Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED: June 26, 2006

GSBCA 16736

WALTER R. MOODY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Walter R. Moody, pro se, Yreka, CA.

Leigh Ann Bunetta, Office of Regional Counsel, General Services Administration, Denver, CO, counsel for Respondent.

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

PARKER, Board Judge.

Walter R. Moody (appellant) has appealed the decision of a General Services Administration (GSA) contracting officer assessing liquidated damages in the amount of $1180 in connection with the purchase of a truck at a GSA auction. The parties have requested the Board to decide the appeal based upon the written record. Both sides have submitted all of the evidence they deem relevant, as well as a brief or letter setting forth their arguments. We find that GSA has not proved by a preponderance of the evidence the validity of its claim for liquidated damages. Accordingly, we grant the appeal.

Findings of Fact

With one exception, which will be discussed in detail below, the facts are undisputed. On May 12, 2005, appellant participated in a GSA auction. Among the terms and conditions of the auction to which appellant agreed when he registered were the following:

> **Description Warranty:** The Government warrants to the original purchaser that the property listed in the Invitation for Bids 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.
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> . . . .
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> **Deficiencies**, when known, have been indicated in the item description. However, absence of any indicated deficiencies does not mean the item is without deficiencies. Bidders are cautioned to inspect before bidding.
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> . . . .
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> **Payment/Removal:** Payment must be made during or immediately following the sale: **BY 2:00**. Successful bidders must remove property between 8:30 AM and 3:30 PM, local time on or before **MAY 19, 2005** or storage charges may be assessed, the following day, at the prevailing commercial storage rate for the local area.
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> . . . .
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> **Failure to pay/remove:** The purchaser agrees that in the event he/she fails to pay/remove, the Government shall be entitled to retain or collect 20% or $200 [p]er item in [a]ccordance with the General Sales Terms and Conditions.

Appeal File, Exhibit 2.

Immediately prior to the commencement of bidding on Item No. 079, a 1993 Ford F350 pickup truck, the vehicle description was read aloud. Although the written description did not contain an estimated mileage for the vehicle, the actual mileage of 86,544 was announced at that time.

Appellant, who was present during the auction, bid on the vehicle and won it at a price of $5900. Appellant paid for the vehicle by check, and the parties signed a Purchaser's

Receipt and Authority to Release Property. The receipt listed the mileage at 86,544. Appellant was given the keys to the vehicle, but did not remove it on the day of the sale.

Appellant states that, after he returned home, he realized that the vehicle had 86,000 miles on it. Before GSA could cash the check, appellant stopped payment on it and also mailed back the keys.

On May 24, appellant had a telephone conversation with the contracting officer during which they discussed whether appellant intended to follow through with the purchase. Here is where the disputed fact comes into the picture. Appellant claims that during the telephone conversation, the contracting officer gave appellant until the morning of May 26 to inform him whether appellant intended to honor the purchase agreement. GSA maintains that the contracting officer gave appellant until May 25 to state his intent.

Back to the undisputed facts. Appellant called the contracting officer on the morning of May 26 and left a message saying that he intended to honor the purchase agreement and pick up the truck over the weekend. The contracting officer returned the call later that morning and left appellant a message, telling appellant that he was too late.[1] Also on May 26, the contracting officer sent appellant a letter stating that appellant was in default of the contract and assessing liquidated damages in the amount of $1180. Appellant wrote back on June 8, reminding the contracting officer that he had given appellant until the morning of May 26 to state whether appellant intended to proceed. In his decision of June 27, the contracting

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[1] Appellant submitted a tape from his answering machine purporting to be a recording of the May 26 message from the contracting officer:

[As transcribed by appellant]

> Walt [appellant], this is Mike Gartland [the contracting officer], since I didn't hear from you yesterday as I ask [sic] you to or earlier this morning you are already in default so there is no need in going to Missoula this weekend. Thank you.

