

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: June 10, 2003

GSBCA 16050

STAN DIEKER,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stan Dieker, pro se, Placitas, NM.

A.R. Dattolo, Office of Regional Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **WILLIAMS**.

BORWICK, Board Judge.

Appellant purchased a 1988 Chevrolet truck from the General Services Administration (GSA) at an internet auction. Instead of releasing the truck appellant had purchased, GSA released a 1986 Chevrolet truck with a different vehicle identification number (VIN) from the VIN on the 1988 truck and with differing mileage. GSA conceded a misdescription and offered appellant a refund of his purchase price. Appellant filed an appeal at this Board asking for not only a refund but also an additional sum of money to compensate him for repairs to the 1986 truck and for the time and trouble spent in resolving this situation.

Appellant and the Government filed cross-motions for summary relief. Later both parties advised the Board at a telephonic pre-hearing conference that they desired a decision on the record without a hearing. Board Rule 111.

We deny the appeal. The description warranty clause of the contract makes a refund of the purchase price the exclusive remedy for a misdescription. Contrary to appellant's argument, an agency's identification of the wrong item is as much a misdescription as a

partially incorrect description an item. Appellant has not shown bad faith conduct on the part of Government officials which might allow an additional recovery.

Findings of Fact

On or about July 22, 2002, the Orangeburg, South Carolina, National Fish Hatchery, a component of the United States Fish and Wildlife Service, reported to GSA a 1988 Chevrolet truck for sale, with serial number 1GCGC34K9JE177718. Appeal File, Exhibit 1. On or about October 1, 2002, the GSA posted this vehicle as item six on its on-line internet auction site; the posting read in pertinent part:

1988 CHEVY TRUCK. . . . THE GENERAL CONDITION OF THIS
VEHICLE IS POOR. REPAIRS ARE REQUIRED . . . VIN
1GCGC34K9JE177718. . . . MILEAGE: 072000

Appellant's Notice of Appeal, Exhibit 1; Appeal File, Exhibit 4. Another vehicle--item eight--from that same fish hatchery was also auctioned. This vehicle was a 1986 Chevrolet Fleetside truck with a VIN of 1GHC34M8GS174695. Appeal File, Exhibit 2.

GSA conducted its on-line auction through the web site "GSAAuctions.gov." Appeal File, Exhibit 2. On that site, GSA posted its Sale of Government Property Online Sale Terms and Conditions, which provided in pertinent part:

Description Warranty and Refunds

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 the money paid. If a misdescription is determined after removal, the Government will refund any money paid if the purchaser takes the property at his/her own expense to a location specified by the contracting officer following the Refund Claim Procedure described below. No refund will be made, after [the] property is removed, for shortages of individual items within a lot. **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 fitness for any use or purpose. The purchaser is not entitled to any payment for loss of profit or any other monetary damages, special, direct, indirect, or consequential.

Refund Claim Procedure. To file a refund claim for misdescribed property, (1) submit a written notice to the Contracting Officer within 15 calendar days from the date of removal that the property was misdescribed, (2) maintain the property in the purchased condition until it is returned and (3) return the property at your own expense to a location specified by the Contracting Officer.

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

Appeal File, Exhibit 2.

At the internet auction, appellant submitted a bid of \$2538 for item six--the 1988 Chevrolet truck. Appeal File, Exhibit 6. On or about October 8, 2002, GSA registered appellant as the high bidder for item six and appellant duly paid \$2538 for that truck. Appeal File, Exhibit 6-7.

Instead of going to the Orangeburg, South Carolina, National Fish Hatchery to inspect the truck himself, appellant sent a third party to pick up the truck and inspect it. Appeal File, Exhibit 10. According to appellant, "repairs were made to the . . . pickup and it was moved to New Mexico at appellant's expense." Appellant's Statement of Uncontested Facts at 1 (¶ 4). After appellant received the truck, he inspected the original title which he had found in the vehicle and noticed that the title showed the truck to be a 1986 model, not the 1988 model described for auction item six. Appellant's Statement of Undisputed Facts at 1 (¶ 5). Appellant also notice a discrepancy in the VIN since the VIN for the truck appellant had received did not match the VIN of the truck for which appellant had submitted a bid. Id. In fact, the VIN for the truck appellant had received matched the VIN for the 1986 truck that GSA had auctioned as item eight. Compare Appellant's Notice of Appeal, Exhibit 1 with Appeal File, Exhibit 4.

On or about October 25, 2002, appellant received the Government's Certificate to Obtain Title. Appellant's Statement of Undisputed Facts at 2 (¶ 6). The back of the certificate had an apparent erasure of the name of an individual residing in Johnson City, Tennessee, in the transferee section of the certificate and appellant's name and address inserted. Appellant's Statement of Undisputed Facts at 1 (¶ 5); Appellant's Notice of Appeal, Exhibit 2.

On October 25, appellant called the sales contracting officer about the discrepancies he had found and demanded a price adjustment. The sales contracting officer requested appellant to put his request in writing. Appeal File, Exhibit 8. On October 28, appellant wrote the contracting officer and described the circumstances by which he had obtained the wrong truck. Appellant told the contracting officer that he had "spent a great deal of time and money on repairs and moving the wrong vehicle," and sought a refund of his \$2538 purchase price and reimbursement of \$1800 for his time and expenses in repairing the truck. Appeal File, Exhibit 10.

On November 14, the contracting officer issued her final decision admitting a misdescription and offering appellant a refund if appellant were to leave the truck at a drop-off point designated by the Government. The contracting officer denied appellant's claim for additional damages because the description warranty of the contract made a refund the exclusive remedy.

Discussion

In this case the Government delivered the wrong car to appellant--a 1986 Chevrolet truck instead of the 1988 Chevrolet truck the appellant had purchased. The contracting officer conceded a misdescription and offered appellant a refund of the purchase price, the relief available under the description warranty clause of the contract.

GSA argues that appellant received all the relief available under the contract. Generally, a refund under the description warranty is the sole remedy available for a misdescribed item under a contract like this one. Parish v. General Services Administration, GSBCA 16025 (Mar. 5, 2003). Appellant argues that in his case he is not bound to accept the exclusive remedy of a refund because the Government delivered an entirely different item to him, not a misdescribed item. The argument, while clever, fails. The liability limitation of the description warranty clause applies when the Government delivers the wrong item as well as a somewhat misdescribed item. Deep Run Salvage, ASBCA 45152, 95-1 BCA ¶ 27,565 (buyer limited to contract adjustment not exceeding refund of purchase price when Government delivered fiberglass scrap instead of aluminum scrap the contractor had purchased). The identification of a different item, in other words, is the ultimate misdescription.

Appellant maintains that Government officials acted fraudulently and that he is entitled to more than a refund. Where officials have acted under circumstances that "can be characterized as significant, willful, and unjustified breach or arrant indifference tantamount to a lack of good faith," the limitation of liability of the description warranty clause does not apply. See Sidney Danziger, ASBCA 37795, 89-3 BCA ¶ 22,125, at 111,287. However, Government officials are presumed to act in good faith, to act fairly, and to act conscientiously in fulfillment of their duties. Kalvar Corp. v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976); Custom Printing Co. v. United States, 51 Fed. Cl. 729, 734 (2002); Logan v. Department of State, GSBCA 15691-ST, 02-2 BCA ¶ 31,915. The presumption may be overcome by clear and convincing evidence of malice or of specific intent to injure. Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002); Logan. Here appellant points to the supposed erasure of another individual's name and the substitution of appellant's own name on the Certificate to Obtain Title as evidence of alleged fraud. There is, however, a less sinister explanation--that the officials who delivered the wrong truck to appellant made an honest mistake in putting appellant on the certificate as the transferee. Appellant has not established Government conduct sufficient for us to ignore the presumption of good faith and to find that Government officials acted in bad faith.

Decision

The appeal is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

MARY ELLEN COSTER WILLIAMS
Board Judge