

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: January 27, 2005

GSBCA16473

CHRIS WARD,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Chris Ward, pro se, Gautier, MS.

Andrew J. Sinn, Office of Regional Counsel, General Services Administration,
Atlanta, GA, counsel for Respondent.

Before Board Judges **NEILL**, **HYATT**, and **DeGRAFF**.

HYATT, Board Judge.

This appeal is from a contracting officer's decision denying a claim for refund of the purchase price of a boat purchased from the General Services Administration (GSA) pursuant to an online auction. Appellant, Chris Ward, maintains that the vehicle was not properly described by GSA. He wishes to return the boat for a refund of monies paid. GSA contends that appellant is not entitled to this relief and asks that the appeal be denied. The parties have agreed to submit this matter for decision on the written record. Rule 111 (48 CFR 6101.11 (2003)).

Findings of Fact

1. On February 11, 2004, the Bureau of Immigration and Customs Enforcement, National Marine Support Center (NMSC), in St. Augustine, Florida, filed a Report of Personal Property for Sale with GSA. Among the items reported was a 1993 thirty foot Hydra-Tech catamaran with two outboard engines and a trailer. Appeal File, Exhibit 1.

2. The boat in question was offered for sale to the public on the GSA auctions website (<http://www.GSAAuctions.gov>) under invitation for bids number 41 FBPI04192, item 001. This item went up for bids on March 22, 2004; the bid closing date was April 6, 2004. The following description, accompanied by pictures, was provided:

BOAT, CATAMARAN 1993 30' HYDRA-TECH
CATAMARAN, . . . WITH THE FOLLOWING OUTBOARD
MERCURY ENGINES, 250 CXLEFI SERNR OG870035,
WITH 61 HOURS AND 250XLEFI SERNR OG605440, WITH
71 HOURS. MYCO TRIPLE AXLE TRAILER,
REPAIRS MAY BE REQUIRED.

The item description for the catamaran also provided a name, address, and telephone number for the custodian of the property and advised the prospective purchaser to contact the custodian for additional information and for inspection dates and times. Appeal File, Exhibit 3.

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

Acceptance Period. By marking the required box next to the Terms and Conditions located at the bottom of the registration form and submitting a bid, the bidder agrees to the Terms and Conditions of sale and to pay for and remove the property, if the bid is accepted, by the date and times specified in each lot.

. . . .

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.
. . . **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 4.

5. Of the top three bids, appellant's bid of \$41,051 was slightly higher than the next two, and he was awarded the boat following bid closing on April 6, 2004. Appellant paid for the boat on April 8, 2004, and picked it up on April 13, 2004. Appeal File, Exhibits 6-8.

6. Mr. Ward telephoned the GSA contracting officer on the same day that he picked up the boat to inquire about returning the boat. His stated reason for returning the

boat and seeking a refund was that the engines were frozen. The contracting officer advised Mr. Ward that he would have to submit his request in writing and further advised him to review the terms and conditions of sale. Appeal File, Exhibit 9.

7. On April 19, 2004, Mr. Ward e-mailed the contracting officer to request a full or partial refund of his purchase money. The e-mail stated that, according to his mechanic, both of the vessel's engines were seized, most likely due to submersion in salt water. Mr. Ward also expressed his disappointment at the manner in which the boat had been described, noting that the auction site mentioned only that repairs "may" be required, not that they were in fact required. Mr. Ward found this to be misleading, especially in light of his conversation, prior to bidding, with a custodian who stated that the boat was operational. He noted that the custodian had further communicated that the boat had been maintained as a "showboat" and used for demonstration purposes at schools. Appellant also advised that his mechanic would be checking the engine hours the "next day." Appeal File, Exhibit 8. The record does not reflect any further communication from Mr. Ward to the contracting officer concerning the engine hours reported on the vessel's two outboard motors. Appeal File, Exhibit 8.

8. In response to an inquiry from the contracting officer, the custodian at the NMSC in St. Augustine stated that:

This sale was one of several simultaneous sales. During this time I received hundreds upon hundreds of phone calls and emails. I recall this boat described as a law enforcement vessel that was contract maintained. To my knowledge, it was a showboat for schools and county fairs. The engine hours were taken right off the console meter. I do not recall speaking with Mr. Ward specifically due to the numerous calls. We record who came to inspect the vessel and Mr. Ward did not inspect the vessel. Our listing clearly states repairs may be required.

Appeal File, Exhibit 10.

9. Another employee of the NMSC reported that he was present when Mr. Ward, accompanied by his father, arrived to pick up the boat. The employee noted that appellant's father commented to his son that he should have inspected the boat before he bid on it. Mr. Ward wanted to lift the engines on the boat prior to transporting it, but the NMSC employees were unable to trim, adjust the angle of, the engines, so as to move them. Yet another NMSC employee, who assisted in attempts to start the engines, thought that the engines' batteries were dead. Appeal File, Exhibit 10.

10. By letter dated May 17, 2004, the contracting officer informed Mr. Ward that his request for a refund of his purchase price was denied. Pointing to the terms and conditions of the sale, she noted that the description of the vessel did not state that it was operational and did advise that repairs may be required. The terms and conditions also stated that property was not warranted as to condition and that the failure to disclose deficiencies did not mean that none existed. The terms of the sale also expressly provided that purchasers could not rely on oral representations by representatives of the Government to vary or

supplement these terms. Prospective bidders were cautioned and encouraged to physically inspect the vessel prior to bidding -- Mr. Ward did not undertake to do this. She stated that this was her final decision and advised Mr. Ward of his appeal rights. Appeal File, Exhibit 11.

11. Mr. Ward filed a timely appeal at the Board. He stated in his appeal that while the description of the vessel stated that the engine hours were sixty-one and seventy-one, he discovered, after taking the boat to an authorized dealer where the engines were put on a diagnostic computer, that the engines had far more hours on them than was stated. A dealer's invoice is attached to the appeal. The invoice reflects that the vessel was received by the dealer on June 24, 2004, and contains a notation that the starboard engine had 235.30 hours and the port engine had 249.18 hours, which differ from the readings on the vessel's console. Mr. Ward added in his appeal that the dealer confirmed that both engines had ingested salt water and that the lower units of the boat were frozen, such that neither the engines nor the lower units were salvageable. He thus contended that the boat did not conform to its description and he is entitled to a full refund. Appeal File, Exhibit 12.

Discussion

Mr. Ward argues that he was misled by the auction's description of the catamaran when he submitted his bid. Based on his conversation with an individual in the custodian's office, he expected that the boat would be operational, despite the fact that it needed work. Instead, after paying for and removing the boat, he discovered that it was not operational and was in need of major repairs. Appellant maintains that if he had been fully informed of the true condition of the boat and the extensive repairs required to make it operational, he would not have submitted a bid. He suggests that the boat was misdescribed both because the number of hours reported to be on the engines were found to be inaccurate by his dealer and because the statement that "repairs may be required" should have been more precisely phrased to alert the prospective buyer that substantial repairs would most definitely be required. Under these circumstances, appellant maintains that the vessel should be deemed to have been misdescribed and he should be permitted to return it for a refund of his purchase price.

GSA responds that no relief is available under the terms and conditions of the auction sale, which prospective purchasers must accept in order to submit a bid. The item that was advertised on GSA's auction site and purchased by appellant was in fact the item that was identified and pictured on the auction site -- a thirty foot 1993 Hydra-Tech catamaran with two outboard Mercury engines and a trailer. The hours reported to be on the engines were the hours shown on the console. There was no warranty as to the condition of the boat. Thus, GSA argues, the appeal must be denied.

The boat with trailer advertised on GSA's internet auction site, and the boat with trailer made available for pick-up by appellant in St. Augustine, was in fact the same item identified and pictured on the auction site. Mr. Ward thus purchased the vessel identified in the auction. To the extent appellant complains about the fact that the engines were not operational, his complaint concerns the condition of the property he bought and is not properly directed to the accuracy of the description. See Danny R. Mitchell, GSBCA 16209, 04-1 BCA ¶ 32,551, reconsideration denied, 04-1 BCA ¶ 32,588.

Although GSA warrants that the items purchased in its auctions are the items they are stated to be, it expressly disavows any warranty of condition. Property that is listed for auction sale to the public is sold "as is" and, at best, purchasers are told of any known deficiencies. Coleridge D. Henri v. General Services Administration, GSBCA 13991, 97-2 BCA ¶ 29,187, at 145,161; 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. Prospective bidders are strongly encouraged to inspect property in person prior to bidding and are cautioned that they cannot rely on the oral representations of Government representatives, who are not authorized to supplement or modify the auction terms or item description. The information allowing bidders to contact the property custodians is provided for the purpose of arranging to inspect the property in person. Talking to the custodian is not a substitute for a site inspection, and we can provide no relief in circumstances where the buyer asserts he or she was misled by the custodian as to the condition of property sold under the auction procedures.

Here, Mr. Ward's complaint that the engines were not salvageable concerns the condition of the boat he purchased. In essence, the catamaran he purchased required far more extensive repairs than he had planned for based on the description and his conversations with the custodian at NMSC. Admittedly, the description provided little information beyond model and age of the vessel, the console readings for engine hours, and a statement cautioning that repairs may be required. As we explain above, the buyer assumes the risks and uncertainties inherent in purchasing a used vessel through the auction process. It is expected that the buyer will account for these risks and uncertainties, including the possible need for extensive repairs, in formulating the price that is bid for the property. If it is impracticable to inspect the property prior to submitting a bid, the buyer should consider the possibility that, in the absence of a warranty as to condition, the article purchased may require substantial repairs. The terms and conditions of these auction sales do not provide a remedy for the optimistic bidder who is disheartened to learn, upon making arrangements to accept delivery of the property, that the repairs required are more extensive than he or she had anticipated. At that point the bidder has two choices -- to breach the contract, decline to purchase the property, and pay the resulting liquidated damages, or to honor the contract, purchase the property, and remove it from the Government's premises. Once the property has been removed, the buyer has no alternative but to keep it, unless he or she can demonstrate a misdescription that would justify a full refund. The contracting officer has no authority to provide any other relief and neither does the Board.

Mr. Ward's contention concerning the engine hours similarly does not serve to entitle him to the relief he requests -- a full refund of the purchase price and the right to return the boat to another location that is more convenient for him. Appellant has submitted a dealer invoice suggesting that the engines were run for more hours than the sixty-one and seventy-one hours reflected on the console. This is counterbalanced by GSA's statements that the hours reflected on the console were accurately stated in the auction description. There is no basis for inferring that GSA had any reason to believe that the console readings were inaccurate. We note, without having to decide the matter, that the information provided with respect to actual engine hours in this case is probably not sufficient to carry the day for appellant's claim of misdescription. To prevail on a claim of this nature, at minimum, the Board would need a record establishing the type of testing performed by the independent marine dealer, a basis for concluding that the dealer's assessment or derivation of the actual

engine hours was more reliable or more accurate than the console readings, and evidence establishing the context of this information (for example, the usual number of engine hours that might ordinarily be obtained from the type of engines in question). Since we need not resolve this issue in this appeal, however, we leave for another day the standard of proof needed to sustain an alleged misdescription of this nature.

Here, the information relating to the actual engine hours was provided far too late to support a claim under the misdescription warranty, even if we were to conclude that it otherwise might entitle appellant to rescind the transaction. Relief under that clause is available only if the purchaser identifies the misdescription and notifies the contracting officer in writing of the misdescription within fifteen days of the purchase. Here, Mr. Ward offhandedly suggested that he planned to have the engine hours independently verified, but failed to undertake that task until well after the contracting officer had responded to his request for a refund and long after the fifteen-day time frame provided by contract had expired. See Joy J. Hurst v. General Services Administration, GSBCA 14050, 97-2 BCA ¶ 29,238. This is not enough to effect compliance with the terms of the contract's refund provision.

Decision

The appeal is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

MARTHA H. DeGRAFF
Board Judge