

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: August 30, 2005

GSBCA 16613

GRANT OGCEL,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Grant Ogcel, pro se, Oceanside, CA.

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

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

DeGRAFF, Board Judge.

Grant Ogcel appeals the decision of the General Services Administration (GSA) to declare him in default, terminate his contract to purchase an item sold at auction by GSA, and impose liquidated damages. We grant GSA's motion for summary relief and deny the appeal.

Background

In November 2004, GSA listed a surgical laser ophthalmic photocoagulation apparatus for sale on its online auction web site. The invitation for bids contained the street address where the property was located in Birmingham, Alabama, and identified Roy Carter as the

property custodian. The invitation provided potential bidders with Mr. Carter's name and telephone number, including an extension number. It also listed December 8, 2004, as the property removal date. Exhibit 3.¹

The terms and conditions of the sale included the following:

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.

Notification of Sale Results. Successful bidders will be notified by email It is the bidder's responsibility to follow up on the status of his/her bid and to ensure that his/her email address and all registration data are kept accurate and up to date. If at any time, your information changes, it is your responsibility to update the appropriate information at GSA Auctions®.

Payment and Removal. Property must be paid for within 2 business days and property removed within 10 business days from the time & date of the email notification of sale results, unless otherwise specified in the contract.

Removal. SUCCESSFUL BIDDERS ARE CAUTIONED THAT THEY ARE RESPONSIBLE FOR LOADING AND REMOVAL OF ANY AND ALL PROPERTY AWARDED TO THEM FROM THE EXACT PLACE WHERE THE PROPERTY IS LOCATED, AS INDICATED FOR EACH ITEM ON THE GSAAUCTIONS.GOV WEBSITE. The Purchaser will make all arrangements and perform all work necessary to effect removal of the property, to include loading, packing and transportation of the property.

Default. Bidders are cautioned to bid only on items they are prepared to pay for and remove in accordance with the Terms and Conditions of this sale. Failure to pay for and remove all items awarded within the specified time could result in

¹

All cited exhibits are contained in the appeal file.

termination of the contract. The bidder will also be subject to paying liquidated damages. **The following supersedes Clause No. 9 of the SF 114C.**

If, after the award, the Purchaser breaches the contract by . . . failure to remove the property as required . . . the Purchaser shall lose all right, title, and interest which he/she might otherwise have acquired in and to such property as to which default has occurred. The Purchaser agrees that in the event he/she fails to pay for the property or remove the same in the prescribed period(s) of time, the Government shall be entitled to retain (or collect) as liquidated damages a sum equal to the greater of (a) 20 percent of the purchase price of the item(s) as to which the default occurred, or (b) \$200 whichever is greater[.]

The Purchaser agrees that in the event he/she fails to pay for or remove the property in the prescribed period(s) of time, liquidated damages may be charged to the credit card on file in accordance with the terms and conditions of the sale.

Exhibit 4.

The terms and conditions of the sale also included those found in Standard Form 114C, which says if a contracting officer determines a purchaser's failure to remove property within the time required arose out of causes beyond the control and without the fault or negligence of the purchaser, the contracting officer will reduce this determination to writing and allow the purchaser a reasonable extension of time to remove the property. Exhibit 4.

On November 23, GSA sent an electronic mail message addressed to Mr. Oggel and notified him he was the high bidder for the laser apparatus. The notice said, "Property must be removed within 10 business days from the date and time this email notification was sent to you." The notice set out the address where the property was located, identified Roy Carter as the property custodian, and provided Mr. Carter's telephone number, including the same extension number as contained in the invitation for bids. Exhibit 2. Mr. Oggel sent his payment to GSA. Declaration of Tonya R. Dillard (June 27, 2005) at 1. Due to the Thanksgiving Day holiday, the tenth business day after November 23, 2004, was December 8, 2004.

On November 30, GSA sent Mr. Oggel a receipt for his payment, which authorized him to remove the property. The receipt said he had to remove the item by December 8, and also said the property was located in Birmingham, Alabama, at the same street address contained in the invitation for bids and the November 23 e-mail message. The receipt also identified Roy Carter as the property custodian, and provided Mr. Carter's telephone number, although the extension number was different from the one contained in the invitation for bids and the November 23 e-mail message. Exhibit 7.

Also on November 30, Mr. Carter sent a telefax to Mr. Oggel and asked him to complete and return a form related to the sale. The cover sheet of the telefax contained Mr. Carter's telephone number, including the same extension number as contained in the invitation for bids and the November 23 e-mail message, which was the correct number. Mr. Oggel completed the form and returned it to Mr. Carter on November 30. Exhibit 14.

Mr. Carter provided a sworn statement in which he said he attempted to contact Mr. Oggel two or three times, without success, after he received the completed form on November 30. He also said Mr. Oggel requested information concerning the auctioned item, which he provided, and told him to expect to be contacted by a shipping company. No shipping company contacted Mr. Carter's office and when he informed Mr. Oggel of this, Mr. Oggel said he would have to get another shipping company. Exhibit 14; Declaration of Roy Carter (July 2, 2005).

Mr. Oggel did not remove the auctioned item. Mr. Carter informed the contracting officer of this "well after" December 8. Carter Declaration.

Mr. Oggel was out of town for five days due to a death in his family. When he returned, he called Mr. Carter. Mr. Carter told Mr. Oggel to contact the contracting officer regarding the auctioned item and gave Mr. Oggel her telephone number. Mr. Oggel says he telephoned the contracting officer on December 24, and she was not available. Exhibit 10. December 24, 2004, was the Friday before Christmas Day and federal offices were closed. Dillard Declaration at 1.

On December 27, the GSA contracting officer mailed a notice to Mr. Oggel telling him GSA had terminated the sale contract because he had defaulted on his obligation to remove the auctioned item within the time permitted. The notice also said GSA was imposing liquidated damages in the amount of \$200. Exhibit 8.

On December 28, Mr. Oggel telephoned the contracting officer's office and left a message saying he had been unable to pick up the auctioned item due to the holidays. On December 29, the contracting officer called and left Mr. Oggel a message saying he was in

default.² On December 30, Mr. Oggel spoke with the contracting officer and her supervisor. The contracting officer told Mr. Oggel he had had more than enough time to remove the property because it was supposed to have been removed by December 8, and she had not placed him in default until December 27. Mr. Oggel said he had not been able to remove the property due to the holidays and a death in his family. The contracting officer and her supervisor advised Mr. Oggel to put his position in writing. Exhibit 11; Dillard Declaration at 1-2.

On January 4, 2005, Mr. Oggel mailed a letter to GSA. In the letter, he said he had encountered difficulty contacting Mr. Carter because he had not been given Mr. Carter's correct extension number. He said he had wanted to ask Mr. Carter the dimensions and weight of the item so he could arrange to have it shipped. Mr. Oggel said he left messages for Mr. Carter, and said Mr. Carter took three days to return his calls. Mr. Oggel said Mr. Carter took another three days to provide him with the information he requested about the auctioned item. Mr. Oggel did not say when he tried to call Mr. Carter or when he spoke with him. In addition, Mr. Oggel said he made two appointments for a shipping company to remove the auctioned item, but the item was not removed because Mr. Carter was unavailable. Mr. Oggel did not say when these appointments were scheduled. Mr. Oggel said because he had kept in touch with Mr. Carter, he did not believe it was fair to terminate his contract. Exhibit 10.

GSA told Mr. Oggel it would give him a written response to his letter not later than January 28, 2005. Exhibit 12. On February 25, the contracting officer sent Mr. Oggel a final decision. In her decision, the contracting officer addressed Mr. Oggel's statements regarding the difficulty he said he had encountered in contacting Mr. Carter. Among other things, she said Mr. Carter was the custodian of seventeen lots of auctioned items and Mr. Oggel was the only bidder who did not remove his item within the time required. Exhibit 11. She repeated this statement in a sworn declaration. Dillard Declaration at 1. The contracting officer's final decision also said Mr. Oggel had been given "an extension of time to remove versus the other bidders" and "additional time after the removal due date" to retrieve the auction item. Exhibit 11 at 2, 3.

Mr. Oggel appealed to the Board. Exhibit 12. In his notice of appeal and his complaint, Mr. Oggel said the contracting officer failed to make appropriate and reasonable arrangements for him to pick up the auctioned item. He said she was unavailable to receive his telephone calls and also said she and Mr. Carter failed on numerous occasions to return

² Mr. Oggel did not receive his copy of the December 27 termination notice until January 7, 2005. Exhibit 8.

his calls in a timely manner. Notice of Appeal at 1; Complaint. In her declaration, the contracting officer denies Mr. Oggel's assertions. Dillard Declaration at 3.

Discussion

When considering a motion for summary relief, we review affidavits, declarations, documents, and appeal file exhibits relied upon by the parties in supporting and opposing the motion. Rule 108 (48 CFR 6101.08 (2003)). We do not weigh evidence in order to determine the truth of the matter. Rather, we examine evidence in order to determine whether there are factual issues in dispute. Summary relief is appropriate when there are no genuine issues of material fact in dispute and when the moving party is entitled to relief as a matter of law. A fact is material if it will affect our decision. 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. Summary relief will be granted if the movant demonstrates there is an absence of evidence to support an essential element of the non-movant's claim or defense. Although the non-movant is entitled to the benefit of the doubt as to the facts, it cannot rest its opposition upon allegations, conclusions, and denials contained in its pleadings. If the moving party demonstrates the absence of a genuine issue as to any material fact, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue as to a material fact to be resolved at a hearing. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

GSA contends it is entitled to summary relief because Mr. Oggel's failure to remove the auctioned item by December 8 was a breach of contract which caused him to lose any interest he might otherwise have acquired in the property and which entitled GSA to retain \$200 as liquidated damages. GSA's position is correct if Mr. Oggel breached the contract by not removing the auctioned item by December 8, and if his breach is not excusable. *Tim Antrim v. General Services Administration*, GSBCA 15885, 02-2 BCA ¶ 32,041; *R.K. Mooney*, GSBCA 4648, 76-2 BCA ¶ 12,138.

In opposition to GSA's motion, Mr. Oggel makes arguments which fall into four categories. He says (1) GSA was not legally entitled to declare him in default, (2) he was not required to remove the auctioned item by December 8, (3) any default was excusable, and (4) he was entitled to an extension of the December 8 deadline. We examine his arguments below.

First, Mr. Oggel says GSA was not legally entitled to declare him in default because paragraph number 9 of Standard Form 114C required GSA to send a written notice before it could terminate the contract based upon his failure to remove the property within the time required. As the terms and conditions of the sale state, however, the provisions of the

Default clause supersede paragraph number 9 of the standard form, and the Default clause does not require any written notice before GSA could terminate the contract. Mr. Oggel also says GSA was not legally entitled to declare him in default because GSA told him he would receive a contracting officer's decision by January 28, 2005, and the decision was not issued until February 25. Although GSA told Mr. Oggel he would receive a decision not later than January 28, we know of no statute or regulation which required the contracting officer to issue a decision by this date, and no law which says the lack of a response by then would invalidate the contracting officer's decision. Mr. Oggel's arguments do not controvert GSA's position that it is entitled to relief as a matter of law.

Mr. Oggel also says GSA was not legally entitled to declare him in default because it gave him an extension of time past December 8 to remove the property. He rests his argument upon the contracting officer's final decision, which said Mr. Oggel had been given "an extension of time to remove versus the other bidders" and "additional time after the removal due date" to retrieve the auctioned item because GSA did not terminate the contract until December 27, even though the deadline for removing the item was December 8. According to Standard Form 114C, the contracting officer would have established a new deadline if she had determined Mr. Oggel's delay arose out of causes beyond his control and without his fault or negligence, and she would have reduced her decision to writing. There is no evidence to show the contracting officer made such a determination, much less reduced it to writing, so there is no evidence to show she extended the December 8 deadline. Although GSA could have terminated the contract immediately after December 8, it was allowed to take a reasonable amount of time to act. GSA does not give up its right to terminate based upon a contractor's failure to meet a deadline unless its words or the circumstances suggest it is willing to allow the delinquent contractor to continue to perform, and the contractor relies upon GSA's forbearance and continues to perform with GSA's knowledge and consent. *DeVito v. United States*, 412 F.2d 1147 (Ct. Cl. 1969); *Donald R. Baker*, GSBCA 9831, 90-2 BCA ¶ 22,873. Here, the circumstances did not suggest GSA was willing to allow Mr. Oggel to continue to perform. The nineteen-day forbearance period between December 8 and December 27 was relatively brief and GSA did nothing during this time to encourage Mr. Oggel to perform. Also, there is no evidence to show Mr. Oggel took any action during the nineteen days in reliance upon GSA's forbearance with GSA's knowledge and consent. Mr. Oggel's argument does not refute GSA's position that it is entitled to relief as a matter of law.

Second, Mr. Oggel says he was not required to remove the auctioned item by December 8, 2004. He says if the November 23 e-mail notice established a removal date of December 8, it was defective because a ten day removal period would have ended on December 7, not December 8. This is not correct, however, because the terms and conditions of the sale said the ten-day removal period was measured in work days, and the tenth work

day after November 23 was December 8. Mr. Oggel also says Standard Form 114C does not mention a ten-day removal period. Although this is correct, it is irrelevant because the generic form does not establish deadlines for removing specific auctioned items. In addition, he says the November 30 receipt for his payment did not say the item had to be removed by December 8. In fact, however, the receipt did say the item had to be removed by December 8. None of Mr. Oggel's statements creates a genuine dispute as to a material fact.

Mr. Oggel also says he was not required to remove the auctioned item by December 8 because GSA cannot prove it sent the November 23, 2004 e-mail notice to him. GSA's proof consists of a copy of an e-mail message addressed to Mr. Oggel, dated November 23. The recipient's e-mail address is a combination of Mr. Oggel's street name and house number. The e-mail address is the same as the e-mail address listed for Mr. Oggel on GSA's bidders report, and according to the terms of the sale, Mr. Oggel was responsible for providing GSA with an accurate e-mail address. Mr. Oggel does not contend the e-mail address on the November 23 message is not his address; he simply says GSA cannot prove it sent the message to him. GSA's evidence is sufficient to show it sent the e-mail message to Mr. Oggel and he has offered nothing to contradict GSA's evidence and create a genuine dispute as to a material fact.

Mr. Oggel says he was not required to remove the auctioned item by December 8 because he did not receive GSA's November 23 e-mail message. Mr. Oggel offers no evidence to support his statement, and whether he received the e-mail message is immaterial because he received two other notices which contained the same deadline as was contained in the November 23 e-mail message. The invitation for bids said the removal date was December 8, and this information was available to Mr. Oggel when he placed his bid. The terms and conditions of the sale said Mr. Oggel would be in default if he did not remove the item within the time allowed, and this information was also available to Mr. Oggel when he placed his bid. Mr. Oggel paid for the auctioned item on November 29, and GSA sent him a receipt which listed the removal date as December 8. Even if he did not receive the November 23 e-mail message, which established December 8 as the deadline for removing the auctioned item, he received notices before and after the sale stating the deadline was December 8. Mr. Oggel's unsupported statement that he did not receive GSA's November 23 e-mail message does not create a genuine dispute as to a material fact.

Third, Mr. Oggel says if he was in default, the default was excusable because GSA and Mr. Carter did not give him adequate access to the property, did not make appropriate or reasonable arrangements for him to remove the property, and did not give him adequate information about removing the property. He also says the contracting officer did not respond rapidly to his telephone calls, and says Mr. Carter was unavailable, did not respond rapidly to his telephone calls, and could not be contacted by shippers.

The terms and conditions of the sale stressed the importance of inspecting items before bidding, made plain that successful bidders had little more than one week to remove items they purchased, and cautioned bidders in no uncertain terms that they were responsible for making all of the arrangements and performing all of the work needed to load, pack, and transport the property from the site where it was stored. GSA provided the name and telephone number of the property custodian, Mr. Carter, and included the address where the property was located in the invitation for bids, the November 23 e-mail message, and the receipt for payment. Sixteen other bidders whose auctioned items were in Mr. Carter's custody had adequate information about removing their property and they successfully gained access to their auctioned items and removed them in a timely manner. This evidence shows GSA and Mr. Carter provided bidders with reasonable access to their property, made appropriate arrangements to remove the property, and gave adequate information about removing property.

The contracting officer's sworn statement says she did not fail to respond to Mr. Oggel's telephone calls. In addition, the available evidence shows he first contacted her after the December 8 deadline for removing the auctioned item had passed, making any delayed response immaterial to Mr. Oggel's default.

Mr. Carter signed a sworn statement in which he said he attempted to contact Mr. Oggel two or three times, without success, after November 30. He eventually contacted Mr. Oggel and gave him the information he requested regarding the auctioned item. Although Mr. Oggel told him to expect to be contacted by a shipping company, there was no such contact and when he informed Mr. Oggel of this, Mr. Oggel said he had to get another shipping company. In the letter he mailed to GSA on January 4, Mr. Oggel said he had kept in touch with Mr. Carter, which is inconsistent with his contention that Mr. Carter was unavailable and unresponsive. He also said he had not been given Mr. Carter's correct extension number, although he had been given the correct extension number in the invitation for bids, the November 23 e-mail notice, and on the cover of the telefax Mr. Carter sent to him on November 30.

Although Mr. Oggel is entitled to the benefit of the doubt as to the facts, he has offered nothing in support of his position except bare allegations. Unsupported assertions do not amount to evidence and do not produce a genuine issue as to a material fact.

Fourth, Mr. Oggel says GSA should have given him more time to pick up the item because of the holidays, because he was absent for five days due to a death in his family, and because he kept in touch with Mr. Carter. Standard Form 114C said the contracting officer would extend Mr. Oggel's deadline for removing the auctioned item if a delay arose out of causes beyond his control and without his fault or negligence. Mr. Oggel has not put forward

any evidence, however, to show the existence of any such cause for delay. As for the holidays, the invitation for bids listed December 8 as the deadline for removing auctioned items, and the only holiday which fell within the ten-day removal period was Thanksgiving Day. This holiday was not included in the number of days Mr. Oggel had to remove the item, so it did not delay the running of the ten-day removal period. As best we can tell from the record, Mr. Oggel's absence due to the death in his family occurred after the December 8 deadline, so it did not delay his removing the item on time. Even if Mr. Oggel kept in touch with Mr. Carter, a contention contrary to his assertion that Mr. Carter was chronically unavailable, this does not show his delay in retrieving the auctioned item was beyond his control and without his fault or negligence. GSA was not required to hold the item for him until he cut off contact with Mr. Carter. GSA was required to hold it for him only until December 8, 2004. There is no genuine issue as to any material fact which would support Mr. Oggel's position that he was delayed from removing the auctioned item due to causes beyond his control and without his fault or negligence.

Decision

GSA's motion for summary relief is granted and the appeal is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge