

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: February 3, 2006

GSBCA 16692

JOON SOO KYONG,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joon Soo Kyong, pro se, Anaheim, CA.

Sandra Balmer, Office of Regional Counsel, General Services Administration,
Atlanta, GA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **PARKER**, and **NEILL**.

PARKER, Board Judge.

The General Services Administration (GSA) moves for summary relief on the basis that the above-captioned appeal contains no genuine issues of material fact and GSA is entitled to relief as a matter of law. We agree and deny the appeal.

Findings of Fact

The following facts are undisputed. In April 2005, through its internet auction site, GSAAuctions.gov, GSA offered for sale one lot of mobile radios. Appellant, Joon Soo Kyong, registered for the auction and accepted the terms and conditions of the sale. Among the terms and conditions were the following:

Notification of Sale Results. Successful bidders will be notified by email and must contact the regional sales office within 2 business days from the date the email notification was sent. Bid results will not be furnished by telephone or fax. It is the bidder's responsibility to follow-up on the status of his/her bid and to ensure that his/her email address and all registration data are kept accurate and up-to-date. . . .

Payment and Removal. Property must be paid for within 2 business days and property removed within 10 business days from the time & date of the email notification of sale results, unless otherwise specified in the contract.

. . . .

Default. Bidders are cautioned to bid only on items they are prepared to pay for and remove in accordance with the Terms and Conditions of this sale. 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 2-4.

Appellant was the high bidder for the radios and was awarded a contract at his bid amount of \$36,700. In accordance with the terms and conditions, he was notified of the award by electronic mail. Appeal File, Exhibit 2.

When the required payment was not received, GSA's contracting officer sent appellant another electronic mail message, giving appellant until 2:00 p.m. on May 2, 2005, to pay for the radios. The message explained that if payment was not received, the contract

would be terminated for default and appellant assessed liquidated damages in the amount of \$7340 (twenty percent of the purchase price). Appeal File, Exhibit 3.

Payment was never received, and on May 4, 2005, the contracting officer terminated the contract for default and assessed liquidated damages. Appeal File, Exhibit 4. GSA ultimately sold the radios to someone else for \$22,100. *Id.*, Exhibit 6.

Appellant has purchased many items at GSA online auctions. This time, however, he never saw the electronic mail messages from the contracting officer because appellant was having computer problems and he “accidentally forgot” to follow up on his bid.

Discussion

Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

When GSA accepted Mr. Kyong’s bid, the terms and conditions of the online auction became part of a contract between the agency and the buyer. *Darren R. Gentilquore v. General Services Administration*, GSBCA 16705, 05-2 BCA ¶ 33,117. It is undisputed that appellant (1) agreed to the terms and conditions of the electronic auction, (2) submitted the winning bid, and (3) failed to pay for the items after being sent two electronic mail notifications of acceptance from the contracting officer. The terms and conditions of the sale stated that successful bidders would be notified by electronic mail, not by telephone or fax, and that failure to pay for and remove the items within the prescribed time periods (two and ten days, respectively) would result in an assessment of liquidated damages in the amount of \$200 or twenty percent of the purchase price, whichever is greater.

Appellant’s failure to pay for the radios was a breach of the contract, and the contracting officer’s assessment of liquidated damages was proper. Although appellant’s computer problems prevented him from receiving the contracting officer’s electronic mail messages, under the contract’s terms and conditions, it was appellant’s responsibility to “follow-up on the status of his/her bid.” Appellant, not the Government, bore the risk of appellant’s computer malfunctioning. We do not know the precise circumstances in which appellant received telephone reminders in the past, but here, the terms of the sale specifically stated that successful bidders would not be notified by telephone. The Government followed the contract to the letter -- appellant did not.

Decision

Based on undisputed material facts, GSA is entitled to judgment as a matter of law. Accordingly, GSA's motion for summary relief is granted and the appeal is **DENIED**.

ROBERT W. PARKER
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

EDWIN B. NEILL
Board Judge