

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Benson Aero-Motive, Inc.) ASBCA No. 52474
)
Under Contract No. 01-9167-0062)

APPEARANCE FOR THE APPELLANT: Mr. Charles E. Benson
Owner/President

APPEARANCE FOR THE GOVERNMENT: Theodore R. Pixley, Jr., Esq.
Chief Trial Attorney
Defense Reutilization and
Marketing Service
Battle Creek, MI

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON GOVERNMENT' S MOTION TO DISMISS

Appellant, Benson Aero-Motive, Inc. (Benson) appeals the denial of a claim for the purchase price of missing parts appellant believes should have been part of items purchased under a surplus sales contract. The Government filed a Motion to Dismiss Appeal, arguing that appellant is not entitled to any relief under the contract beyond what had already been afforded. We treat the motion as one for summary judgment since it refers to matters outside the pleadings. Appellant has responded to the motion. The motion is granted.

Statement of Facts

1. The Defense Reutilization and Marketing Service issued Invitation for Bids (IFB) No. 01-9167 with a bid opening date of 4 August 1999 (R4, tab 1). The following relevant terms and conditions of the sale were either set forth in the IFB or referenced therein:

1. INSPECTION.

The bidder is invited, urged, and cautioned to inspect the property prior to submitting a bid. Property will be available for inspection at the places and times specified in the Invitation.

2. CONDITION AND LOCATION OF PROPERTY.

Unless otherwise provided in the Invitation, all property listed therein is offered for sale “as is” and “where is.” Unless otherwise provided in the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose. Except as provided in Conditions No. 12 and 14 or other special conditions of the Invitation, no request for adjustment in price or for rescission of the sale will be considered. *This is not a sale by sample.*

....

15. LIMITATION OF GOVERNMENT’ S LIABILITY.

Except for reasonable packing, loading, and transportation costs (such packing, loading, and transportation costs being recoverable only when a return of property at Government cost is specifically authorized in writing by the Contracting Officer) the measure of the Government’ s liability in any case where liability of the Government to the Purchaser has been established shall not exceed refund of such portion of the purchase price as the Government may have received.

....

30. GURANTEED DESCRIPTIONS.

Despite any other conditions of sale, the Government guarantees to the original Purchaser that the property will be as described in the Invitation for Bid; however:

....

b. If a misdescription is determined to exist after removal of the property, the Government will adjust the purchase price paid for the property or any portion thereof determined to be misdescribed commensurate with the fair market value of the property actually received; however:

....

(2) No adjustment will be made unless the Purchaser notifies the Contracting Officer of any misdescription by written notice, within 30 calendar days after removal of the property FURTHERMORE, THE GOVERNMENT DOES NOT WARRANT OR GUARANTEE ANY OF THE FOLLOWING:

(a) Information in the item description pertaining to condition, . . . manufacturer’s part number, Federal Stock Number or the property’s fitness for any use or purpose.

. . . .

c. Should the Contracting Officer determine that a misdescription exists after removal of property, regardless of the exceptions stated above under this clause, the Government will accept return of the misdescribed property at the Purchaser’s expense, to a location specified by the Contracting Officer, for a refund of any money received for that property, provided the Contracting Officer received timely notice of the misdescription as stated in paragraph b(2) above.

d. This warranty is in lieu of all other guarantees, expressed or implied and all other obligations on the part of the Government. The Purchaser is not entitled to any payment for loss of profits or any other monetary damages, special, direct, indirect, or consequential. Recovery of any kind against the Government under this provision is limited to a refund of the purchase price of the material found to have been misdescribed. THE GOVERNMENT DOES NOT WARRANT THE MERCHANTABILITY OF THE PROPERTY OR ITS FITNESS FOR ANY USE OR PURPOSE.

(R4, tabs 1, 2)

2. Item 33 of the IFB, Borescope, five each, was described with the following special features:

FLEXIBLE; FIBEROPTIC; SOFT COVER; DIRECT VISION; DEFLECTING TIP; 0.380 IN. O/DIA; 39.000 IN. WORKING LG; 50.0 DEG FIELD OF VIEW

. . . .

NSN 6650-01-38-7198, PART NO. BFIF3839DD,
BFOF3839DD, BFS3839DD

(R4, tab 1)

3. On 11 August 1999, Benson's bid for the five borescopes was accepted (Contract No. 01-9167-0062) in the bid amount of \$301.40 each plus a required \$50 shipping fee for a total of \$1,557.00 (R4, tab 4). Payment was made on 18 August 1999 (R4, tab 5). Benson did not inspect the property prior to bid (R4, tab 3).

