Truck Sales, Inc., Glendive, MT, appearing for Appellant.

Neeraj Kumar and Keaton Norquist, Office of Regional Counsel, General Services Administration, San Francisco, CA, counsel for Respondent.

KULLBERG, Board Judge.

Appellant, Badland Truck Sales (BTS), claims the amount of \$10,500 for the reduction in price of a John Deere 544J wheeled loader (loader) that it purchased from the General Services Administration's (GSA's) auction website. BTS contends that it is entitled to the reduction in price because of problems with the loader that were unknown at the time of the sale. GSA, the respondent, has filed a motion for summary judgment in this appeal on the grounds that BTS failed to timely submit written notice of misdescription as required under the terms and conditions of its contract or, in the alternative, that the terms and conditions of the sale did not provide a warranty for the condition of the loader. BTS has opposed the motion on the grounds that GSA was aware of the condition of the loader, and it should have been allowed additional time to file its notice.

Subsequent to GSA's motion for summary judgment, BTS elected to have the Board hear this appeal under the Board's small claims procedure. Rule 52 (48 CFR 6101.52 (2020)). Accordingly, this decision "is final and conclusive, shall not be set aside except for fraud, and is not precedential." Rule 52(c). For the reasons stated below, the Board grants GSA's motion for summary judgment and denies the appeal.

Background

The Board finds the facts set forth below to be not in dispute.

On July 1, 2021, GSA offered the loader for sale on its auction website. The description of the wheel loader was the following:

2006 John Deere 544J Wheeled Loader Loader was acquired in August 2006 with original cost of \$102,565.73. Unknown deficiencies. SOLD AS IS. Inspection is highly recommended prior to bidding. Successful bidder is responsible for packing and removal. Loader is located at South Rim, Grand Canyon National Park 1575 Shuttlebus Rd., Grand Canyon, AZ.

GSA required that participants in its auctions "acknowledge that they have read and accepted ALL terms and conditions detailed on this website and indicate that they agree by marking the required box during the registration process." Those terms and conditions, in pertinent part, were the following:

Condition of property is not warranted. Deficiencies, when known, have been indicated in the property descriptions. However, absence of any indicated deficiencies does not mean that none exists. Therefore, the bidder should ascertain the condition of the item through physical inspection.

. . . .

The Government warrants to the original purchaser that the property listed on GSAAuctions.gov will conform to its written description. Features, characteristics, deficiencies, etc. not addressed in the description are excluded from this warranty. GSA further cautions bidders that GSA's written description represents GSA's best effort to describe the item based on the information provided to it by the owning agency. Therefore, gross omissions regarding the functionality of items, failures to cite major missing parts and/or restrictions with regards to usage may occur.

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

....

If items have been awarded but 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 contact with the custodian or the Sales Contracting Officer or any other federal official will constitute a notice of mis-description.

When items are awarded and payment has been received, regardless of the removal status (removal may or may not have occurred), the successful bidder must submit a written notice to the Sales Contracting Officer within 15 calendar days from the date of payment e-mail (the Purchaser's Receipt). If property has been removed and the claim is accepted by the Sales Contracting Officer, the purchaser must maintain the property in its purchased condition and return it at their expense to the location designated by the Sales Contracting Officer of their designated official.

BTS accepted those terms and conditions.

On July 8, 2021, GSA accepted BTS' bid in the amount of \$50,010, and awarded contract number GS09F21FBE7785 (contract) to BTS. GSA further advised BTS that payment was due within two days. On July 13, 2021, GSA informed BTS that it was in default for failure to make payment, and GSA directed BTS to make payment within two days. Exhibit 6. BTS submitted payment for the loader on July 14, 2021.

In an email dated August 5, 2021, BTS advised GSA of the following:
I would like to submit a claim on this front end wheel loader.

....

The main loader scoop bucket which is a 4&1 bucket has a very large bow and bend in it and it doesn't close appropriately as it should.

The other deficiency is that upon starting it up on the truck to back it off; none of the gauges are working and it is not shifting out of first gear. The loader does run and drive, but there is not a single working gauge currently.

