



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 28, 2012

CBCA 2604

DONALD P. WOOD,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Donald P. Wood, pro se, Tampa, FL.

Fallyme E. Guerrero, Office of General Counsel, General Services Administration, Kansas City, MO, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **ZISCHKAU**.

ZISCHKAU, Board Judge.

Appellant, Donald P. Wood, was the winning bidder, through a General Services Administration (GSA) online auction, of a single surplus property lot consisting of forty-one pallets containing an estimated 1122 boxes of unused "wag bag" waste kits. Approximately a month after the notice of award, Mr. Wood complained to the contracting officer and sought a price adjustment because, he alleged, he received only an estimated 970 boxes and many of the boxes were damaged. The contracting officer stated that she could not refund any part of the price paid because the surplus property was sold as a single lot, the claim was untimely, and the state agency custodian believed the box estimate was accurate. We deny the appeal. Mr. Wood failed to make a timely claim for misdescription under the contract, and he has not shown that the goods at the point of transfer materially varied from the bid description and pictures.

Background

In approximately July 2011, the Missouri State Agency for Surplus Property identified for GSA a number of surplus property items that it wished GSA to sell through GSA's online auction program. On its surplus property listing, the Missouri State Agency identified lot 031 with a brief descriptive paragraph for "wag bag waste kits," including a description of the contents of each kit, with an indication that there were an estimated one hundred unused waste kits per box, the boxes were stored on forty-one pallets, and the kits were being sold as a single lot. The contracting officer asked the state agency how many boxes were in the lot because that information was not in the original description. The state agency replied that there were an estimated 1122 boxes on the forty-one pallets.

The online auction posting showed three pictures, one of which depicted a pallet with the boxes on the front stacked four high and three wide, with clear plastic shrink wrap bundling the stacked boxes, and a large handwritten marker notation of "32 EA" on the shrink wrap. The picture also showed behind the first pallet two additional pallets stacked one on top of the other with boxes stacked three high on each pallet. After receiving the additional information from the state agency, the contracting officer edited the description which, as posted at the auction website, read as follows:

(476463-1201-0031) WAG BAG WASTE KITS, MFG PHILLIPS ENVIRONMENTAL PRODUCTS, KIT INCLUDES 1 DEGRADABLE WASTE BAG W/ GELLING AGENT, ODOR NEUTRALIZER, DECAY CATALYST, DEGRADABLE ZIP CLOSE DISPOSAL BAG, TOILET PAPER & HAND SANITIZER, EST 100 KITS PER BOX, EST 1,122 BOXES) (41 PALLETS) (UNUSED) 1 LOT 47646312010031

THE CONDITION OF THE PROPERTY IS NOT WARRANTED.

The following terms and conditions were applicable to this auction and the resulting contract award:

Inspection of Property

Bidders agree to physically inspect the property upon which they bid or thereby waive the opportunity to conduct a physical inspection. In waiving their inspection rights, bidders bear the risk for any gross omissions regarding the functionality of items, failures to cite major missing parts and/or restrictions with regards to usage that would have been revealed by physical inspection.

Condition of Property

The following replaces Clause No. 2 of the SF114C. 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. Please also reference the Inspection of Property clause.

Description Warranty & Refunds

The Government warrants to the original purchaser that the property listed in the GSAAuctions.gov website 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 of profit or any other money damages – special, direct, indirect, or consequential.

Refunds Claim Procedures

Please be advised that refunds are not a frequent practice of GSA Auctions. A request for refund must be substantiated in writing to the Contracting Officer for issues regarding mis-described property and voluntary defaults within 15 calendar days from the date of payment.

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 contact with the custodian or the Sales Contracting Officer or any other federal official will constitute a notice of misdescription.

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 award email notification. 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 . . . [purchaser's] expense to the location designated by the Sales Contracting Officer or any other federal official.

The closing date and time for bids was August 16, 2011, at 7:18 p.m. Central Time. Pre-bid inspections were permitted only on August 12. Mr. Wood stated that he made no pre-bid physical inspection of the auction items but chose to rely on the description and pictures posted by GSA. Respondent stated that some other persons did make a physical inspection of the goods. The contracting officer asserts that a physical inspection would have revealed the number of pallets, the number of boxes on those pallets, and the condition of the boxes.

Most of the bids received at the GSA auction website were made shortly before the closing time on August 16. Mr. Wood's bid of \$63,019 was the winning bid. Mr. Wood received an email award notification from GSA that same evening. According to the terms of the solicitation, payment was due by August 18 and the goods had to be removed by August 31. Mr. Wood did not submit his payment by the August 18 deadline. After contacting Mr. Wood, GSA received his payment on August 25. After receiving payment, GSA generated a Purchaser's Receipt and Authority to Release Property form the same day. It stated that the property was to be removed by the purchaser by August 31.

Mr. Wood hired a truck driver to transport the goods from the state agency's surplus property location in Jefferson City, Missouri, to Mr. Wood's location in Florida. Mr. Wood states that a pickup date of September 2, 2011, was arranged with a state agency surplus property representative. There is no evidence that GSA or the state agency delayed Mr. Wood's pickup of the goods. The record indicates that Mr. Wood delayed payment and voluntarily chose to pick up the property on September 2.

