

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: January 2, 2002

GSBCA 15643-TD

DILIP G. BHARWANI,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Dilip G. Bharwani, pro se, Parsippany, NJ.

Barbara H. Vail, Office of Chief Counsel, United States Customs Service, Department of the Treasury, Washington, DC, counsel for Respondent.

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

DeGRAFF, Board Judge.

Appellant contracted to purchase seized property from the agency, but did not remove the property from the country within the time allowed by the contract. According to the terms of the contract, the agency is entitled to retain appellant's payment.

Findings of Fact

On January 25, 2001, the United States Customs Service, a component of the Department of the Treasury, held a sale of seized property and other merchandise in Edison, New Jersey. The rules that governed the sale were set out in a sale catalog, which explained that Treasury's sales agent was EG&G Technical Services. Lot number 276 listed in the sale catalog was described as 226 cartons of handloomed throws for "export only." The sale catalog explained that goods identified as "export only" could not be entered into the commerce of the United States and stated that such goods had to be removed from the country no later than April 2, 2001. If "export only" goods were not removed by that date, the purchaser would be deemed to be in default, title to the goods would revert to the Government, the purchaser would forfeit any money paid for the goods, and the Government

would resell the goods. The catalog stated more than once that there were no exceptions to the requirements imposed upon "export only" goods. Exhibit 1.¹

The sale catalog also explained that a purchaser of "export only" goods had to fulfill certain licensing and federal permit requirements before the goods would be released for export. The catalog stated that some export requirements were complex, and suggested that if purchasers of "export only" goods were not familiar with all of the requirements imposed upon exported goods, they should engage the services of a broker, bonded carrier, or other professional who was familiar with those requirements. The catalog also said that the failure of a purchaser to obtain the necessary licensing would not result in the return of the purchaser's money. Exhibit 1.

Dilip Bharwani attended the January 25 sale and signed a bidder registration form which stated, "I agree to comply with the terms of sale contained in the sale catalog for this sale I further agree upon purchasing any property it will be my responsibility to comply with any Local, State or Federal regulations or laws as applicable for the Items purchased." Exhibit 2. Mr. Bharwani was the successful bidder for lot number 276, for which he paid \$14,000. Exhibit 3. Subsequently, he traveled out of the country and returned on March 26. Exhibit 6.

On April 2, the last day to remove the goods from the country, Mr. Bharwani verbally asked EG&G's warehouse foreman for an extension of the deadline for removing the goods from the country. Exhibits 4, 6, 16. EG&G's warehouse foreman understood that Mr. Bharwani needed just a few days to remove the goods, and told Mr. Bharwani that although an extension until April 4 was possible, any more time might not be possible. The warehouse foreman asked his district manager for an extension of Mr. Bharwani's deadline until April 4, and the district manager verbally approved the extension. On April 3, however, Mr. Bharwani told EG&G's warehouse foreman that he would not be able to remove the goods by April 4, and asked to extend the deadline for removal. In an electronic message sent from EG&G's warehouse foreman to his district manager on April 3, the warehouse foreman said that Mr. Bharwani asked that the deadline be extended to April 11. The warehouse foreman confirmed in a declaration that the removal date requested by Mr. Bharwani was April 11. Exhibit 16. In a letter to EG&G dated April 3, Mr. Bharwani stated that he would be unable to export the goods before Wednesday, April 4,² and he asked EG&G for an "extension of storage . . . for the next 30 days." Exhibit 4. On April 5, EG&G's warehouse foreman contacted Mr. Bharwani and told him that the new removal deadline was April 11. The warehouse foreman made a note of this new deadline in a handwritten note at the bottom of Mr. Bharwani's April 3 letter. Exhibits 6, 16.

¹ All of the exhibits are contained in the appeal file compiled by the parties.

² Mr. Bharwani now asserts that his April 3 letter contained a typographical error when it stated that he would not be able to export the goods before April 4, and that he meant to say April 2. Notice of Appeal ¶ 2. We do not accept Mr. Bharwani's assertion. His April 3 letter says, "I am unable to export the shipment before April 4, Wednesday" April 2, 2001, was a Monday, while April 4 was a Wednesday.

Mr. Bharwani selected a customs broker to act as his agent in connection with lot number 276. Exhibit 5. On April 6, the broker submitted an application to the Foreign Trade Zone administrator to admit the goods to a Foreign Trade Zone. The administrator approved the application that same day. On April 9, the broker submitted the application to a Customs office for approval. According to the broker, the transfer of "export only" freight to a Foreign Trade Zone is an unusual transaction, and Customs rejected the application on April 10. Mr. Bharwani's broker spoke with someone at Customs about the application, resubmitted the application on April 11, and obtained Customs' approval on April 12. After his broker resubmitted the application, however, Mr. Bharwani notified the broker that he had found an overseas buyer for the goods and asked the broker to arrange for immediate export of the goods instead of moving them to a Foreign Trade Zone. On April 11, Mr. Bharwani's broker submitted the paperwork to a Customs office to obtain approval for immediate export of the goods, and on April 12, Customs approved that paperwork. Exhibits 6, 52. The trucking company used by Mr. Bharwani's broker was closed on April 13, and the broker could not arrange to have the goods picked up before April 17. Exhibit 52.

