



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: April 10, 2008

CBCA 940

EVERETT M. MYERS,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Everett M. Myers, pro se, Smithfield, VA.

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

Before Board Judges **BORWICK**, **FENNESSY**, and **POLLACK**.

**FENNESSY**, Board Judge.

We have before us an appeal from a final decision of a contracting officer of the General Services Administration (GSA) denying the claim of appellant, Mr. Everett M. Myers (Mr. Myers or appellant), for return of the purchase price of \$1850 for an engine he purchased at a GSA on-line auction. The parties elected to have this appeal resolved on the written record without a hearing. We deny the appeal for the reasons set forth below.

Facts

GSA offered for sale on the GSAAuctions.gov website an outboard engine described as follows:

Outboard engine one each Johnson 150 outboard engine, model J150VLSIG, asset number: none sn: G04938087, repairs may be required. . . .

. . . .

The condition of the property is not warranted.

Appeal File, Exhibit 3.

The website also listed the terms and conditions of the sale. To bid on the engine, Mr. Myers was required to agree to these terms and conditions, including the following:

**Condition of Property** is not warranted. Condition No. 2, "Condition and Location of Property," of Standard Form 114C is deleted in its entirety. Deficiencies, when known, have been indicated in the property descriptions. However, absence of any indicated deficiencies does not mean that none exists.

### **Description Warranty and Refunds**

**Description Warranty.** The Government warrants to the original purchaser that the property listed in the [GSAAuctions.gov](http://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. 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.

**Refund Claim Procedure.** To file a refund claim for misdescribed property, (1) submit a written notice to the Sales Contracting Officer within 15 calendar

days from the date of award prior to payment or 15 calendar days from the date of removal that the property was misdescribed, (2) if removed, maintain the property in the purchased condition until it is returned, and (3) if removed, return the property at your own expense to a location specified by the Sales Contracting Officer. Written claims need to be filed to the Sales Contracting Officer, no verbal contact with the custodian or the Sales Contracting Officer will constitute a notice of misdescription.

**Refund Amount.** The refund is limited to the purchase price of the misdescribed property.

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**Inspection.** Bidders are invited, urged and cautioned to inspect the property prior to bidding. Bidders must contact the custodian indicated in the item description for inspection dates and times.

Appeal File, Exhibit 2.

Mr. Myers did not inspect the engine before placing his bid. Mr. Myers' bid of \$1850 was the successful bid.

The engine was located at the National Marine Center, United States Customs & Border Protection (CBP), in St. Augustine, Florida. On March 29, 2007, Mr. Myers removed the engine from that location.

On May 18, 2007, Mr. Myers wrote a letter to Mr. Pat Conway of CBP, the custodian of the engine, seeking a refund of the \$1850 purchase price. Mr. Myers stated that, on that date, he had taken the engine to a repair facility in Newport News, Virginia, for a "test run." The mechanic's report is dated May 17, 2007. Upon removal of the engine cover, Mr. Myers learned that the engine had two broken carburetors and "closer inspection" revealed that the engine was "blown." Mr. Myers stated that the Government "may have erroneously overlooked the blown engine when it was 'advertised as repairs may be required.'" Appeal File, Exhibit 7.

Mr. Conway forwarded Mr. Myers' letter to the contracting officer at GSA. On July 11, 2007, the contracting officer denied Mr. Myers' claim. This timely appeal followed.

### Discussion

There is no dispute that the engine on which Mr. Myers bid and the engine he removed from the custodian were one and the same. Nevertheless, Mr. Myers claims he is entitled to a refund of the purchase price pursuant to the Description Warranty clause of the sale because the description of the engine did not state that the engine was “blown.” Mr. Myers states that he relied upon the description language, “repairs may be required.” According to Mr. Myers, a blown engine is not repairable and a blown engine cannot be detected absent assistance from a boat mechanic. Mr. Myers further states that, after purchasing and removing the engine, he timely engaged a boat mechanic to inspect it and, when the mechanic detected a hole in the engine block, he timely notified GSA. The record does not support Mr. Myers’ claim.

The Description Warranty clause expressly warned that the refund claim procedure would be strictly followed. The applicable refund claim procedure specified that, to recover for a misdescription, Mr. Myers was required to submit to the contracting officer a written notice of the claimed misdescription within fifteen days of removal of the engine from the Government’s possession. This was the sole remedy available for a misdescription. Fifty days elapsed between the time Mr. Myers removed the engine on March 29 and when he sent his May 18, 2007, letter notifying the Government of an alleged misdescription. Therefore, Mr. Myers’ notice of misdescription was untimely. The law is clear that failure to comply with terms of the notice provision of the Refund Claim Procedure clause of the terms of sale precludes recovery. *See Benno Stein v. General Services Administration*, GSBCA 15517, 01-2 BCA ¶ 31,490, and cases cited therein.

Further, Mr. Myers has failed to prove a claim of misdescription. To recover based upon misdescription, appellant must show that, prior to the sale, the Government knew of the specific mechanical problem appellant encountered and did not disclose that information to prospective bidders. *Stein*. Mr. Myers has not demonstrated that the Government knew at the time of the sale that the engine was “blown.” There is no evidence in the record to that effect.

In any event, Mr. Myers’ complaint is with the condition of the engine and is not properly directed to the Description Warranty clause. Although GSA warrants that the items purchased in its auctions are the items they are stated to be, it expressly disavows, in multiple provisions of the sale terms and conditions, any warranty of condition. *Stein; accord Chris Ward v. General Services Administration*, GSBCA 16473, 05-1 BCA ¶ 32,881. Assuming that Mr. Myers’ allegation that the engine was not repairable is correct, the result is the same. The engine was sold with no warranty of condition; that is, it was sold “as is.” At best,

bidders were notified of any know defects. *Id.* In these auction sales, where both the buyer and the seller are ignorant of the true condition of the item sold, the buyer assumes the risks and uncertainties inherent in purchasing a used item. *Michael Griffin v. General Services Administration*, GSBCA 16729, 06-1 BCA ¶ 33,274.

Appellant's contention that it was not possible to discover the problem with the engine without the assistance of a boat mechanic is of no merit because, before bidding, Mr. Myers did not perform, or have performed, an inspection of the engine. However, even if it was not possible to detect a "blown" engine without the aid of a mechanic, there is no requirement that the Government undertake a mechanical inspection of an item prior to selling it at auction. "[T]o impose such a requirement would be antithetical to the very nature of a sale in which warranties are expressly disclaimed." *Rene A. Hernandez v. General Services Administration*, GSBCA 15448, 01-2 BCA ¶ 31,463 (citing *John C. Cruden*, GSBCA 9331, 89-1 BCA ¶ 21,348 (1988); *James P. Smith*, GSBCA 8216, 86-3 BCA ¶ 19,131).

Finally, appellant complains that it was denied "arguments and evidence in its favor" because respondent did not meet the December 14, 2007, date for completing discovery as specified in the Board's November 6, 2007, Order. Appellant's Submission at 2. We do not condone respondent's failure to comply with the Board's order. However, we have examined appellant's discovery requests and respondent's responses thereto and find that there is nothing in the responses that lends support to appellant's claim.

### Decision

The appeal is **DENIED**.

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EILEEN P. FENNESSY  
Board Judge

We concur:

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ANTHONY S. BORWICK  
Board Judge

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HOWARD A. POLLACK  
Board Judge