

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: December 2, 2003

GSBCA 16182-DHS

HOUSE OF DENIM, LTD.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Timothy E. Nilan of the Law Offices of Frank E. DiGiacomo, Huntington Park, CA, counsel for Appellant.

Christopher Veith, Office of Chief Counsel, Customs and Border Protection, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT** and **DeGRAFF**.

DeGRAFF, Board Judge.

Appellant contracted to purchase property from the agency and did not pay for the property within the time required by the sale contract. According to the terms of the contract, the agency is entitled to retain appellant's bid deposit.

Findings of Fact

On January 30, 2003, the United States Customs Service, a component of the Department of the Treasury, held a sale of seized property and other merchandise in Rancho Dominguez, California.¹ Exhibit 1. The auction catalog described more than 200 lots of merchandise, including one lot that contained two groups of cigarettes. The catalog described the first group of cigarettes as 4405 cases of Marlboros, "approx 220,180 ctns," and the second group as twenty-seven cases of assorted brands of cigarettes, "approx 844

¹ The agency is now the Bureau of Customs and Border Protection, a component of the Department of Homeland Security.

ctns." The catalog explained the cigarettes had to be exported from the United States and said the winning bidder would be required to make a deposit of 10% of the winning bid price. Exhibit 1.

The auction catalog said each lot in the auction would be sold to the highest bidder when the bid amount was accepted by Customs, and also said a bid could not be withdrawn once accepted. According to the catalog, announcements might be made on the day of the sale regarding the lots of property being sold and such announcements would take precedence over information contained in the catalog. The auction catalog explained the bidding would progress very quickly and told bidders to pay attention during the auction. Exhibit 1.

Final payment for the items being auctioned was due February 3, according to the auction catalog. The catalog said if a winning bidder failed to pay on time, the bidder would be in default and would forfeit the deposit and any right to the merchandise. Exhibit 1.

An errata sheet dated January 30, the day of the sale, said the description of the first group of cigarettes in the sale lot should be changed to show the cigarettes were genuine European Marlboros, to change the case count to 3997 cases, and to change the number of cartons to 199,850. Exhibit 2. Customs's sales agent was EG&G Technical Services. Exhibit 1. EG&G's standard operating procedure is to hand an auction catalog and any errata sheet to each person who completes a bidder registration form at an auction. In addition, if there is an errata sheet, EG&G makes an announcement about the sheet at the beginning of the auction and typically holds up the sheet and shows it to the audience. Also, there are members of the auction staff on the floor with copies of the errata sheet, in case someone needs one. Exhibit 14. The EG&G coordinator who was present at the January 30 auction says EG&G's standard procedures were followed and also says a videotape of the auction shows the auctioneer made an announcement at the beginning of the auction about the "change" sheet. Exhibit 15.

Mike Chahine, president of House of Denim, attended the auction. He completed and signed a bidder registration form, in which he agreed to the terms set out in the auction catalog. He submitted the winning bid of \$710,000 for the lot of cigarettes and gave Customs a deposit of \$63,000, which Customs accepted. The quantity sold was 3997 cases for the first group in the lot and twenty-seven cases for the second group in the lot. Exhibits 3, 4. The next-highest bid was \$700,000. Exhibit 4.

In a declaration filed in support of this appeal, Mr. Chahine said he did not know about the errata sheet until after House of Denim's bid was accepted and it was awarded the cigarettes. When he asked an EG&G representative at the sale why the quantity of cigarettes sold was different from the quantity shown in the auction catalog, the EG&G representative said Mr. Chahine had been shown an amendment before the bidding began. Mr. Chahine said although some people were given "a paper" before bidding began, he was not given a copy of the errata sheet before House of Denim was awarded the cigarettes. Exhibit 55.

When House of Denim's bid was accepted, neither EG&G nor Customs had any reason to suspect House of Denim was mistaken as to the quantity of cigarettes being sold. The dollar amount of House of Denim's bid should not have caused anyone to believe a

mistake had been made, because it was within 1.5% of the next-highest bid. In addition, EG&G and Customs had no reason to suppose any bidder would be unaware of the existence of the errata sheet that listed the changed quantity of cigarettes, because the auction catalog told bidders to pay attention during the auction and warned there might be an errata sheet, and EG&G provided bidders with copies of the errata sheet when they registered, announced at the beginning of the auction there was an errata sheet, and stood ready to provide a copy of the sheet to any bidder who needed one.

House of Denim did not pay the balance due on February 3, as required by the terms of the sale contract. House of Denim contacted EG&G on this date and asked for an extension of ten to fourteen days to make payment. Initially, EG&G rejected House of Denim's request. On February 5, however, Customs and EG&G decided to give House of Denim an extension until February 14 to make its final payment for the cigarettes. Exhibit 5. House of Denim did not pay the balance due on February 14. Sometime before February 18, House of Denim asked for an additional extension of time until February 21, and this request was denied. Exhibit 7. In two undated letters to EG&G, one written before House of Denim learned of the extension until February 14, and the other written after it learned it would receive no further extension, House of Denim said it had not been able to make the final payment due to unspecified security difficulties it encountered in having money wired from overseas, and asked for the return of its \$63,000 deposit. Exhibits 6, 8. On February 20, EG&G notified Mr. Chahine it would not refund House of Denim's deposit because House of Denim had defaulted on its payment obligation when it did not pay the balance due on February 14. Exhibit 9.

In a letter dated March 10, House of Denim wrote to Customs regarding the auction. House of Denim said it planned to sell the cigarettes to a customer overseas. The sale was not completed however, because when the customer saw the quantity of cigarettes sold to House of Denim was different from the quantity listed in the catalog, "a cycle of mistrust started to occur" and the customer refused to complete the purchase. House of Denim explained it had not been able to notify its customer of the difference in quantity before the sale occurred because the errata sheet was not issued until the day of the sale and because House of Denim did not realize the quantity had changed until after the sale occurred. House of Denim asked for the return of its deposit. Customs received this letter on March 27. Exhibit 10.

On May 23, 2003, Customs's contracting officer issued a decision denying House of Denim's request for the return of its deposit. The contracting officer reviewed the facts and concluded House of Denim was in default for not having paid for the cigarettes within the time allowed by the sale contract or within the extended time provided for payment. Exhibit 12. House of Denim appeals to the Board from this decision.

Customs sold the lot of cigarettes for \$450,000. The sales commission and the costs of holding and storing the cigarettes exceeded \$50,000. Exhibit 13.

The parties agreed to submit the appeal for a decision based upon the written record pursuant to Board Rule 111, and House of Denim elected the accelerated procedure pursuant to Board Rule 203. 48 CFR 6101.11, 6102.3 (2002).

Discussion

House of Denim says this is a case of mutual mistake, because both Customs and House of Denim were mistaken as to the quantity of cigarettes being sold. Clearly, however, Customs knew the quantity being sold, as is evidenced by the errata sheet distributed the day of the sale. "[T]his is not a case where two parties, both thinking a cow barren when in fact she was not barren, agreed to the sale of that cow." Bromley Contracting Co. v. United States, 794 F.2d 669, 671 (Fed. Cir 1986).

House of Denim also says this is a case of unilateral mistake, because when it placed its bid, it believed one group of cigarettes within the sale lot consisted of 4405 cases when, in fact, the group consisted of 3997 cases. The evidence of House of Denim's mistake consists of Mr. Chahine saying he failed to receive the errata sheet when he completed his bidder registration form, failed to hear the announcement made at the beginning of the auction regarding the errata sheet, and discovered the true quantity of cases being sold only after House of Denim's bid was accepted. Accepting Mr. Chahine's statements as true, they are sufficient to establish the existence of a unilateral mistake.

House of Denim argues its unilateral mistake prevented the formation of a contract because there could have been no meeting of the minds regarding the quantity of cigarettes being sold. As a general rule, a unilateral mistake does not prevent a meeting of the minds unless one party had a reason to know of the other party's mistake. Albano Cleaners, Inc. v. United States, 455 F.2d 556 (Ct. Cl. 1972); Rumley v. United States, 285 F.2d 773 (Ct. Cl. 1961); Leonard Johnson, GSBCA 4558, 77-1 BCA ¶ 12,341; Rocky Cariglio, ASBCA 16742, 73-2 BCA ¶ 10,233. Here, there was a meeting of the minds. House of Denim offered to purchase one lot of cigarettes for \$710,000, according to the sale terms set out in the auction catalog. When the offer was accepted, neither Customs nor EG&G had any reason to suppose House of Denim had made a mistake as to the quantity of cigarettes being sold. House of Denim's unilateral mistake did not prevent a meeting of the minds and the formation of a contract.

House of Denim says if a contract was formed, it should be allowed to rescind the contract. The equitable remedy of rescission is available to a bidder when the Government knew or should have known of the bidder's mistake at the time the Government accepted the bid. Ruggiero v. United States, 420 F.2d 709 (Ct. Cl. 1970); Wender Presses, Inc. v. United States, 343 F.2d 961 (Ct. Cl. 1965); Torres v. General Services Administration, GSBCA 11472, 92-3 BCA ¶ 25,178; Stampco Constr., VABCA 1599, 83-2 BCA ¶ 16,697. As we explained in Robert McBride, GSBCA 6247, 82-2 BCA ¶ 15,971, if a winning bidder at an auction discovers a mistake and calls it to the Government's attention before award, the bidder is entitled to withdraw the bid. No harm results from this because the Government can make an award to the next high bidder. But, when a mistake is not discovered or communicated to the Government until after award, circumstances have changed. The award discharges all other bids, so award to the next high bidder is not possible and "[t]he property must be stored, re-advertised, and resold with all of the trouble and expense such a resale entails." 82-2 BCA at 79,217. For these reasons, a mistake about which the Government is justifiably unaware until after award does not entitle the successful bidder to rescind the contract. Here, when the offer was accepted, the mistake made by House of Denim was not

apparent to either Customs or EG&G, and there is no reason it should have been apparent. House of Denim's unilateral mistake does not entitle it to rescind the contract.