BTS acknowledged that it failed to inspect the loader before purchasing it. Finally, BTS requested “a discount of \$8500 for the bucket and \$2000 for the instrument cluster problem.” On October 1, 2021, the contracting officer (CO) denied BTS’ claim. The CO noted that BTS had no remedy under the contract because the loader was sold “as is” and BTS had failed to inspect the loader before purchasing it. BTS subsequently appealed the CO’s decision.

Discussion

The issue before the Board is whether GSA has established grounds for summary judgment. The Board’s authority is pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). In ruling upon a motion for summary judgment, the Board recognizes the following:

Summary judgment is only appropriate where there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.* It is not the judge’s function “to weigh the evidence and determine the truth of the matter.” *Id.* at 249. All justifiable inferences and presumptions are to be resolved in favor of the nonmoving party. *Id.* at 255.

The moving party has the initial responsibility of stating the basis for its motion and “identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[A]llegations without support are not evidence.” *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (quoting *Max Castle*, AGBCA 97-128-1, 97-1 BCA ¶ 28,833, at 143,845).

Optimum Services, Inc. v. Department of the Interior, CBCA 4968, 19-1 BCA ¶ 37,383, *aff’d*, *Optimum Services, Inc. v. Secretary of the Interior*, 829 F. App’x 527 (Fed. Cir. 2020) (table).

GSA contends that BTS’ notice of misdescription was not submitted within the fifteen-day period after award as required under the terms and conditions of the contract.

The Board has recognized that “the failure to submit a claim within the requisite time-frame of fifteen days defeats any claim a purchaser might otherwise have under the Description Warranty clause.” *Stephen D. Bradley v. General Services Administration*, CBCA 5040, 16-1 BCA ¶ 36,327 (quoting *Joseph M. Hutchison v. General Services Administration*, CBCA 725, 08-1 BCA ¶ 33,804). GSA awarded the contract on July 8, 2021, but BTS did not submit any notice regarding the loader until August 5, 2021, which was more than fifteen days after award.

BTS contends that circumstances beyond its control, which were the result of the pandemic, prevented it from filing timely notice. The Board finds no merit in that assertion as there is no contract provision that excuses failure to comply with its terms. Additionally, BTS also delayed payment until July 14, 2021, which, due to its own fault, further limited its time in which to file its notice.

Even if the Board were to find that BTS submitted a timely misdescription claim, there is no evidence that GSA misdescribed the loader, and, consequently, BTS has no recourse under the warranty provision of the contract. The Board has recognized the following:

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”).

Randy Preston v. General Services Administration, CBCA 1465, 10-1 BCA ¶ 34,317 (2009) (quoting *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.” *Id.* (quoting *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631, at 166,572). In *Preston*, the Board held that appellant had failed to show a misdescription of the paddle boats that he had purchased at a GSA auction where the damage to the boats could have been determined by inspection before bidding. *Id.*

GSA properly described the loader, which was a 2006 John Deere 544J Wheeled Loader, and BTS has not denied that it purchased such a piece of equipment. Instead, BTS has cited issues related to its condition, which included the scoop bucket, gear shift, and gauges. All of those issues could have been discovered upon inspection of the loader, but BTS failed to do so.

BTS has also suggested that government personnel were aware of the condition of the loader. Even if BTS is correct in its allegation, it is of no avail because the terms and conditions of the contract, and not the knowledge of government personnel, determined BTS' rights under its contract with GSA. Those terms and conditions were explicit and blunt in advising prospective bidders "that gross omissions regarding the functionality of items, failures to cite major missing parts and/or restrictions with regards to usage may occur."

Finally, BTS in its claim seeks a reduced price for the loader, \$10,500, which is not an available remedy under the contract. The terms and conditions of the contract did not include "any payment for loss or profit or any other money damages—special, direct, indirect, or consequential." At most, BTS has only alleged a hypothetical reduction in the value of the loader, which is not recoverable under the terms and conditions of the contract.

Decision

The motion for summary judgment is granted. The appeal is **DENIED**.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge