

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: October 26, 2004

GSBCA 16093, 16329

KEVIN J. LeMAY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Daniel H. Byrne and Cynthia W. Veidt of Fritz, Byrne, Head & Harrison, LLP, Austin, TX, counsel for Appellant.

Lee W. Crook, III and Melissa Putman, Office of Regional Counsel, General Services Administration, Fort Worth, TX, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **HYATT**.

BORWICK, Board Judge.

Kevin J. LeMay, appellant, in GSBCA 16093 seeks a declaration that respondent, General Services Administration (GSA), breached its contract with appellant for a sale of surplus tires, and in GSBCA 16329 seeks damages in the amount of \$92,250.¹ Appellant maintains that in accordance with the contract's item description, the parties contracted for the sale of a "lot" of surplus tires. Appellant further maintains that the contracted-for sales lot consisted of a trailer of tires containing about 200 sets of tires. Appellant argues that the Government's refusal after award to release to appellant more than 200 tires from the Government's inventory constituted a breach for which appellant is entitled to damages.

Respondent maintains that it had the right to cancel the sales contract, either under the Description Warranty clause of the contract or under the Withdrawal of Property After Award clause. Respondent maintains that there was a misdescription because the

¹ We denied respondent's motion to dismiss GSBCA 16093 for lack of jurisdiction. Kevin J. LeMay v. General Services Administration, GSBCA 16093, 03-2 BCA ¶ 32,345.

Government had intended to sell 200 tires, not one lot consisting of 200 sets of tires. Respondent also maintains that its reliance on the Withdrawal of Property After Award clause was proper because of the grave unit price disparity between the 200 tires respondent says it intended to sell and the trailer full of tires appellant maintained he had purchased.

We deny the appeal. Appellant misinterpreted the item description of the contract. The contract described for sale one lot of about 200 tires, not 200 sets of tires. Photographs posted on the GSA auction website in conjunction with the sale cannot be reasonably read to suggest that the Government intended to sell a trailer full of tires numbering more than 200. The Government acted properly in refusing to release more than the 200 tires that had been estimated as available in the contract.

Findings of Fact

In 2002, Federal Prison Industries, Inc., (FPI)² purchased 281 Jeep Grand Cherokee sport utility vehicles for use by the Immigration and Naturalization Service's Border Patrol. Transcript at 112-13, 121.³ The FPI removed the original equipment tires on those vehicles and replaced them with specialty tires better suited for the vehicles' mission. Id. at 106.

On December 30, 2002, FPI reported 200 Goodyear Wrangler tires P 215/75 R15 as surplus and asked GSA to sell the tires. Appeal File, Exhibit 1.⁴

GSA conducted an auction on its web site, "www.GSAAuctions.gov." Appeal File, Exhibit 4. In that auction, GSA auctioned seventy-two lots of goods, id., Exhibit 2, including lot sixty-four, which was described as follows on the web site:

ONE LOT OF GOODYEAR WRANGLER TIRES RT/S, P 215/75 R 15,
STANDARD LOAD, 2 POLYESTER CORD - 2 STEEL CORD, MADE IN
THE USA, TIRES HAVE 0-20 MILES (APPROX), EST 200
(1574C223470001) UNUSED/USED.

Id., Exhibit 11 at 6.

In addition to the written description, respondent's auction web site displayed four photographs of the tires that were the subject of the auction. Appeal File, Exhibit 11 at 6. The web site showed a large photograph of seven tires stacked in a pyramid on a pallet and three other thumbnail photographs that could be expanded. Id. The first and second

² FPI is the wholly owned Government corporation operated by the United States Bureau of Prisons, United States Department of Justice. FPI also goes by the trade name UNICOR.

³ In this opinion, we refer to the miniscript version of the transcript.

⁴ Respondent prepared two appeal files in this matter, one for GSBCA 16093--the appeal seeking a declaration of contract terms--and one for the consolidated dockets of GSBCA 16093 and 16329. Unless otherwise noted, we refer to the appeal file respondent prepared for the consolidated dockets.

thumbnail photographs, apparently of the same object taken at different angles,⁵ showed five stacked tires with two additional tires leaning against the stack on a pallet. Id. The third thumbnail photograph showed tires stacked in the back of a large storage trailer. Id.; Transcript at 102-04.

