

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: March 31, 2005

GSBCA 16553

SHEPHERD KINGDOM, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Tony Chukwura of Shepherd Kingdom, Inc., Cambria Heights, NY, appearing for Appellant.

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

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

DeGRAFF, Board Judge.

Appellant contracted to purchase property from respondent and did not pay for the property within the time required by the sale contracts. When respondent assessed liquidated damages, appellant filed this appeal. Respondent filed a motion for summary relief. We grant the motion and deny the appeal.

Findings of Fact¹

¹ With the exception of finding number 5, all of the findings of fact were put forward by GSA in support of its motion for summary relief, were not disputed by Shepherd Kingdom, and are supported by the cited exhibits. In its opposition to GSA's motion, Shepherd Kingdom put forward finding number 5, which is supported by the cited exhibit and which we accept as true for purposes of resolving the motion. All of the cited exhibits are contained in the appeal file.

1. In late 2004, the General Services Administration (GSA) offered several vehicles for sale on its internet auction web site. Exhibit 2. Shepherd Kingdom, Inc. placed bids for three of the vehicles. Exhibit 3.

2. By placing its bids, Shepherd Kingdom agreed to various terms and conditions. Among other things, Shepherd Kingdom agreed if it was the successful bidder, it would pay for the vehicles within two business days from the time GSA notified it by e-mail of the sale results. Payment could be made by cash, credit card, bank cashier's check, credit union cashier's check, money order, traveler's check, or a properly endorsed government-issued check. Payment could be made by personal and company checks only if they were accompanied by a bank letter guaranteeing payment. Shepherd Kingdom also agreed if it failed to pay for the vehicles within the time required, it would forfeit any right to the vehicles and would pay liquidated damages in the amount of twenty percent of the purchase price or \$200 per vehicle, whichever was greater. Exhibit 1.

3. Shepherd Kingdom was the successful bidder for all three vehicles, for a total price of \$13,315. Exhibit 4. On the afternoon of November 14, GSA notified Shepherd Kingdom by e-mail messages of its successful bids. Respondent's Supplementation of Statement of Uncontested Facts, Exhibit A.

4. On November 17, Shepherd Kingdom telephoned GSA and asked for an extension of time, until November 24, to pay for the vehicles. GSA agreed to give Shepherd Kingdom until November 19 to make its payment. Exhibit 5.

5. On November 19, GSA received a company check from Shepherd Kingdom for \$13,315. This same day, GSA telephoned Shepherd Kingdom and explained the company check was acceptable only if it was accompanied by a bank letter guaranteeing payment. Shepherd Kingdom told GSA it would not be possible to obtain a letter of guarantee on November 19. Exhibit 6.

6. On November 19, when Shepherd Kingdom had not paid for the vehicles in a manner permitted by the terms and conditions of the sale, the GSA contracting officer decided the sale contracts were in default and assessed liquidated damages of \$2663, which is twenty percent of the sales price of all three vehicles. Exhibit 8. Shepherd Kingdom appeals to the Board from this decision.

Discussion

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). A fact is material if it will affect our decision, and an issue is genuine if enough evidence exists so 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 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 parties entered into three contracts which required Shepherd Kingdom to pay for its purchases within two business days after November 14, 2004. At Shepherd Kingdom's request, GSA extended the payment due date to November 19. Shepherd Kingdom, however, did not pay by November 19. Although Shepherd Kingdom sent GSA a company check, this did not constitute payment because the check was not accompanied by a letter of guarantee from Shepherd Kingdom's bank. Shepherd Kingdom's failure to pay for its purchases by the due date was a breach of its contracts with GSA.

Shepherd Kingdom argues its failure to pay for the vehicles within the time permitted by the contracts should be excused because GSA sometimes allows bidders more than two business days to pay for auctioned items and had the discretion to extend Shepherd Kingdom's payment due date past November 19. True, GSA sometimes allows bidders more than two business days to pay for their purchases. It did so in this case. However, Shepherd Kingdom had no basis for believing GSA would continue to extend the deadline and allow Shepherd Kingdom as much time as it needed to pay as required by the contract. GSA's ability to extend the payment deadline does not mean Shepherd Kingdom's failure to meet the extended deadline is excusable. Although GSA could have extended the deadline even further than it did, its decision to give Shepherd Kingdom until November 19 to pay for its purchases was reasonable because this allowed Shepherd Kingdom five business days to pay using cash, a credit card, a bank cashier's check, a credit union cashier's check, a money order, a traveler's check, a properly endorsed government-issued check, or a personal or company check accompanied by a bank letter guaranteeing payment. With all of these payment options available, it was reasonable for GSA to expect Shepherd Kingdom to pay for its purchases by November 19. GSA's decision not to extend Shepherd Kingdom's payment deadline past November 19 was not unreasonable and does not excuse Shepherd Kingdom's failure to pay.

Shepherd Kingdom argues its failure to pay for the vehicles within the time permitted by the contracts should be excused because the failure to pay was not Shepherd Kingdom's fault. In its notice of appeal, Shepherd Kingdom said it could not obtain a letter of guarantee by November 19, because after September 11, 2001, banks began making it difficult to effect transactions which involve large amounts of money, and delays are always encountered when funds are disbursed. Notice of Appeal at 2. There is no evidence to support a conclusion that banks are unwilling or unable to guarantee a company check for \$13,315 in a reasonable amount of time. However, assuming this is true, Shepherd Kingdom's inability to obtain such a letter and make timely payment for its purchases was no one's fault but its own. The terms and conditions of the sale were quite clear regarding the need for a letter of guarantee if Shepherd Kingdom chose to use a company check, and when Shepherd Kingdom realized it was going to have a problem securing a letter of guarantee, it could have chosen another option for making its payment. Whatever the requirements imposed by the banking industry upon the issuance of letters of guarantee, they do not excuse Shepherd Kingdom's breach of its contracts.

Shepherd Kingdom also argues its breach of the contracts should not result in the imposition of liquidated damages because the imposition of damages was an abuse of

discretion and amounted to a penalty. The imposition of liquidated damages was not an abuse of discretion. The terms and conditions of the sale allowed the contracting officer to impose such damages and the imposition of damages did not violate any statutes or regulations. Liquidated damages provisions such as the one here are nearly always enforced when actual breach damages are either uncertain or difficult to measure. *Sun Printing and Publishing Assn. v. Moore*, 183 U.S. 642 (1902); *DJ Manufacturing Corp. v. United States*, 86 F.3d 1130 (Fed. Cir. 1996); *Anthony P. Miller, Inc. v. United States*, 161 Ct. Cl. 455 (1963). Occasionally, however, a clause which appears to be a liquidated damages clause is unenforceable because at the time of contracting, the parties did not intend for the clause to establish a fixed amount as compensation for a breach. The intent of the parties is evaluated at the time of contracting, and one means of determining the parties' intent is to look at the amount due according to the clause. If the amount is extravagant or does not bear a reasonable relationship to the loss caused by a breach, the clause was not intended to establish an amount of liquidated damages and, instead, imposes a penalty. *Priebe & Sons v. United States*, 332 U.S. 407 (1947); *Kothe v. R.C. Taylor Trust*, 280 U.S. 224 (1930). It is "rare" and "unusual" to use this "narrow exception" in order to avoid enforcing the terms of a contract, and the party challenging a liquidated damages clause has the burden of proving the clause is unenforceable. *DJ Manufacturing*, 86 F.3d at 1133-34; *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400 (Ct. Cl. 1978).

Shepherd Kingdom does not contend actual damages were either certain or easy to measure at the time of contracting, and there are no facts in the record to suggest either party knew when it entered into the contracts what GSA's damages would be if Shepherd Kingdom were to breach the contracts. In addition, Shepherd Kingdom has not established it and GSA, at the time of contracting, intended for the auction's terms and conditions to establish something other than a fixed amount as compensation for a breach. Although Shepherd Kingdom alleges it is unfair for GSA to impose damages in the amount of \$2663, Shepherd Kingdom has not established this amount is either extravagant or so disproportionate to the loss caused by its breach, so as to show it amounts to a penalty. As we have recognized in other cases, retaining a deposit of as much as twenty percent of a bid amount as liquidated damages is not extravagant. *Griffith v. General Services Administration*, GSBCA 11571, 93-1 BCA ¶ 25,421 (1992) (citing cases). Shepherd Kingdom has not established the lack of a reasonable relationship between \$2663 and the administrative cost of terminating the contracts, securing and storing the vehicles until the next sale, and conducting another sale. In short, Shepherd Kingdom has not established the amount of the liquidated damages was so excessive as to amount to a penalty.

Decision

The motion for summary relief is granted and the appeal is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

CATHERINE B. HYATT
Board Judge