

## Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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DENIED: August 18, 2004

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GSBCA 16090

MICHAEL R. KEENAN, d/b/a SOUTHWEST MOTORSPORTS,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Michael R. Keenan, pro se, Albuquerque, NM.

Cecillia Chu, Office of Regional Counsel, General Services Administration, San Francisco, CA, counsel for Respondent.

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

**HYATT**, Board Judge.

This appeal arises from the purchase by appellant, Michael R. Keenan, doing business as Southwest Motorsports, of a 1993 GMC Jimmy truck through an auction of surplus property conducted by respondent, the General Services Administration (GSA). Appellant filed a motion seeking a ruling by the Board that the truck was misdescribed because it should have been categorized as a salvage vehicle. Respondent opposed the motion, and thereafter the parties attempted for some time to reach a settlement. When settlement efforts failed, they agreed to submit the matter to the Board for a merits decision on the written record based on the arguments raised in the motion and response. Rule 111.<sup>1</sup>

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<sup>1</sup> The record includes the Rule 104 file submitted by respondent, a supplemental appeal file submitted by appellant, the pleadings, the parties' motions and accompanying exhibits, and appellant's responses to the Government's discovery requests.

### Findings of Fact

The vehicle in question was offered for sale to the public on the GSA auctions web site (<http://www.GSAAuctions.gov>) under invitation for bids number 91 FBPI03064. The vehicle was advertised in lot 302 and the following description was provided:

UTILITY TRUCK: 1993 GMC JIMMY, 06CYL, 4X4, PS [POWER STEERING], PB [POWER BRAKES], RADIO, FUEL: GAS, VIN [VEHICLE IDENTIFICATION NUMBER]: 1GKDT13W8P2527995, EST[IMATED] MI[LEAGE]: 107,859. REPAIRS REQUIRED, INCLUDING BUT NOT LIMITED TO: ENGINE, NUMEROUS DENTS, AND CRACKED WINDSHIELDS. INOPERABLE.

Appeal File, Exhibits 1 at 2, 3 at 1. A picture of the vehicle, showing damage to the body of the truck, accompanied the description. Id., Exhibit 3 at 2. The property was located at a United States Department of Agriculture (USDA) field office in St. Michaels, Arizona. The IFB also provided names and a telephone number for the property custodians in St. Michaels. Id., Exhibits 1, 3.

In USDA's request that GSA list the vehicle for auction, the property custodian in St. Michaels provided essentially the above information, and also noted that "the engine does not hold oil and does not run." GSA was not told at that time that the vehicle had been stolen and recovered prior to being listed for auction. Declaration of Sing L. Chen, Contracting Officer (Chen Declaration) (Aug. 28, 2003) ¶ 3, Exhibit A.

A property damage report on the vehicle, known by the USDA, also reflected extensive damage, with estimated repairs to the body and engine amounting to more than \$8300. The blue book value of the vehicle at the time of sale amounted to only \$5690. Thus, the cost of needed repairs exceeded the blue book value of the truck at the time it was listed for sale on the GSA auction site. Supplemental Appeal File, Exhibits C, D.

The terms and conditions of sale applicable to online auctions are posted at [GSAAuctions.gov](http://GSAAuctions.gov). These include the following:

Acceptance Period. By marking the required box next to the Terms and Conditions located at the bottom of the registration form and submitting a bid, the bidder agrees to the Terms and Conditions of sale and to pay for and remove the property, if the bid is accepted, by the date and times specified in each lot.

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Contract Disputes. Contracts resulting from the sale of any offer in the [GSAAuctions.gov](http://GSAAuctions.gov) website are subject to the Contract Disputes Act of 1978 (41 USC 601-613), as amended.

Condition of Property is not warranted. . . . Deficiencies, when known, have been indicated in the property description.

However, absence of any indicated deficiencies does not mean that none exist.

**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. If a misdescription is determined after removal, the Government will refund any money paid if the purchaser takes the property at his/her expense to a location specified by the Contracting Officer following the Refund Claim Procedure described below. . . . 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 of profit or any other money 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 price of the misdescribed property.

**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.

. . . .

**Oral Statements and Modifications.** 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. Further no interpretation of any provision of the contract, including applicable performance requirements, shall be binding on the government unless furnished or agreed to, in writing by the Contracting Officer or his designated representative. Bidders are required to agree to these terms and conditions in order to register to make a bid on the items featured for auction.

Default. . . . Failure to pay for and remove all items awarded within the specified time could result in termination of the contract. The bidder will also be subject to paying liquidated damages. . . .

. . . 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 has occurred, or (b) \$200, whichever is greater.

Appeal File, Exhibit 1 at 5-11.

Appellant submitted a bid for the truck, in the amount of \$1085, based on his review of the information provided on the internet auction site and two telephone conversations with the property custodians. One of the custodians told him that the truck ran but had a bad oil leak. The custodian recommended that the vehicle be trailered rather than driven away from the site. Appellant's Responses to Respondent's First Set of Interrogatories. He was determined to be the high bidder and was awarded contract number GS09F03FBE2074 on February 20, 2003. Appeal File, Exhibits 3-4.

Mr. Keenan paid for the truck and made arrangements to pick it up in Arizona on February 28, 2003. He states that when he arrived at the lot where the vehicle was located, he was told by the USDA employees there that the vehicle had been stolen, driven out of oil, and otherwise damaged. He further states that he attempted to drive the vehicle at the lot, making sure it had enough oil. The engine knocked, a condition that Mr. Keenan attributed to a thrown rod, and leaked oil at a rate of approximately one quart per minute. After he discovered the actual state of the vehicle, appellant left the truck at the lot in Arizona, with the keys and paperwork inside under the passenger seat. He then wrote to the GSA contracting officer, in San Francisco, California, to request a refund or, alternatively, a price adjustment. This letter was dated March 3, 2003. Appeal File, Exhibit 6.

In a letter dated March 10, 2003, the contracting officer responded, stating that she had no authority to offer any relief given that the property description "clearly stated that the vehicle was inoperable and needed repairs." Further, she was of the view that everything noted in Mr. Keenan's letter, which had objected to the failure to identify the truck as a theft recovery vehicle with major mechanical problems, was either implicit in the description or could have been discovered by inspecting the vehicle prior to bidding. The contracting officer did offer appellant the option of electing to default under the terms of the contract. If appellant chose to proceed in this manner, his purchase price would be refunded less a liquidated damages assessment of \$217. Appeal File, Exhibit 11.

Mr. Keenan declined to accept a default termination and appealed the contracting officer's denial of his claim, noting in his notice of appeal, which he designated as his complaint, that while GSA provided certain basic information about the truck, it neglected to mention that the truck had been stolen and abused prior to its recovery, and failed to convey the extent of known deficiencies. Appeal File, Exhibit 12.

A Memorandum for Fleet Managers dated June 25, 1993, establishes guidelines authorizing individual fleet managers to exercise the discretion to declare a vehicle as salvage. This memorandum states that as a general rule "salvage (or non-repairable) vehicles are vehicles that are deemed as unsafe if returned to normal highway use." The policy further states that "Vehicles with accident damage that are uneconomical to repair based upon our book values, but are completely repairable to safely operate on highways, will not be identified as salvage." Chen Declaration ¶ 4, Exhibit B. The contracting officer further states that in general practice, vehicles with frame damage are listed in the salvage/scrap category. The subject truck was not reported to her as a salvage vehicle, however. She had no knowledge prior to Mr. Keenan's communications with her of any theft history. She also was not aware of any frame damage based on the description USDA provided for the vehicle. Chen Declaration ¶¶ 3-5.

### Discussion

Appellant has advanced two arguments in support of his appeal of the decision to terminate for default his contract to purchase the subject truck and to assess liquidated damages. First, he urges that the property was not appropriately described. In particular, he contends that GSA should have revealed that the truck had been stolen and taken on a joy ride that resulted in the loss of all engine oil, causing a thrown rod to the engine that will require a full engine rebuild for the vehicle to be driveable. In addition, he points out, the truck had significant suspension damage, as well as damage to the roof, windshield pillars, fenders, and hood that was not readily discoverable from the description and photograph provided on the auction site. Because of this, the agency, in appellant's view, failed to properly alert the prospective buyer to the true condition of the vehicle. He suggests that "a proper description" might have read: "theft recovery, engine knocks/leaks oil, needs rebuild, also significant suspension and body damage due to theft." Mr. Keenan maintains that the vehicle should have been classified as a salvage vehicle and listed in this category on the GSA auctions website, rather than advertised under the trucks and trailers category. He further argues that the misclassification of the truck, and failure to offer it as a salvage vehicle, was contrary to industry custom and in violation of Arizona law. He concludes that the vehicle was "grossly misdescribed" and the sale should be canceled.

GSA opposes appellant's motion and argues that the appeal should be denied. It asserts that the vehicle was not improperly described or represented, nor was the agency required to list it as a salvage vehicle on the auction website. Further, GSA points out, many of the deficiencies complained of by Mr. Keenan, and particularly the body damage, could have been ascertained in an inspection of the vehicle, which all bidders are expressly cautioned to make before submitting an offer to buy an item on line.

The provisions of Arizona state law relied upon by appellant are not germane to this dispute. The Board has no jurisdiction to entertain causes of action that are created under state law. Danny R. Mitchell v. General Services Administration, GSBCA 16209, 04-1 BCA ¶ 32,551; Danny R. Mitchell v. General Services Administration, GSBCA 16122, 04-1 BCA ¶ 32,511, reconsideration denied, 04-1 BCA ¶ 32,588. Controversies involving the rights and duties of the Federal Government under a contract to which it is a party are generally governed by federal law. Prudential Insurance Co. v. United States, 801 F.2d 1295, 1298 (Fed. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); Forman v. United States, 767 F.2d 875,

880 (Fed. Cir. 1985). In this case, our jurisdiction is limited to review of the contract under the Contracts Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2000) (CDA). There is a well-developed body of federal law governing the resolution of disputes of this nature that has been generated under the CDA, and that is what the Board applies.

The issue in this appeal, then, is whether the vehicle in question was misdescribed so as to entitle Mr. Keenan to decline to purchase the car and retain the full purchase price. GSA maintains that he is in default of the contract and owes the Government some \$217 in liquidated damages. We agree with GSA.

The truck advertised on GSA's internet auction site, and the truck made available for pick-up by appellant in St. Michaels, Arizona, was in fact the same truck identified and pictured on the auction site -- a 1993 GMC Jimmy. Mr. Keenan thus purchased the truck identified in the auction, and, as stated, the truck required engine repairs, was inoperable, and had numerous dents and broken windshields. The description provided was adequate to alert the prospective buyer that the truck was not in particularly good shape, and GSA warrants nothing more. Appellant's real complaint concerns the condition of the vehicle he bought, and is not properly directed to the accuracy of the description. In short, GSA did not misdescribe the vehicle. See Danny R. Mitchell, 04-1 BCA at 160,995.

In his correspondence with GSA, appellant states that he has bought approximately thirty-five vehicles under GSA's sealed bid internet procedures, and has generally been very happy with his purchases. He additionally notes that in his experience GSA is usually very negative in its descriptions of vehicles, but was not in this case. He argues that the vagueness of the description's references to the need for repairs did not suffice to alert the prospective buyer to the significance of the damages sustained by this vehicle.

Mr. Keenan's complaint that GSA was not sufficiently negative in its description of this particular vehicle is not well taken -- the salient points concerning its condition were made. The terms of sale expressly state that the condition of the truck is not warranted and the bidder is cautioned to take the opportunity to inspect the vehicle. Further, the terms and conditions of the auction expressly cautioned prospective buyers that the absence of any indicated deficiencies did not mean that none existed. The Board has, on numerous occasions, recognized the nature of these sales and the consequences of purchasing vehicles in this manner:

An individual purchasing a vehicle at auction "as is" and free of any warranties other than that of description, inevitably accepts certain risks and uncertainties. As we have pointed out in the past, the uncertainties inherent in such a transaction are presumably reflected in the price bid.

Coleridge D. Henri v. General Services Administration, GSBCA 13991, 97-2 BCA ¶ 29,187, at 145,161 (citations omitted); accord Rene Hernandez v. General Services Administration, GSBCA 15448, 01-2 BCA ¶ 31,463; William B. Wobig v. General Services Administration, GSBCA 14424, 98-1 BCA ¶ 29,650.

GSA knew the engine required repairs and that the vehicle was inoperable, and it conveyed this information to the bidders. GSA had no additional obligation to examine the vehicle or otherwise try to determine the precise condition of the truck. Appellant's complaint that he was not told the exact extent of the body damage or that the vehicle had been stolen and recovered does not justify the refusal to pay for and remove the vehicle. There were no known deficiencies that were not basically disclosed -- the item description made it clear that the vehicle was not operable, repairs to the engine were required, and the body was damaged. Although Mr. Keenan spoke with the property custodian, who disclosed the oil leak and said the truck would run, but could probably not be driven away from the lot, he did not inspect the truck in person. The full extent of the body damage would have been ascertainable had appellant inspected the vehicle. Moreover, to the extent appellant believes the property custodian misled him about the truck's condition, the terms and conditions of sale make it clear that oral representations by Government employees are not binding on the Government. Gaven L. Rouse v. General Services Administration, GSBCA 15993, 03-1 BCA ¶ 32,210, at 159,301. Appellant proceeded to submit a bid, which, we note, was well below the blue book value of the truck.

Finally, we cannot conclude that GSA was required to list the truck as salvage. The agency's internal policy is to list as salvage only those vehicles that cannot be safely repaired. At best, appellant has shown only that the vehicle cannot be economically repaired. That is a risk that is assumed by the bidder, particularly by the bidder who chooses to forego the opportunity to make an on-site inspection of the vehicle prior to submitting an offer to purchase it. As we stated in Coleridge, it is the bidder's responsibility to adjust the price offered to reflect the unknown variables present in sales of this nature.

Appellant submitted a valid bid, which was accepted by GSA. Appellant had no viable grounds for withdrawing his bid, which in effect is what he has done. Accordingly, GSA was within its rights to terminate the contract for default and assess liquidated damages as provided for under the terms of the auction sale. John F. Collins v. General Services Administration, GSBCA 14555, 98-2 BCA ¶ 30,004.

### Decision

The appeal is **DENIED**.

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CATHERINE B. HYATT  
Board Judge

We concur:

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STEPHEN M. DANIELS

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ANTHONY S. BORWICK

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Board Judge

Board Judge