The expanded version of the last thumbnail photograph on the auction website showed in the back of the trailer three stacks of tires, approximately fifteen tires each. Three tires rested between the first and second stacks. It is not possible to tell whether there were additional tires behind the three stacks shown. Appeal File, Exhibit 3 at 4. Between forty-five and forty-seven tires are visible in the photograph. Id.

GSA's auction website for this sale listed FPI's Michael Maggard as the point of contact for property location and custodian information. Appeal File, Exhibit 11 at 6.

GSA's Property Disposal Specialist for the sale prepared the sale of lot sixty-four from the written report of excess provided by FPI and from pictures on a diskette furnished to her by FPI. Transcript at 54. The Property Disposal Specialist testified at the hearing on the merits of this appeal that she did not consider the pictures part of the item description; rather, she considered them "just as a sample." Transcript at 55.

The sale was subject to the GSA "Sale of Government Property Online Sale Terms and Conditions" (Online Sale Terms and Conditions). Appeal File, Exhibit 4 at 5. The Online Sale Terms and Conditions contained a Description Warranty clause, 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 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. No refunds will be made, after 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 purpose. The purchaser is not entitled to any payment for loss of profit or any other money damages - special, direct, indirect, or consequential.

Id. at 2-3.

⁵ According to appellant's sensible observation. See Transcript at 258.

The Online Sale Terms and Conditions also warned bidders that 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 rights upon the bidder or purchaser." Appeal File, Exhibit 4 at 2.

The offering was also subject to the GSA Federal Supply Service's "General Sales Terms and Conditions." Appeal File, Exhibit 4 at 4. Those terms and conditions contained the Adjustment for Variation in Quantity or Weight clause which provided in pertinent part:

Unless otherwise provided in this invitation, when property is sold by a unit other than "weight", the Government reserves the right to vary the quantity tendered or delivered to the Purchaser by 10 percent[.] . . . The purchase price will be adjusted upward or downward in accordance with the unit price and on the basis of the quantity or weight actually delivered. Unless otherwise specifically provided in the invitation, no adjustment for such variation will be made where property is sold on a "price for the lot" basis.

Id. at 2 (¶ 12). This paragraph was modified by the Adjustment For Variation In Quantity Or Weight clause which provided:

Condition No. 12, General Sale Terms and Conditions . . . is modified to authorize the Government to vary the quantity. . . delivered by 50% from the quantity. . . listed in the invitation.

Id. at 6 (¶ D).

The General Sales Terms and Conditions contained a Withdrawal of Property After Award clause, which provided in pertinent part:

The Government reserves the right to withdraw for its use any or all of the property covered by this contract, if a bona fide requirement for the property develops or exists prior to [the] actual removal of the property from Government control. In the event of a withdrawal under this condition, the Government shall be liable only for the refund of the contract price of the withdrawn property or such portion of the contract price as it may have received.

Appeal File, Exhibit 4 at 3 (¶ 22).

Appellant is a foreman for an underground utility contracting company, a part-time independent businessman, and a former Sergeant/Unit Supply Specialist with the United States Army. Transcript at 234, 241.

At the hearing on the merits of these appeals, appellant explained that he assumed he was bidding on a lot of tires which consisted of the tires in the trailer and the tires on the pallets, particularly since the invitation for bid stated that the sale was not a sale by sample and a total of 200 tires was not shown in the pictures. Transcript at 256-57. He stated that

before bid, "he could only assume that maybe . . . there could be more than the tires that were shown in the photographs." Id. at 252. Appellant also explained that before bid, "calculating the dimensions of a standard semi-trailer, the number of tires that would need to be present in the trailer would be around the number of 200 sets of tires." Appeal File, Exhibit 7. Appellant also testified that he considered the estimated amount meaningless, because in appellant's view, he was bidding on a trailer full of tires, which he considered the lot, no matter how many tires were in the lot, and not on individual tires. Transcript at 247.

Before submitting his bid, appellant called FPI's Michael Maggard. Appeal File, Exhibit 7. Appellant asked Mr. Maggard the origin of the tires and was told, according to appellant, that the tires came from 200 Jeeps purchased for the United States Border Patrol. Transcript at 251. Mr. Maggard testified at one point that he did not remember the details of the conversation, but that he would not have mentioned a specific number, because he did not have the information at the time; the most Mr. Maggard would have told appellant was that the tires came from Jeeps purchased for the Border Patrol. Later, he testified that he "might have told" appellant that 200 tires were for sale. Transcript at 109-10, 132. There is a dispute of fact whether Mr. Maggard told appellant that the tires had come from 200 Jeeps. We have heard the testimony and examined the demeanor of the witnesses. We conclude that on this point, appellant's testimony is specific and credible and that Mr. Maggard's testimony is vague. We find as fact that before bid, Mr. Maggard advised appellant that the tires came from 200 Jeeps.

Appellant bid \$5400 for lot sixty-four. Appeal File, Exhibit 5. The next two bidders bid \$5350 and \$5100, respectively. Id., Exhibit 6. The next highest bidder for the same lot assumed he was bidding on one lot of 200 tires. Respondent's Hearing Exhibit 10.

On or about February 13, 2003, GSA accepted appellant's high bid. Appeal File, Exhibit 11 at 5. The Government e-mail notification of award stated that appellant's bid amount was for \$5400 "per lot." Id. On February 20, appellant paid the bid amount; he was required to remove the property on or before February 28. Id., Exhibit 12 at 13.

According to appellant, on February 21, appellant drove to the site--a federal prison in Bastrop, Texas--where the tires were located. Appeal File, Exhibits 7, 10; Transcript at 95, 124-25. The custodian of the tires, whom appellant described as a "guard," told appellant that his 200 tires were ready for removal. Appellant replied that he had purchased "the whole lot" of tires. Appeal File, Exhibit 7. The custodian told appellant that he would only be allowed to remove 200 tires. Id. According to appellant, he contacted the contracting officer and the "Government Fraud Department" in Washington, D.C., and was told by the contracting officer to submit a written statement. Id.

The appellant then had a discussion with another person at the FPI site concerning the amount of tires for which appellant had submitted a bid, with the FPI official insisting that appellant had purchased 200 tires and appellant insisting that he had purchased the whole lot. Appeal File, Exhibit 7.

Appellant did not wish to argue further with the official, so he left without the 200 tires and called GSA on his cellular phone. Transcript at 279. As appellant was leaving, FPI officials advised appellant that there were 1400 tires in the trailer and that appellant could have only 200. Transcript at 284.

Appellant wrote the contracting officer and advised her what had transpired at the site when he attempted to pick-up the tires. Appellant told the contracting officer:

As you can plainly see by reading the item description for the auction and looking at the pictures, that the estimate should have been for an estimate[d] 200 sets. At this time I would like to pick up my lot of tires if any assistance you can give, will be greatly appreciated [sic].

Appeal File, Exhibit 7.

After appellant submitted his written statement to the contracting officer, appellant continued to call FPI officials. He reached Mr. Buse, who advised him that there had been 1600 tires in the trailer and that he was working with a GSA contracting officer to split up the tires into smaller lots to be auctioned. Transcript at 288.

Upon receipt of the letter, on March 7, the contracting officer canceled the contract on the grounds of misdescription. The contracting officer advised appellant that she was instructing respondent's Finance Office to refund the \$5400 appellant had paid for the tires, and that he could receive the refund check within four to six weeks. Appeal File, Exhibit 8. The contracting officer testified that she relied on the Description Warranty clause to cancel the award because of appellant's confusion as to whether he was bidding on a lot of 200 tires or a lot consisting of 200 sets of tires. Transcript at 165-67.

On March 10, after receiving the contracting officer's notice of cancellation, appellant wrote the contracting officer and stated in pertinent part:

When I bid on the tires, I knew that I was bidding on the lot whether it contained [two] or 200 tires. If what the guard told me is true and that there are 1400 tires in the trailer, then I should be able to pick up the whole lot. Furthermore, I do not think GSA has the right to cancel my contract for [its] own advantage. I feel that the GSA according to the terms and conditions of the sale, which I agreed to prior to the award of the lot, would be in breach of contract. So at this time, I am asking for alternative dispute resolution.

Appeal File, Exhibit 10. On March 12, appellant sent e-mail messages to the GSAAuctions.gov web site asking whether, having bid on a lot, appellant was entitled to the whole lot or just the estimated amount. The answer appellant received was that appellant was entitled to the lot, not a portion of the lot. Id., Exhibit 12 at 17-18.

By notice of appeal dated March 17, 2003, appellant appealed the final decision of the contracting officer dated March 7, 2003. The appeal was docketed as GSBCA 16093 by this Board.

On August 23, 2003, appellant submitted to the contracting officer a \$71,325 claim for breach damages arising out of the withdrawn award.⁶ The contracting officer denied the claim by decision of December 30, 2003. From that decision, appellant filed a timely appeal, which was docketed as GSBCA 16329. We consolidated the two appeals.

Discussion

A lot consists of a number of items taken collectively as a unit -- that is, one involving a group of items for which the purchaser pays a lump sum price for the entire group, not a sale in which the purchaser buys on a unit price basis. Harry Thuresson, Inc. v. United States, 453 F.2d 1278, 1282-83 (Cl. Ct. 1972). According to the item description in the contract, the Government clearly sold "one lot," either of tires, according to GSA, or sets of tires, according to appellant, "est. 200." The sale was undoubtedly of a group of tires because the Government did not ask for bids on a unit price (i.e., per tire) basis. Indeed, GSA's notice of award recognized that appellant's price was "per lot."

At dispute in this case is the number of tires in the lot, that is, whether the description was a sale of 200 tires or sets of tires and whether the "lot" that was sold was a trailer full of tires numbering more than 200.

Appellant maintains that his examination of the photograph of the trailer posted on the GSA Auctions website, plus Mr. Maggard's advice that the tires came from 200 jeeps, convinced him that the item description "est. 200" meant that he was bidding on 200 sets of tires. In his brief, appellant also argues that the written item description in the GSA Auctions website, combined with the photograph of the trailer posted on that website in conjunction with the sale, unambiguously states the Government's intention to sell a trailer full of tires. Appellant's Brief at 11. Appellant argues that upon contract award, he was entitled to "every item contained in that group [the trailer], and any stated estimate concerning quantity is superfluous." Id. at 15. Appellant maintains that the Government made a unilateral mistake in failing to clearly state its intention in the item description to sell 200 tires. Appellant argues that the Government could not, as it did, rely on the contract's Description Warranty clause to declare a misdescription to correct that unilateral mistake. Id.

GSA argues that there was no ambiguity in the item description, and that GSA's description of lot sixty-four communicated to prospective buyers the opportunity to bid on an estimated 200 tires. GSA considered that the photographs only served to provide "visual aid to prospective bidders in order that they [had] an idea of what they were bidding on." Respondent's Brief at 13. As to appellant's contention that the item description "est. 200" refers to 200 sets of tires, GSA notes that the word "sets" never appears in the property description. Id.

Where an estimate is used of an otherwise designated quantity, then the estimated quantity is susceptible of a broad interpretation and the contract will be construed as

⁶ In his complaint, appellant amended his damage claim to seek \$92,250.

applying to the designated quantity, provided it be "sufficiently identified." Pine River Logging & Improvement Company v. United States, 186 U.S. 279, 288-89 (1902), citing Brawley v. United States, 96 U.S. 168 (1887). Thus, for the lot designation to take precedence over the estimated quantity in the lot, the lot must be identified "with reasonable accuracy." Everett Plywood and Door Corp. v. United States, 419 F.2d 425, 432 (Ct. Cl. 1969).

However, if the agreement is to deliver certain property not then in existence, or to be taken from a larger quantity, then the addition of the words of estimation will be given a narrow construction and held to apply only to such accidental variation in quantity that would naturally occur with such a transaction. Everett Plywood; Goldstein Oil Co. v. J.M. Sweeney Oil Co., N. D. Ill. (No. 84 C 8571, June 14, 1985); available on Westlaw, 1985 WL 1725; 11 Samuel Williston and Richard A. Lord, A Treatise on the Law of Contracts, § 30:11 at 137 (4th ed. 1999).

Here, the written item description clearly states GSA's intention to sell a lot of an estimated 200 tires. The description of lot sixty-four never mentions "sets" of tires. Rather, the description refers to "ONE LOT OF GOODYEAR WRANGLER TIRES" and the estimate of 200 refers to the tires, not "sets" of tires.

Mr. Maggard's statement to appellant that the tires were taken from 200 Jeeps cannot reasonably be interpreted to suggest that the GSA intended to sell 200 "sets" of tires. Even if appellant's interpretation of that statement were reasonable, appellant could not rely on the statement since the Online Sale Terms and Conditions warned appellant that such statements were unauthorized and conferred no rights on the purchaser. Thus, in one case involving a sale of surplus property, in the item description the Government identified fifteen propeller blade assemblies. The oral statements of the Government's forklift operator that the item description should have contained two additional boxes of propellers could not vary the terms of the sale. Dave McDaniel, ASBCA 46342, 95-2 BCA ¶ 27,917; see Billy D. Starks, ASBCA 50205, 97-1 BCA ¶ 28,741 (pre-bid oral statement of Government property officer to purchaser regarding condition of engines for sale not binding on the Government).

Appellant's position that the picture of the trailer on the auction website meant that the Government intended to sell a trailer full of more than 200 tires is fallacious for a number of reasons. As noted, for the trailer full of tires as shown in one of the photographs to take precedence over the Government's estimate of 200 tires stated in the written description, the trailer would have had to have been reasonably identified as the closed quantity being sold.

Here, however, the written description did not refer to any of the photographs as identification of the sales lot. Of the photographs that were posted, the prominent photograph displayed was one of seven tires on a pallet; the photograph of the trailer was the last picture in the set of photographs displayed. Appellant has not explained, aside from potential financial benefit to himself, why we should ascribe any greater significance to that last photograph than to the others. Finally, all of the photographs combined did not clearly show more than the 200 tires mentioned in the written description, and thus cannot reasonably be interpreted to modify the quantity of 200 tires in the lot that the Government,

in its written description, told bidders it was selling. Only by combining the far-fetched assumption that the written description referred to sets of tires with the further assumptions that the trailer must have contained more than 200 tires and that GSA had meant the trailer full of tires to designate the closed quantity of tires being sold, could claimant come to the conclusion that the GSA intended to sell a trailer full of tires numbering more than 200.

Construing the contract as a whole and giving every term its reasonable and realistic meaning, PGP Industries, GSBCA 9415, 91-1 BCA ¶ 23,359 (1990), we conclude that the Government clearly intended to sell a lot of approximately 200 tires. Appellant is simply wrong in suggesting that the estimate of 200 tires was superfluous.

GSA, relying on Dieker v. General Services Administration, GSBCA 16050, 03-2 BCA ¶ 32,283, maintains that in determining a misdescription before removal and in refunding appellant's bid, it correctly applied the provisions of the Description Warranty clause because the parties had made a mutual mistake. Respondent's Brief at 27-28. In Dieker, the Government identified the wrong item and the appellant bid on that item, a clear case of mutual mistake. Here, if at all, appellant made a unilateral mistake, unknown to the Government, in assuming that he had purchased a trailer full of tires numbering more than 200. Such a mistake would not entitle appellant to relief under the Description Warranty clause. House of Denim v. Department of Homeland Security, GSBCA 16182-DHS, 04-1 BCA ¶ 32,477 (2003). GSA generously gave appellant a refund; however, since that matter is not before us, we do not consider the propriety of the refund. In light of our disposition, and for the same reason, we do not consider GSA's alternative argument that it could have invoked the Withdrawal of Property from Award clause in canceling the contract.

The Government did not breach the contract in refusing to release more than 200 tires to appellant. The appeal in GSBCA 16093 is denied. Appellant is not entitled to the damages he seeks. The appeal in GSBCA 16329 is therefore denied.

Decision

The appeals are **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge