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Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: January 22, 2004

GSBCA 16122

DANNY R. MITCHELL,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Danny R. Mitchell, pro se, Pocahontas, AR.

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

Before Board Judges **HYATT** and **GOODMAN**.

HYATT, Board Judge.

This appeal arises from the purchase by appellant, Danny R. Mitchell, of a dump truck in an auction of surplus property conducted by respondent, the General Services Administration (GSA). Mr. Mitchell contends that the condition of the dump truck he purchased was misrepresented. Appellant has elected to have this case processed in accordance with the accelerated procedure provided in Board Rule 203. 48 CFR 6102.3 (2002). GSA has filed a motion for summary relief. We grant the motion and deny the appeal.

Findings of Fact

1. In August 2002, GSA received from the State of Mississippi's Office of Surplus Property a list describing various items of surplus property to be auctioned to the public. The list included a dump truck that had been excessed by Eglin Air Force Base in Florida. The following information about this vehicle was provided to GSA:

1984 GMC Dump Truck, V-8, 62,499 Miles, Automatic. There is some rust on the bed, tarp on top has some holes in it, exterior looks decent with some dents and scratches in it, starter is missing from engine, doesn't start. Interior looks rough well worn. VIN-1GTS7D4G8EV541178
Received 6-12-2001 A.C. - \$57,800.00 Condition Code - H-7

Appeal File, Exhibit 1.

2. In October 2002 the items on the State of Mississippi's list were offered for sale to the public on the GSA auctions web site (<http://GSAAuctions.gov>) under invitation for bids number 41 FBPI03021. The truck in question was listed as item number 18 and described as follows:

1984 GMC DUMP TRUCK, 8 CYL, AT, INOPERABLE, NO STARTER, SOME RUST, TARP HAS HOLES, DENTS AND SCRATCHES, INTERIOR ROUGH, REPAIRS ARE REQUIRED, VIN-1GTS7D4G8EV541178, RPT # 4744EN22810018

Several pictures were included. Appeal File, Exhibit 2.

3. The terms and conditions of sale applicable to online auctions are posted at GSAAuctions.gov. These include the following:

Condition of Property is not warranted. . . . Deficiencies, when known, have been indicated in the property description. However, absence of any indicated deficiencies does not mean that none exist.

Description Warranty. The Government warrants to the original purchaser that the property listed in the GSAAuctions.gov website will conform to its description. 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 Contracting Officer following the Refund Claim Procedure described below. 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 Contracting Officer within 15 calendar days from the date of removal that the property was misdescribed, (2) maintain the property in the purchased condition until it is returned, and (3) return the property at your own expense to a location specified by the Contracting Officer.

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

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.

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 designated representative.

Bidders are required to agree to these terms and conditions in order to register to make a bid on the items featured for auction. Appeal File, Exhibit 10.

4. Mr. Mitchell bid the amount of \$2250 for the dump truck and was determined to be the high bidder for the vehicle. The contracting officer issued a notice of award on October 21, 2002; Mr. Mitchell paid for the property on October 29 and arranged for its removal on November 4. Appeal File, Exhibits 3-4.

5. On November 26, appellant spoke to the contracting officer about the truck, informing her that it needed repairs and, in particular, had a cracked engine block. The contracting officer cited him to the terms and conditions of the sale. He responded that he would have his attorney send a letter to her. Appeal File, Exhibit 6.

6. No written communications concerning this sale, however, were received by GSA until February 2003. In a letter dated February 3, 2003, addressed to the contracting officer, Mr. Mitchell's attorney stated the following:

This letter was originally intended to be sent in November 2002. Apparently it was lost, as you have reported to my client that you did not receive this letter.

My client, Mr. Danny Mitchell, wishes to appeal the purchase of a 1984 Dump Truck, Lot No. 41FBPI03021. GSA has apparently misrepresented this vehicle in that when the truck was received the engine was locked up, it was busted and water was leaking into the oil. There were no keys to the vehicle upon arrival and therefore Mr. Mitchell was not allowed to inspect the vehicle. This dump truck arrived with no starter, no battery, busted engine and the motor was locked up. Also Mr. Mitchell's requests as to the identity of the agency that turned in this truck were ignored. GSA represented the truck to be inoperable due to a missing starter.