Appellant's letter to the Board of April 18, 2006, with enclosure. The Board has listened to the tape several times but, due to the extremely low quality of the recording, is unable to understand any of the content. The Board did not consider the tape in rendering its decision, but did consider the undisputed fact that the contracting officer told appellant that he was too late.

officer stated that "you did not contact my office on May 25th as we had discussed, but rather, on May 26th." This appeal ensued.

Discussion

The parties agree that appellant failed to comply with the original terms of the contract concerning payment for, and pickup of, the vehicle appellant won at a GSA auction. They also agree that the contracting officer, in a telephone call of May 24, set a new date by which appellant could state his intention to complete the purchase of the vehicle. GSA claims that the date was May 25; appellant asserts that the contracting officer gave him until the morning of May 26. The parties agree that Mr. Moody called on the morning of May 26 to state his intention to pay for and pick up the vehicle. GSA argues that appellant failed to meet the deadline imposed by the contracting officer and was thus in breach of the contract. Appellant disagrees and has appealed GSA's decision to assess liquidated damages for the alleged breach.

There is a dearth of evidence in the record upon which the parties have asked the Board to base a decision. The only document that supports GSA's position is the contracting officer's decision itself, which states that appellant was given until May 25 to respond. On appellant's side, there is Mr. Moody's June 8 letter to the contracting officer, reminding the contracting officer that he gave appellant until the morning of May 26 to respond.

The Government has the burden of proof here. Assessment of liquidated damages is a Government claim. *Midwest Properties, LLC v. General Services Administration*, GSBCA 15822, et al., 03-2 BCA ¶ 32,344. Consequently, the Government, not the contractor, has the burden of proving its claim by a preponderance of the evidence. *Mitchell Enterprises, Inc.*, ASBCA 53202, et al. (May 4, 2006).

By not paying for and picking up the vehicle within the timeframes provided in the contract, appellant breached the contract. The contracting officer, however, in a telephone call of May 24, gave appellant a period of time in which appellant could cure the breach. The Government has not established, by a preponderance of the evidence, what period of time was given and, consequently, has not established that appellant failed to cure the breach within the period.

The contracting officer's decision does not establish that the cure period ended on May 25. Once appealed, a contracting officer's decision is entitled to no special deference:

> "De novo review precludes reliance upon the presumed correctness of the decision." *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994). As this court previously had stated in *Assurance Co. v. United States*, 813 F.2d

> 1202, 1206 (Fed. Cir. 1987), quoted with approval in *Wilner*: "where an appeal is taken to a board or court, the contracting officer's award is not to be treated as if it were the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal." Delta cannot escape these principles by framing its argument not in terms of deferring to the contracting officer's decision but in terms of treating that decision as reflecting the government's contemporaneous interpretation of the contract.

White v. Delta Construction International, Inc., 285 F.3d 1040, 1045 (Fed. Cir. 2002).

Each side has presented an essentially equal amount of evidence, both in quantity and quality -- evidence of a telephone conversation in which the contracting officer gave appellant some amount of time to cure the default, one follow-up telephone message from each side supporting their respective recollections of the first telephone call, and one letter from each party to the other reiterating the differering recollections. Appellant's call to the contracting officer on the morning of May 26 telling him that appellant was going to pay for and pick up the truck over the weekend, as well as appellant's letter of June 8 reminding the contracting officer that he had given appellant until the morning of May 26 to make the call, have convinced us that appellant believed that he complied with the contracting officer's offer to allow appellant to cure the breach. Although we have no doubt that the contracting officer honestly thought that he had given appellant only until May 25 to respond, without the ability to assess the credibility of the conflicting versions of the events, we cannot say with any certainty which version is correct. Accordingly, because the Government has the burden of proof, and because the Government has not established by a preponderance of the evidence that the cure date was earlier than the morning of May 26, we hold that the Government has failed to establish that appellant's response was untimely. The contracting officer's assessment of liquidated damages for breach was thus improper.

Decision

The appeal is **GRANTED**.

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ROBERT W. PARKER
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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MARTHA H. DEGRAFF
Board Judge