The parties entered into a binding contract that required House of Denim to pay for its purchase in full by February 3, 2003. House of Denim did not pay by this date, and did not pay by the extended due date of February 14, established by Customs. House of Denim's failure to pay for its purchase by the due date was a breach of its contract with Customs.

House of Denim argues its breach of contract should not result in the forfeiture of its bid deposit because the law abhors a forfeiture and because the forfeiture here amounts to a penalty. Forfeiture provisions such as the one here allow the Government to retain bid deposits as liquidated damages, and such provisions are nearly always enforced when actual breach damages are either uncertain or difficult to measure. Sun Printing and Publishing Association v. Moore, 183 U.S. 642 (1902); DJ Manufacturing Corp. v. United States, 86 F.3d 1130 (Fed. Cir. 1996); Anthony P. Miller, Inc. v. United States, 161 Ct. Cl. 455 (1963). Occasionally, however, a clause that appears to be a liquidated 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. The intent of the parties is evaluated at the time of contracting, and one means of determining the parties' intent is to look at the amount due according to the clause. If the amount is extravagant or does not bear a reasonable relationship to the loss caused by a breach, then the clause was not intended to establish an amount of liquidated damages and, instead, imposes a penalty. Priebe & Sons v. United States, 332 U.S. 407 (1947); Kothe v. R.C. Taylor Trust, 280 U.S. 224 (1930). It is "rare" and "unusual" to use this "narrow exception" in order to avoid enforcing the terms of a contract, and the party challenging a liquidated damages clause has the burden of proving the clause is unenforceable. DJ Manufacturing, 86 F.3d at 1133-34; Jennie-O Foods, Inc. v. United States, 580 F.2d 400 (Ct. Cl. 1978).

House of Denim does not contend actual damages were either certain or easy to measure at the time of contracting, and there are no facts in the record to suggest either party knew when it entered into the contract what Customs's damages would be if House of Denim were to breach the contract. In addition, House of Denim has not established it and Customs, at the time of contracting, intended for the auction catalog's provisions to establish something other than a fixed amount as compensation for a breach. Although House of Denim alleges it is unfair for Customs to retain a deposit as large as \$63,000, House of Denim has not established this amount is either extravagant or so disproportionate to the loss caused by its breach of contract, so as to show the forfeiture amounts to a penalty. The \$63,000 retained by Customs is less than 10% of the amount of House of Denim's bid and as we have recognized in other cases, retaining a deposit of as much as 20% of a bid amount is not extravagant. Griffith v. General Services Administration, GSBCA 11571, 93-1 BCA ¶ 25,421 (1992) (citing cases). House of Denim has not established there was no reasonable relationship between \$63,000 and the administrative cost of terminating the contract, the cost of securing and storing a large quantity of cigarettes worth several hundred thousand dollars until the next sale, the cost of advertising and conducting another sale, and the loss incurred when the cigarettes sold for considerably less than the amount of House of Denim's bid. In short, House of Denim has not established the \$63,000 bid deposit it forfeited was so excessive as to amount to a penalty.

House of Denim also argues it would be unconscionable to enforce the provision of the contract that allows Customs to retain House of Denim's bid deposit. An unconscionable contract provision is one "which no man in his senses, not under a delusion, would make, on the one hand, and which no fair and honest man would accept on the other." Hume v. United States, 21 Ct. Cl. 328, 330 (1886), aff'd, 132 U.S. 406 (1889), quoted in Peters v. United States, 694 F.2d 687, 694 (Fed. Cir. 1982). The doctrine of unconscionability "has been applied in situations where one party signed an unreasonable contract with little or no knowledge of its terms, from which it could be inferred there was no consent." Louisiana-Pacific Corp. v. United States, 656 F.2d 650, 655 (Ct. Cl. 1981). As applied in our circuit, the doctrine is "a means to prevent oppression and unfair surprise. It is not intended as a tool to permit tribunals the discretion to redistribute risks assumed by the contracting parties in the bargaining process." American Transparents Plastics Corp., GSBCA 7006, et al., 85-1 BCA ¶ 17,819 at 89,151 (1984). Accord, Fraass Surgical Mfg. Co. v. United States, 571 F.2d 34, 40 (Ct. Cl. 1978).

To require House of Denim to forfeit a deposit of slightly less than 10% of the purchase price is neither unusual nor unfair. Griffith. The forfeiture provision contained in the contract is quite clear and there is no evidence to establish House of Denim was unaware of the provision or was taken by surprise at its existence. When House of Denim made its bid, it assumed the risk of forfeiting its deposit if it could not pay for the cigarettes within the time permitted. When Customs accepted the bid, it assumed the risk of being limited to the amount of the deposit as compensation for the loss it would sustain if House of Denim did not complete the sale. Although the amount forfeited by House of Denim is large, the amount of the loss sustained by Customs as a result of House of Denim's failure to complete the sale is much larger. It is not unconscionable to hold the parties to the terms of the contract and enforce the forfeiture provision.

Decision

The appeal is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

I concur:

CATHERINE B. HYATT
Board Judge