Mr. Mitchell requests that GSA send someone to look at the vehicle and make the needed repairs, or in the alternative that his money be refunded in the amount of \$2250.00, plus \$600.00 shipping fee. Upon refund of Mr. Mitchell's expenses, GSA may pick up the vehicle at DeClerk Diesel, where it is being stored.

Appeal File, Exhibit 7.

7. There is a written statement in the file which appears to have been authored by the custodian of the vehicle at the Mississippi Office of Surplus Property in Jackson, Mississippi, where the auctioned vehicle was located. According to the custodian of the property there, Mr. Mitchell made several calls about the dump truck prior to the close of the auction. He asked where the truck was from and who he could talk to about it. Ms. Corey told him the truck had come from Eglin Air Force Base in Florida, and gave him the name of her contact there. She further advised Mr. Mitchell that this person was on vacation and would not be available prior to the close of the auction. According to the statement, there were no keys with the vehicle when it came from Eglin, and the starter was on the floor of the truck. Finally, the memorandum asserts that Mr. Mitchell was not prohibited from inspecting the vehicle. Appeal File, Exhibit 9.

8. By letter dated February 11, 2003, the contracting officer wrote to Mr. Mitchell, acknowledging receipt of the February 3 letter authored by Mr. Mitchell's attorney. In this letter she states that the vehicle was removed on November 4 and that the next contact she had with Mr. Mitchell was on November 26, 2002, when he called her to assert that in his opinion the truck had been misdescribed. The contracting officer had no further communications with Mr. Mitchell until she received a letter from his attorney on February 4, 2003. In her letter, the contracting officer pointed out that the terms of the auction required the purchaser to assert a written claim of misdescription within fifteen calendar days after removal of the property. Since no written claim was received until some three months after removal of the property, the claim was denied. Appeal File, Exhibit 10.

9. Mr. Mitchell responded to this letter in an electronic mail message dated February 14, 2003. In this communication, Mr. Mitchell took issue with the contracting officer's assertion that his misdescription claim was untimely, stating he had made several efforts to contact her. He also explained the basis for his claim. In his view, the item had been described as inoperable due to the missing starter. No other major problems were listed in the description, including the fact that the keys were missing, the battery was missing, the engine was locked up, the engine block was cracked, and water had gotten into the engine oil. Mr. Mitchell further expressed his opinion that GSA had knowledge of these deficiencies and "attempted to cover them up by misdescribing the item." Based on these considerations, Mr. Mitchell contended the item was misdescribed, and demanded that GSA either (1) repair the vehicle or (2) refund his purchase price, plus \$600 for the cost of shipping the truck to Arkansas, and pick up the truck in Arkansas. Appeal File, Exhibit 11.

10. By letter dated March 14, 2003, the contracting officer formally denied Mr. Mitchell's claim and advised him of his appeal rights. Appeal File, Exhibit 13. Thereafter, Mr. Mitchell filed a timely appeal with the Board. In August 2003, at the request of counsel representing him at that time, appellant was permitted to elect the Board's accelerated procedure. Rule 203.

Discussion

Respondent has filed a motion for summary relief, asserting that, as a matter of law, the vehicle in question was not misdescribed and appellant is, in any event, not entitled to relief because he failed to comply with the terms and conditions of the auction. Appellant opposes the motion and seeks to add numerous additional allegations and causes of action to his complaint. Specifically, appellant seeks to recover:

Statutory Restitution for Criminal Offenses, Damages, and Other Monetary Relief under the Common Law or Equitable Theories of Fraud, Extrinsic Fraud, Fraud in the Inducement, False and Deceptive Item Descriptions, False and Deceptive Advertising, Fraudulent Misrepresentations, Unjust Enrichment, Payment by Mistake of Fact, Recoupment and Disgorgement of Illegal Profits, False and Fraudulent Statements, False and Fraudulent Writings, False and Fraudulent Documents, Perjury, Racketeering, Conspiracy, Collusion, Cover-Up, False Concealment, Obstruction of Justice, Internet Fraud, Wire Fraud, Mail Fraud, Contempt, [and] Honest Services Fraud.

In addition, appellant seeks civil penalties for respondent's willful and intentional violations of a long litany of federal statutes and regulations, provisions of Mississippi state law, and the Uniform Commercial Code. Appellant's motion to add these causes of action to his appeal at the Board must be denied. These added claims and causes of action sound in tort and criminal law and, as such, are matters over which the Board has no jurisdiction. The Board's authority to consider this matter is limited to its review of the contracting officer's final decision denying appellant's claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2000). To the extent appellant seeks remedies available at common law or provided by statutes and regulations other than the CDA and its implementing regulations,

appellant must initiate separate proceedings in the appropriate tribunals. See Dan Parish v. General Services Administration, GSBCA 16025, 03-1 BCA ¶ 32,211.

This brings us to GSA's motion for summary relief, which addresses the issues that are raised pursuant to the CDA and that are properly before the Board. Summary relief is appropriately granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); US Ecology, Inc. v. United States, 245 F.3d 1352, 1355 (Fed. Cir. 2001); Olympus Corp. v. United States, 98 F.3d 1314,1316 (Fed. Cir. 1996). In resolving summary relief motions, the Board has recognized that a fact is material if it will affect our decision and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing. John A. Glasure v. General Services Administration, GSBCA 16046, 03-2 BCA ¶ 32,284 (citing Celotex Corp.); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)). Because we find that there are no genuine issues of material fact in dispute and because GSA is entitled to relief as a matter of law, we grant GSA's motion for summary relief.

The gist of Mr. Mitchell's appeal is that the truck he bought required extensive repairs that he did not anticipate when he placed his bid and thereafter paid for and removed the vehicle. He argues that employees at Eglin Air Force Base were aware of the truck's defects and that these defects should have been fully disclosed in the auction sale. Thus, appellant maintains, under the circumstances, the vehicle's condition was misrepresented and he should be permitted to obtain a refund of the purchase price and require GSA to pick up the vehicle in Arkansas, where he had it shipped.

The description of the truck stated, inter alia, that it was inoperable, lacked a starter, and required repairs. Mr. Mitchell contends that the juxtaposition of the words "inoperable" and "no starter" suggested that the only reason the truck was inoperable was the lack of the starter. We find this interpretation, in context, to be unreasonable. A number of words and phrases, separated by commas, were used to describe the condition of the truck. As used in the truck's description, the commas served to make each word or phrase independent of the others. The description conveyed both that the truck was inoperable and that it lacked a starter. It also mentioned that the truck's exterior had rust and dents, that the interior was "rough," and that the vehicle required repairs. There is no clear implication that the lack of a starter is the sole cause of the truck's inoperability, particularly since the description went on to point out the general need for repairs.¹

¹ Mr. Mitchell also notes in his reply to GSA's motion that, although he did not travel to Mississippi to inspect the vehicle prior to placing his bid, he did communicate by telephone with the State of Mississippi's Office of Surplus Property about its condition. The custodian of the property referred him to another person in her office. That individual told Mr. Mitchell that so far as he knew the truck was in working condition but the starter needed to be reinstalled and the brake lines replaced before the truck could be driven. Even accepting this unsworn testimony as true, however, does not help Mr. Mitchell to defeat the motion, since the terms and conditions of the auction explicitly caution that oral statements by Government representatives are unauthorized and do not serve to confer any rights upon

Appellant has provided records, which he obtained from Eglin Air Force Base, pertinent to the decision to excess the vehicle. These records, which were obtained after the filing of the appeal, reflect that the overall condition of the truck was "bad," that the engine needed to be replaced, and that the cost to repair the vehicle, which had exceeded its life expectancy in years and was excess to the base's needs, would exceed monetary limits established by the base. According to appellant, the Air Force had classified the vehicle as unserviceable and as salvage. There is no indication in the record, and appellant has not established, that either GSA or the Mississippi Office of Surplus Property was given copies of these records at the time the vehicle was transferred to Mississippi by the Air Force or that either of these organizations had any specific knowledge of the condition of the truck beyond what was disclosed in the auction.

GSA maintains, in reply to appellant's arguments concerning the information provided by the Air Force after the filing of the appeal, that the condition of the truck was not reported to it and GSA was not aware of specific repairs that might be required as of the time of the auction sale. GSA adds that the disclaimer of condition clause is included in the terms and conditions precisely because of the large volume of transactions in auction sales of surplus property and GSA's inability to control the information reported to it by the agencies transferring excess property for sale.

Mr. Mitchell's indignation is misplaced. The terms and conditions of the auction expressly alerted prospective buyers that the items for sale were not warranted as to condition and that the absence of any indicated deficiencies did not mean that none existed. The Board has recognized the nature of these sales and the consequences of purchasing vehicles in this manner:

An individual purchasing a vehicle at auction "as is" and free of any warranties other than that of description, inevitably accepts certain risks and uncertainties. As we have pointed out in the past, the uncertainties inherent in such a transaction are presumably reflected in the price bid. . . . In purchasing a Government-owned vehicle at auction, the purchaser accepts the uncertain risk of repair. In doing so, however, the purchaser pays a price presumably lower than that which would be sought by the Government if the condition of the vehicle were subject to warranty. Appellant, therefore, should have already received a certain benefit price-wise in purchasing his vehicle from GSA free from any warranty. Under the contract, he is not entitled to anything more.

Coleridge D. Henri v. General Services Administration, GSBCA 13991, 97-2 BCA ¶ 29,187, at 145,61(citations omitted); accord Rene Hernandez v. General Services Administration, GSBCA 15448, 01-2 BCA ¶ 31,463; William B. Wobig v. General Services Administration, GSBCA 14424, 98-1 BCA ¶ 29,650.

the purchaser. Finding 3. Moreover, an employee of the state of Mississippi would not in any event be authorized to bind the Federal Government.

Even assuming, arguendo, that the information in the records kept by Eglin Air Force Base should be imputed to GSA and that knowledge of this information would justify appellant's claim that a misdescription or failure to disclose a known condition had occurred, there is, nonetheless, a further bar to recovery in this case. The buyer's contractual remedy is expressly limited under the terms and conditions of the auction to a refund of the purchase price when the requirements of the Refund Claim Procedure have been met. Glasure. These requirements were not met here. Appellant failed to submit a written notice of claimed deficiencies within fifteen calendar days of removal of the vehicle and did not return the vehicle in the same condition as when removed.² The law is clear that appellant is not permitted to recover because he failed to comply with the terms of the notice provision of the description warranty. Benno Stein v. General Services Administration, GSBCA 15517, 01-2 BCA ¶ 31,490 (citing Geoffrey W. Garner, GSBCA 9942, 89-3 BCA ¶ 22,163; Irving Kaplan, GSBCA 8244, 86-3 BCA ¶ 19,196; Jerome T. Jenks, GSBCA 7952, 86-2 BCA ¶ 18,877). The terms and conditions of vehicle auctions are strictly enforced. See Magdi A. Risk, GSBCA 13572, 96-2 BCA ¶ 28,401; Ashby Wood, GSBCA 11124, 93-2 BCA ¶ 25,608; Afaf Salem, GSBCA 10375, 91-1 BCA ¶ 23,343. Even if we accept Mr. Mitchell's assertions that he attempted to call the contracting officer within the fifteen-day window, these efforts did not make him compliant with the unequivocal terms of the refund policy. He has offered no proof that he furnished the requisite written notification prior to February 2003, some three months after the purchase was completed and the property removed. Because of this, respondent is entitled to prevail as a matter of law.

Decision

Respondent's motion for summary relief is granted. The appeal is **DENIED**.

CATHERINE B. HYATT
Board Judge

I concur:

ALLAN H. GOODMAN
Board Judge

² At best, appellant maintains that he attempted unsuccessfully to contact GSA by telephone within the fifteen day period. He has not shown that any attempt was made to provide the requisite written notice, nor has he produced a copy of the letter that was allegedly sent to GSA in November 2002 following his telephone conversation with the contracting officer.