On Friday, September 2, Mr. Wood's truck driver arrived at the surplus property location and had the pallets loaded into his tractor trailer with the assistance of the state agency property personnel using a fork lift truck. The truck trailer was loaded with pallets stacked on top of each other reaching to the ceiling of the trailer, and, according to Mr. Jim Wood (appellant's brother), probably filled the entire trailer. It appears from the record that the truck driver made no inspection of the goods and made no record of quantities picked up or the condition of the property at the time of pick up. Appellant states that the truck driver was hired only to pick up the goods in Missouri and deliver them to his business location in Florida, not to conduct an inspection of the goods at the surplus property location, or to give

him a report regarding the number of boxes or condition of the boxes at the pickup location. There is no evidence that the shrink-wrapped pallets containing the boxes at the time of pickup were in any way different from the pallets that appeared in the pictures displayed on the auction website.

According to appellant, the truck containing the goods arrived approximately twelve hours late on Monday, September 5, between 10 and 11 p.m. at appellant's place of business in Jacksonville, Florida. Appellant's brother was in charge of the unloading operation, which was begun promptly upon the truck's arrival because the driver stated that he had to leave at daylight the next morning. Approximately five workers had been hired to help unload the truck, "and they worked through the night or until they were physically unable to work to complete the unloading. The truck was unloaded in limited lighting, at night or in the early morning hours, in the late Summer heat and humidity of Florida." Appellant's Proposed Findings of Fact and Conclusions of Law at 3. Appellant's brother explained that the workers began removing the shrink wrap from the pallets and removing the boxes by hand from the truck. There was no fork lift available for unloading the pallets. Appellant's brother states that he came to help with the remainder of the unloading operation beginning around 3 or 4 a.m. and saw the truck when about half of the boxes already had been removed. He and one of the workers continued unloading the remaining boxes until about 5 a.m. At that time, all of the boxes had been removed from the trailer. He does not know how many pallets were received and had no basis to dispute that he received forty-one pallets.

Neither appellant's brother nor any of his workers took any pictures of the pallets with the boxes or the condition of the boxes prior to their unloading. Four pictures (attached to appellant's notice of appeal) were taken by appellant's brother within a few days after the unloading operation. Appellant argues that the stacking of the pallets had damaged the boxes and that damaged boxes must have been concealed by the seller by shrink wrapping them on pallets (to prevent the boxes and their wag bag kit contents from falling apart) and loading the pallets with the damaged boxes on the truck first. We find no basis in the record for concluding that anyone with the Missouri state agency (or GSA) attempted to conceal the condition of the boxes.

The first notification that appellant was not satisfied with the quantity and condition of the boxes is found in his email message dated September 13, 2011, sent to a representative of the Missouri state agency. Appellant stated in that message:

The shipment of Wag Bags came in with a count of way under the amount described in the sale. It is my estimate that we received 970 boxes and quite a large amount of heavily damaged boxes with contents damaged or questionable. I would not make such a big deal of this except I made a very

large investment on this item spending a total of \$63,019.00 dollars. So I am appealing to the GSA department, that there be some consideration for this purchase as the amount listed in the ad and the amount received is very far apart, as well as a large amount of the boxes are damaged. The Delivery driver took notes that the amount received was far short of what was described . . . [s]o please, can someone deliver this request to the proper department.

The state agency custodian forwarded the email message to the GSA sales contracting officer, who provided the following response to Mr. Wood on September 14, 2011:

I have talked to the custodian of the property. They have double checked the inventory they received, and all that were transferred out, and feel very comfortable with the original estimate given to be quite accurate.

I am sorry that the amount you received does not seem to conform to the estimate given in the description. As this Lot was sold on a “price for the lot” basis, and not on a “per count, or per each” basis, I am not able to refund any part of your bid price. According to the Terms and Conditions of the sale, as outlined in the SF114C, I cannot adjust your purchase price for any variance. I have copied the section regarding this below, and have also attached the entire SF114C:

12. Adjustment for Variation in Quantity or Weight.

Unless otherwise provided in the invitation, when property is sold by a unit other than “weight”, the Government reserves the right to vary the quantity tendered or delivered to the Purchaser by 10 percent; when the property is sold by “weight”, the Government reserves the right to vary the weight tendered or delivered to the Purchaser by 25 percent. The purchase price will be adjusted upward or downward in accordance with the unit price and on the basis of the quantity or weight actually delivered. Unless otherwise specifically provided in the invitation, no adjustment for such variation will be made where property is sold on a “price for the lot” basis.

Appellant stated at one point in the litigation that he had sold approximately one hundred of the boxes containing the wag bag kits. The record does not indicate the number of boxes currently retained by appellant. Appellant is unwilling (and unable) to return all of the boxes for a refund. Instead, he seeks a partial refund of the purchase price.

Discussion

Appellant argues that GSA failed to provide him with the quantity and quality of goods that he anticipated based on the online auction description and pictures. Specifically, appellant argues that he received far fewer boxes than estimated in the auction description, and many of the outer boxes holding the wag bag kits were so damaged (“corners, sides, tops, bottoms and edges of the boxes had been rounded, flattened or bent or otherwise damaged”) that he could not resell the kits in their original outer box containers. Appellant also contends that the auction website pictures created an express warranty that he would receive boxes looking like the sample in the pictures and that the auction description of “EST 1,122 BOXES” was a precise but misleading number.

Appellant’s arguments are not well taken. The description clearly identified the goods as a single lot, with an estimated 1122 boxes on forty-one pallets, each box containing an estimated one hundred kits. Appellant choose not to make a pre-bid inspection, failed to make an inspection of the goods at the time of picking up the goods at the state agency facility, and failed to demonstrate that goods as received were mis-described in the online auction description and pictures.

The GSA description does not warrant the condition of the outer boxes in any manner. Indeed, the auction description specifically provided that the condition of the property was not warranted. Given the language of the auction description for this surplus property, one could not reasonably assume that the outer boxes containing wag bag kits, which were stored on pallets for some undefined period of time, to be in perfect condition. One picture at the auction webpage shows one pallet stacked on top of another, so it would be unreasonable for a bidder to expect that the boxes and pallets had never been stacked. By sending a single tractor trailer to pick up the forty-one pallets, appellant should have known that the pallets would be re-stacked on top of each other in order to fit in the trailer for transport to his facility. Judging from appellant’s description of the nighttime unloading operation once the truck driver had arrived at appellant’s Florida facility, it is entirely possible that some damage to the boxes occurred during unloading from the trailer, which was done by hand in darkness under time pressure with this manual work being done by five hired hands and appellant’s brother.

Simply stated, appellant has not shown that the condition of the property at the time of pickup at the state agency materially differed from the property as described at the online auction and in the auction pictures. Appellant’s trucking agent took no pictures of the pallets and boxes at the time of pickup, made no count of the number of boxes received, and made no report at all on the condition of the property. There was no description warranty

concerning the condition of the outer boxes, the description itself disclaimed any warranty on the condition of the boxes, and appellant made no pre-bid inspection.

Appellant argues that pursuant to Missouri's Uniform Commercial Code (UCC), he permissibly rejected the auction goods or "revoked acceptance due to nonconformity of the goods" as to the condition and number of boxes. Mo. Rev. Stat. §§ 400.2-601, 400.2-602. Although appellant never gave any notice to GSA that he was attempting to revoke acceptance or reject the goods, we see no reason to consult the UCC here because the GSA sales contract does not lack the terms and conditions for resolving the dispute at issue. *See Danny R. Mitchell v. General Services Administration*, GSBCA 16122, 04-1 BCA ¶ 32,511 (board looks to the terms and conditions of the federal auction contract and declines to address UCC remedies advanced by the appellant).

This government sales contract contains a misdescription claims clause and a refund claims clause as remedies. Appellant did not timely assert a claim under either clause. The misdescription claims clause required that any claim be made within fifteen calendar days from the date of award notification. Because award notification was made on August 16, appellant had to make such a claim by August 31. The refund claims clause required that any claim be made within fifteen calendar days of the date of payment. Because appellant made payment on August 25, such a claim had to be made by September 9. Appellant's claim was made no earlier than September 13. Thus, the contracting officer legitimately concluded that appellant's claim was untimely. *Joseph M. Hutchison v. General Services Administration*, CBCA 752, 08-1 BCA ¶ 33,804.

Further, appellant never attempted or agreed to return the entire shipment lot to the state agency property facility to resolve the matter through a refund. In fact, appellant began re-selling the boxes and had sold at one point during the litigation at least one hundred boxes of the wag bag kits. The agency points out that if appellant had actually inspected the property at the time of pickup and then determined that he was not satisfied with the condition of the property, he could have decided not to take the property, defaulted, paid a default fee of \$375, and received a refund of the purchase price he paid. Instead, he has retained the goods and is seeking a price adjustment based on an untimely and unproven misdescription claim.

Appellant also argues that GSA failed to observe good faith and fair dealing in the transaction, that GSA acted in bad faith by concealing the condition and number of the boxes with the intent of misleading buyers, and that GSA used deceit to induce appellant to enter into the sales contract. For the reasons discussed earlier, these arguments are without merit. There is no evidence in the record that GSA did not observe good faith and fair dealing in this online auction transaction or that GSA acted in bad faith. GSA obtained a description

and pictures of the surplus property from the Missouri state agency custodian. The property was available for public inspection prior to bidding, there was no warranty on the condition of the property beyond what was contained in the brief description, and appellant has not demonstrated that there was any misdescription of the property.

Decision

We have considered each of appellant's arguments but find no basis for sustaining the appeal. Accordingly, we **DENY** the appeal.

JONATHAN D. ZISCHKAU
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JERI KAYLENE SOMERS
Board Judge