4. Following receipt of the borescopes, Benson reported a discrepancy on 1 September 1999 to the Sales Contracting Officer (SCO), stating that the borescopes were missing the light source box and that the items were useless without the boxes (R4, tab 6). On 2 and 7 September 1999, Benson requested the SCO to communicate with Warner Robins Air Force Base to see if they could locate the light boxes (R4, tabs 7, 8).

5. By letter of 27 September 1999, Benson advised the SCO that the Government was obligated to purchase the light boxes through the original manufacturer at Government cost in order to comply with the contract (R4, tab 10). That view was supplemented on 29 September 1999, when Benson advised the SCO that the Government would also have to purchase the fiber connecting bundle which was also missing (R4, tab 11).

6. On 14 October 1999, the SCO replied to Benson advising that she had contacted Warner Robins and their records showed that they shipped everything they had. She also advised that the Government would not order the parts from a manufacturer and stated that she was authorizing return of the item for a refund in a separate letter. (R4, tab 12) A letter was issued on 14 October 1999 to Benson from the SCO authorizing appellant to return the property to DRMO San Antonio and that upon confirmation that the property was deficient as claimed, a full refund of \$1,507 plus \$50 shipping charges would be made (R4, tab 13).

7. No response was received from appellant and appellant did not return the property. Thus, on 16 November 1999, the SCO advised Benson by fax that if she did not receive the signed receipt for the property from DRMO San Antonio by 26 November 1999, she would consider the matter closed (R4, tab 14).

8. That same day, 16 November 1999, appellant replied by fax as follows:

I have already given a purchase order for the missing parts from the factory. The missing parts consisted of 5 each light boxes and 5 each fiber connecting bundles.

I asked you at one time and gave you the name of the factory man to talk to to purchase the missing parts, and your reply was

you were not allowed to buy the parts from the factory. Therefore, now it is at a point for you to settle with me by reimbursing me my cost of the missing parts. Have talked with my counsel on the above matter, and he advises me that you are responsible for settling this matter without any further cost to me because under the federal stock number and part number in the sales catalog, this is a description of the complete kit. In a short while I will follow my counsel's advise, and you will receive further correspondence regarding the matter from me.

(R4, tab 15)

9. In a follow-up letter dated 17 November 1999, Benson rejected the Government's offer for a refund following return of the property, explaining that it had placed an order for the missing parts and sought reimbursement from the Government for the cost of the parts, \$2,996.80. Appellant explained that if they returned the boroscopes for a refund, the light boxes and fiber connecting bundles already purchased would be useless. Appellant reasserted that the claim was based on the fact that the manufacturer's part number and federal stock number refer to a complete boroscope kit which includes the light source and fiber bundles. (R4, tab 16)

10. On 19 November 1999, the SCO issued a final decision denying the claim for reimbursement of the cost of purchasing light boxes and fiber connecting bundles for the borescopes (R4, tab 17). A timely appeal of that decision was made to this Board and was docketed as ASBCA No. 52474.

Decision

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

There are no genuine issues of material fact. The Government admits in its motion that the property purchased by Benson was misdescribed in the IFB and has advised Benson that it may return the property and receive a complete refund of the purchase price and shipping charges. Appellant, however, contends the Government is liable for the cost of replacing the missing components, which exceeds the amount appellant paid the Government for the borescopes. Appellant bases its claim on the contention that the manufacturer's part number listed in the IFB is a part number for a kit and a kit includes the light box and the fiber connecting bundle.

Under the Guaranteed Descriptions clause of the contract, information in the item description pertaining to manufacturer's part numbers is not warranted or guaranteed and thus appellant's contention is not supported by the contract.

Benson submitted its bid without exceptions and without inspecting the property. It accepted the terms and conditions of the sale. According to those terms and conditions, Benson's remedy for misdescription of the property was limited to a refund of the purchase price following return of the property absent bad faith on the part of the Government or other exceptional circumstances rendering enforcement unconscionable. *Arthur G. Germaine*, ASBCA No. 52537, 00-1 BCA ¶ 30,853.

We discern no exceptional circumstances in this appeal - no large expenditure by appellant prior to discovery of the missing components and no willful breach or other conduct by the Government indicating bad faith such as would justify a conclusion that imposing the limitation on liability would be unconscionable. *See, Sidney Danziger*, ASBCA No. 37795, 89-3 BCA ¶ 22,125.

Having chosen not to return the property, Benson may not recover. The Government is entitled to judgment as matter of law. The motion for summary judgment is granted.

The appeal is denied.

Dated:

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52474, Appeal of Benson Aero-Motive, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals