

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: October 20, 2005

GSBCA 16705

DARREN R. GENTILQUORE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Darren R. Gentilquore, pro se, New Milford, PA.

James R. Froembling, Office of Regional Counsel, General Services Administration,
Auburn, WA, counsel for Respondent.

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

DANIELS, Board Judge.

We allow to stand as permissible, under a contract between the General Services Administration (GSA) and Darren R. Gentilquore, GSA's determination requiring Mr. Gentilquore to pay liquidated damages because he did not pay for and remove a truck he agreed to buy.

Findings of Fact

In May 2004, GSA made available for purchase through its GSAAuctions website a 1995 Ford F250 pickup truck which was located at the Malheur Forest Service in John Day, Oregon. The agency represented that the truck had gone 48,711 miles and had miscellaneous holes in the cab, dashboard, roof, and bed, as well as miscellaneous scuffs, dings, dents, and scratches. No representation was made regarding the tires on the truck. Exhibit 2.¹

The truck was available for bid only by persons who accepted the terms and conditions of sale which were posted on the website. The terms and conditions “invited, urged and cautioned [prospective bidders] to inspect the property prior to bidding.” The terms and conditions included a single warranty – “that the property listed in the GSAAuctions.gov website will conform to its description.” The terms and conditions also cautioned, “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.” Once GSA accepted an auction bid, the terms and conditions would become part of a contract between the agency and the successful bidder. Exhibit 25 at 1-2, 5.

The terms and conditions directed the attention of prospective bidders to “other special requirements and conditions” of certain property. Exhibit 25 at 5. Among those other special requirements and conditions was one for vehicles. This “special condition” informed prospective bidders that “[t]o help protect the environment and reduce the amount of solid waste in our landfills, Federal agencies are using retread tires on some vehicles.” *Id.* at 7.

The terms and conditions provided that each successful bidder would be notified by electronic mail and would have to pay for property he purchased within two business days of the time and date of notification and remove that property within ten business days of that time and date. If a purchaser breached his contract by failing to comply with these provisions, “the Government [would] 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 has occurred, or (b) \$200.” This amount would be “retained (or collected) by the Government as liquidated damages.” Exhibit 25 at 3, 4.

On May 26, 2004, GSA notified Mr. Gentilquore that his bid for the truck, in the amount of \$9050, had been accepted. Exhibit 3. On the same day, Mr. Gentilquore told the contracting officer that he had spoken twice with Forest Service employees at the location

¹ All exhibits are part of an appeal file submitted by GSA in this case.

where the truck was garaged. He said that during the previous week, one of the employees had assured him that the truck was capable of being driven across the country to his home on the East Coast. On May 26, he said, another employee had told him that the truck had recapped (retread) tires and was not safe for long-distance driving. Mr. Gentilquore asserts that the employee told him that in a nearby town, he could buy new tires for about \$600. Exhibit 5; *see also* Exhibit 10. According to GSA, the Government has no record that the first conversation occurred. Answer ¶ 4. According to the Forest Service employee who participated in the second conversation, he did not tell Mr. Gentilquore that the tires were unsafe. Exhibit 7 at 2. A mechanic at the Forest Service facility where the truck was garaged assured the contracting officer, within a week of the sale, that the truck's retread tires had considerable life remaining and were safe to use. Exhibit 9.

GSA has stated that retread tires "are, in fact, a normal and required procurement item for Federal government agencies and have been for many years." Exhibit 15. On September 14, 1998, President Clinton signed Executive Order 13,101, "Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition." Under this Order, each executive agency "shall incorporate waste prevention and recycling in the agency's daily operations and work to increase and expand markets for recovered materials through greater Federal Government preference and demand for such products." Agencies are to establish "affirmative procurement programs" for the purchase of items designated by the Environmental Protection Agency (EPA). Exhibit 23 (63 Fed. Reg. 49,643 (Sept. 16, 1998)). Retread tires are one of those items. Exhibit 24. According to EPA –

In most situations, retread tires can be driven under the same conditions and at the same speeds as new tires with no loss in safety or comfort. In fact, retread tires have been safely used on school buses, trucks, cars, fire engines, and other emergency vehicles for years. Retreading tires also helps conserve a valuable nonrenewable resource – oil. Every year, retreading saves more than 400 million gallons of oil in North America. Retread tires also help divert thousands of scrap tires from disposal each year.

Id. at 1. EPA labels "a myth" the theory that retread tires are less safe than new ones. *Id.* at 7.

On May 27, 2004, the contracting officer cautioned Mr. Gentilquore that if he did not pay for the truck by June 3 and remove it by June 11, GSA would assess liquidated damages in the amount of twenty percent of the purchase price (\$1810). Exhibit 7. On August 25, 2004, the contracting officer terminated the contract for the sale of the truck and demanded that Mr. Gentilquore pay GSA \$1810 as liquidated damages no later than September 24. Exhibit 18. By electronic mail message of July 14, 2005, GSA informed Mr. Gentilquore of

his right to appeal this decision to the Board of Contract Appeals. Exhibit 21. Mr. Gentilquore filed an appeal on July 22.

Discussion

On-line auctions are governed by rules prescribed by the organizations which conduct them. *See, e.g.*, <http://www.auctionbytes.com/cab/abu/y201/m05/abu0038/s02> (last visited Oct. 20, 2005); <http://www.auctionwisconsin.com/help/..beginnersguide/beginner2.htm> (same). Auctions conducted by GSA, through its GSAAuctions.gov website, follow this general principle: they are governed by terms and conditions promulgated by the agency. To participate in a GSA on-line auction, a person must agree to these terms and conditions.

As a bidder in one of these auctions, Darren R. Gentilquore was bound by the rules published by the agency. These rules cautioned him to inspect items prior to bidding, warranted only that those items would conform to their description, alerted him to the fact that vehicles listed for sale might have retread tires, and noted that oral representations of Government representatives were “unauthorized and shall confer no right upon the bidder or purchaser.” The rules also made clear that if Mr. Gentilquore did not pay for and remove promptly any item for which he was the successful bidder, he would have to pay the Government as liquidated damages a sum equal to the greater of twenty percent of the purchase price or \$200.

Mr. Gentilquore complains that he should not have been required to pay for the truck for which he was the high bidder – and now should not have to pay liquidated damages in an amount equal to twenty percent of his bid – because the truck had retread tires. We evaluate his contention under the rules of the auction, which upon GSA’s acceptance of his bid became the terms and conditions of a contract between him and the agency. The argument is not persuasive. Mr. Gentilquore should have understood, from the rules themselves, that the truck might have retread tires. He could have discovered that the truck did have such tires by inspecting it prior to bidding, but he apparently did not do so. Tires were not mentioned in GSA’s description of the vehicle, so the fact that the tires on the truck were retreads cannot be considered a misdescription. Even if the Forest Service employees with whom Mr. Gentilquore says he spoke provided the information he alleges, their statements were oral representations and therefore were unauthorized and conferred no right on him. Additionally, we note that there is no evidence in the record to the effect that retread tires are unsafe for long-distance driving, as contended by Mr. Gentilquore; the only evidence we have is to the contrary.

The terms and conditions of the auction made plain that if Mr. Gentilquore did not pay for and remove the truck promptly, he would have to pay the Government twenty percent of

the purchase price, or \$1810, in liquidated damages. He did not pay for and remove the truck, as required. Therefore, GSA is within its rights in demanding payment.

Decision

The appeal is **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

CATHERINE B. HYATT
Board Judge