

# **Board of Contract Appeals**

General Services Administration  
Washington, D.C. 20405

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DENIED: November 9, 2005

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GSBCA 16681

GAYLE ENSMINGER,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Gayle Ensminger, pro se, Burlington, KY.

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

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DeGRAFF**.

**DANIELS**, Board Judge.

This appeal fails for lack of proof as to damages.

## Findings of Fact

In May 2005, the General Services Administration (GSA) advertised for sale through its on-line GSAAuctions.gov website a 2004 Ford Taurus sedan. Gayle Ensminger was the high bidder for this item. He paid for the car, and GSA prepared a certificate which would enable him to obtain title to it.

A few days later, Mr. Ensminger arrived at the location at which the vehicle was garaged to pick it up. At that time, the car looked quite different from its appearance in the pictures that GSA had posted on its website. In Mr. Ensminger's words, "[S]omeone decided to use the jaws of life to cut the front end off of the car." The contracting officer provided details: "The bumper had been removed, the front quarter panel had been cut and partially removed, the headlight harness had been removed." The parties agree that GSA had either modified the vehicle, or allowed it to have been modified, between the time the agency offered it for sale and the time Mr. Ensminger arrived to take possession of it.

The contracting officer offered to refund the purchase price and cancel the sale on the basis that, as she wrote, "the pictures were so far from the actual condition of the vehicle that it was very misleading to the buyer." Mr. Ensminger accepted this offer. He maintains, however, that cancellation of the transaction is not sufficient relief. He demands that GSA also reimburse him for the costs he incurred in anticipation of taking possession of the automobile: rental of a trailer on which to haul the vehicle (which was advertised as being in inoperable condition), purchase of chains to hold the car on the trailer and a tarpaulin to cover it while on the trailer, and the hire of two young men to assist with transport of the sedan. Mr. Ensminger says that the amount of money he spent on these items was, variously, "over \$1200"; "est. \$1300"; and "including gas[,] about \$1300." The contracting officer refused to make payment, and Mr. Ensminger appealed her decision.

When the Board asked for proof of the claimed costs, Mr. Ensminger increased the amount to \$1800, which included the hire of three individuals, rather than two; the purchase of a wiring adapter and ball hitch for the trailer; the purchase of gasoline the truck consumed on the two-day trip to pick up the car; and food, drink, and lodging for four people on the trip. Mr. Ensminger says that he has no receipts for any of these costs. The Board afforded him an opportunity to submit a declaration under penalty of perjury as to the expenses. Mr. Ensminger declined this opportunity, saying that he "[doesn't] know how accurate the number[s] are" and that he has a very poor memory.

### Discussion

GSA maintains that its liability to Mr. Ensminger is limited by the terms and conditions of the on-line auction in which he participated. When GSA accepted Mr. Ensminger's bid, these terms and conditions became part of a contract between the agency and the buyer. *Darren R. Gentilquore v. General Services Administration*, GSBCA 16705, slip op. at 4 (Oct. 20, 2005). GSA relies on the following clauses which are among the terms and conditions:

**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. . . . **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 or profit or any other money damages – special, direct, indirect, or consequential.

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

We do not agree with GSA that these clauses are pertinent to this case. Mr. Ensminger has never alleged that the 2004 Ford Taurus sedan which was listed in the GSAAuctions.gov website, and for which he was the high bidder, did not conform to its description. Rather, he has alleged, and GSA agrees, that the vehicle did conform to its description but was modified between the time it was offered for sale and the time he arrived to take possession of it. Thus, the Description Warranty and Refund Amount clauses do not help to resolve this case, and the limitations on liability they prescribe are not applicable to it. *Western Aviation Maintenance, Inc. v. General Services Administration*, GSBCA 14165, 00-2 BCA ¶ 31,123, at 153,727, 153,729.

Through the terms and conditions of the auction, GSA agreed to convey to Mr. Ensminger the vehicle it described on its website. By modifying the car after advertising it, or allowing the car to be modified, GSA prevented itself from making this conveyance and therefore breached its contract with Mr. Ensminger. If Mr. Ensminger could prove that he incurred damages as a result of this breach, we could direct GSA to reimburse him for the damages, so as to put him in as good a financial position as the one he would have occupied if the contract had never been made. To receive monetary relief, he would have to show that the damages were foreseeable at the time the contract was made and present sufficient evidence to permit us to make a fair and reasonable approximation of their amount. *Western Aviation Maintenance*, 00-2 BCA at 153,739-40.

Although GSA breached the contract, Mr. Ensminger cannot recover any damages because he has not presented sufficient evidence to permit us to approximate their amount. The amount he claims has changed over time, varying by about fifty percent. The number of helpers he claims to have hired to pick up the car has changed, as well. He has provided no receipts for any of the charges he says he incurred, and when offered a chance to

document those charges in a declaration made under penalty of perjury, he declined to do so. While we may admire Mr. Ensminger's forthrightness in acknowledging the reason for not making a declaration – a poor memory – this failing does not provide any comfort in attempting to determine the extent of his expenses. Further, even if the expenses had been adequately documented, Mr. Ensminger has not shown that all of them should have been foreseeable. Why, one might ask, would a purchaser of an inoperable vehicle need two or three assistants to get the vehicle onto a trailer? Why would these people need to spend a night on the road when traveling the less than five hundred miles round-trip from Mr. Ensminger's home in Burlington, Kentucky, to the place where the car was garaged, Champaign, Illinois? This turns out to be one of those cases in which the breach does not result in an award of damages. *Western Aviation Maintenance*, 00-2 BCA at 153,745 (citing *San Carlos Irrigation & Drainage District v. United States*, 111 F.3d 1557, 1563 (Fed. Cir. 1997); *Wells Fargo Bank v. United States*, 88 F.3d 1012, 1022 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997)).

Decision

The appeal is **DENIED**.

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STEPHEN M. DANIELS  
Board Judge

We concur:

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CATHERINE B. HYATT  
Board Judge

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MARTHA H. DeGRAFF  
Board Judge