On April 19, Mr. Bharwani asked EG&G if it would release the goods to him even though the deadline for removing the goods had passed. Exhibit 6. On April 25, EG&G responded that it would not agree to another extension of the removal deadline. EG&G informed Mr. Bharwani that he would not receive either his goods or a refund of his purchase price, because he had not removed the goods by April 11. Exhibit 7.

On May 1, Mr. Bharwani sent a claim letter to the Customs contracting officer. He asked the contracting officer to review the facts surrounding his purchase and to resolve the situation so that he would not suffer a loss. He also asked to meet with Customs officials in order to explain his position. Exhibit 8. Although Customs officials met with Mr. Bharwani, the meeting did not bring any new facts to light concerning the sale of lot number 276. Exhibit 11.

On June 28, the Customs contracting officer decided not to adjust the contract terms by extending the deadline for removal. She also decided that Mr. Bharwani had defaulted on his contract by not removing his goods by April 11, and that the default resulted in his forfeiting any right to the goods and his purchase price. Exhibit 15. After Customs paid for moving charges, storage charges, other direct charges, sales expenses, and liens, nothing remained of the \$14,000 that Mr. Bharwani paid for lot number 276. Customs subsequently sold the goods contained in lot number 276. Its net revenue was \$3,989.94, without taking into account any administrative expenses incurred by Customs in handling Mr. Bharwani's requests for extension and this appeal. Exhibit 19.

Mr. Bharwani appealed the contracting officer's decision to the Board. The parties agreed to submit the appeal for a decision based upon the written record pursuant to Board Rule 111, and Mr. Bharwani elected the accelerated procedure pursuant to Board Rule 203. 48 CFR 6101.11, 6102.3 (2000).

Discussion

Mr. Bharwani's contract required him to remove the "export only" goods in lot number 276 from the United States no later than April 2, 2001. Customs' sales agent, EG&G,

extended the removal deadline to April 11, and Mr. Bharwani's failure to remove the goods by April 11 was a breach of his contract with Customs. Mr. Bharwani believes that his breach should be excused because EG&G extended his time to remove the goods from the country by fewer than thirty days and did not respond in writing to his request for a thirty-day extension of the storage period, and because he says that he could not take any action to export the goods to a Foreign Trade Zone until April 5, when he learned that EG&G had granted him an extension of time beyond April 2, to remove the goods. Complaint ¶ 1; Notice of Appeal ¶¶ 2, 4.

EG&G's actions do not excuse Mr. Bharwani's breach of contract. The sale catalog put potential bidders on notice that they had to remove the goods in lot number 276 from the country by April 2, and although Mr. Bharwani was not entitled to a relaxation of the terms that other potential bidders took into account when they formulated their bids, EG&G extended the deadline to April 4, and then to April 11, at Mr. Bharwani's request. EG&G had no obligation to give Mr. Bharwani any time beyond April 11 to remove the goods from the country. Although EG&G did not respond in writing to Mr. Bharwani's request for a thirty-day extension of the storage period, it did inform him that the deadline for removing the goods had been extended only through April 11. The lack of a written response from EG&G did not mislead Mr. Bharwani in any way and did not contribute to his failure to remove the goods within the time required by the contract. Although Mr. Bharwani asserts that he could not take any action to export the goods to a Foreign Trade Zone until April 5, there is no evidence that he had to wait to be granted an extension of the April 2 removal deadline before applying to admit the goods into the Foreign Trade Zone.

Mr. Bharwani's predicament is of his own making. He agreed to export the goods in lot number 276 from the country by April 2, which gave him approximately two months either to find a buyer and export the goods directly or to move the goods into a Foreign Trade Zone. He was out of the country until shortly before April 2, and did not find a buyer for the goods until after the export deadline expired. EG&G and Customs did not impede Mr. Bharwani's actions. EG&G's responses to Mr. Bharwani's requests, Customs' approval of his Foreign Trade Zone application, and Customs' approval of the immediate export of the goods were delivered promptly, within one or two days after receipt of his requests and applications. Mr. Bharwani's breach of contract is not excused by the actions of either EG&G or Customs.

Mr. Bharwani has not established that Customs should refund his payment. As we explained in Shelomoh Sameyah v. Department of the Treasury, GSBCA 14733-TD, 99-1 BCA ¶ 30,266, forfeiture provisions such as the one contained in the Customs sale catalog are nearly always enforced when actual breach damages are either uncertain or difficult to measure. In rare and unusual cases, a party can establish that such a 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. Such an intent is found where the amount of compensation is extravagant or does not bear a reasonable relationship to the loss. Mr. Bharwani has not alleged that actual breach damages were either certain or easy to measure, and there are no facts in our record to show that Customs knew what its damages would be if Mr. Bharwani breached the contract. Mr. Bharwani has not alleged that at the time of contracting, he and Customs meant for the sale catalog clause to establish something other than a fixed amount as compensation for a breach. In addition, the amount retained by

Customs is not extravagant and bears a reasonable relationship to the loss caused by the breach. There is no basis upon which we can ignore the forfeiture provisions clearly set out in the sale catalog and refund Mr. Bharwani's payment.

Decision

The appeal is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

I concur:

EDWIN B. NEILL
Board Judge