

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
R.J. & M. Cherry ) ASBCA No. 52434  
 )  
Under Contract No. 50-9305-0004 )

APPEARANCE FOR THE APPELLANT: Mr. R.J. Cherry  
Luxembourg, Belgium

APPEARANCE FOR THE GOVERNMENT: Robin Walters, Esq.  
Trial Attorney  
Defense Reutilization  
& Marketing Service (DLA)  
Wiesbaden, Germany

OPINION BY ADMINISTRATIVE JUDGE DICUS  
PURSUANT TO BOARD RULE 12.3

This appeal is taken from a contracting officer's decision denying appellant's claim that goods purchased under a surplus contract were misdescribed. The underlying contract is for the sale of surplus wire cable. Appellant has elected to proceed under Board Rule 12.3.

SUMMARY FINDINGS OF FACT

Invitation for Bid (IFB) No. 50-9305 with a bid opening date of 14 June 1999 and an inspection period commencing 28 May 1999 was issued by the Defense Reutilization and Marketing Office, Kaiserslautern, Germany. Included among the items offered for sale was Insulated Copper Wire Cable, Scrap, described as follows:

Including various types of insulated copper wire and cable, tinned and untinned copper wire, cable and pieces covered with rubber, plastic, paint, fabric, and other insulations. Some on steel reels, with and without connectors.

....

Loose and on steel and wooden spools which are included in weight and sale. Est. total wt. of steel and wooden spools: 900 kg. On pallets which are not included in weight and sale.

Scrap

35000 KILOGRAM

....

THE FOLLOWING ARTICLES APPLY:

“Sale by Reference, March 1994”

PART 05-I: Military Munitions List Items (MLI)

PART 05-K Munitions List and Commerce Control List  
Items (MLI/CCLI) Compliance

PART 08-F: Import Certificate and Delivery Verification  
(IC/DV)

PART 08-G: Disposition and Use of Property

(R4, tab 3)

The above-cited Sale by Reference pamphlet contained the following relevant sections:

## 2. CONDITION AND LOCALITY 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 ON 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. GUARANTEED 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:

a. If a misdescription is determined to exist prior to removal of the property, the Government will:

(1) Allow the Purchaser to sign a waiver accepting the property as is, with no adjustment made to contract price for that item.

(2) Cancel the item from the contract and refund the Purchaser any money the Government has already received for the item.

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 as misdescribed commensurate with the fair market value of the property actually received; however:

(1) No adjustment will be made for shortages of property sold by the "lot" and

(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 (except for property purchased overseas for import into the United States, in which case the Purchaser has 60 calendar days from the date of removal or 30 calendar days from the date of importation, whichever is less). The Purchaser must hold the property intact to permit inspection

or identification by the Government. FURTHERMORE, THE GOVERNMENT DOES NOT WARRANT OR GUARANTEE ANY OF THE FOLLOWING:

(a) Information in the item description pertaining to condition, acquisition cost, estimated total weight, estimated shipping dimensions, manufacturer's part number, Federal Stock Number or the property's fitness for any use or purpose.

(b) Estimated "weight" of property offered for sale by the "unit" or by the "lot."

(c) Estimated number of "units" of property offered for sale by "weight."

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, tab 11)

On 18 June 1999 appellant's bid of \$9,291 for the scrap wire was accepted and the contract was awarded to appellant (R4, tab 4). By FAX of 28 July 1999 Mr. Cherry

informed respondent that the scrap was misdescribed and that he intended to return it. After further discussion proved unavailing, he filed a claim in the amount of 17,805.27 DM plus transportation costs on 16 August 1999 (R4, tab 7). The contracting officer and the receiving foreman visited the site where the scrap wire resided on 13 October 1999 and concluded it was not misdescribed (R4 supp., tab 1). Thereafter a contracting officer's decision denying the claim was issued on 18 October 1999 (R4, tab 8).

Respondent has submitted evidence in the form of photographs, a statement documenting an examination of the scrap wire in April 2000 by a disposal specialist, and a statement from an independent scrap dealer. The evidence supports its position that the cable was not misdescribed. (R4 supp., tabs 2-4) Appellant has submitted no evidence.\* We find the material was not misdescribed.

### DECISION

Appellant, as the proponent of the claim, bears the burden of proving that the cable was misdescribed. *Sphinx International Incorporated*, ASBCA No. 38784, 90-3 BCA ¶ 22,952. Respondent has submitted evidence that the cable sold to appellant was consistent with the description in the IFB. Appellant has submitted no evidence to refute this or to otherwise support its claim. On the basis of the record before us, we can reach no other conclusion but that the material purchased by appellant was not misdescribed. The appeal is denied.

Dated: 13 July 2000

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CARROLL C. DICUS, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

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\* Earlier in this proceeding the Board unsuccessfully attempted to bring the parties to a settlement. The Board has communicated with appellant to leave no uncertainty that the Board was past the point of facilitating settlement and that a decision would result from this proceeding. The proceeding was prolonged to give appellant additional opportunity to submit evidence, to no avail.

I concur

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EUNICE W. THOMAS  
Administrative Judge  
Acting 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. 52434, Appeal of R.J & M. Cherry, rendered in conformance with the Board's Charter.

Dated:

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