

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Arthur G. Germaine ) ASBCA No. 52537  
 )  
Under Contract No. 31-9354-0037 )

APPEARANCE FOR THE APPELLANT: Mr. Arthur G. Germaine

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

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Arthur G. Germaine appeals the denial of his claim for damages arising from the Government's misdescription of property on a surplus sales contract. The Government moves to dismiss. Since the motion goes to the merits of the claim, and not to our jurisdiction, we treat it as one for summary judgment. There are no genuine issues of material fact, and the Government is entitled to judgment as a matter of law.

STATEMENT OF FACTS

1. On or about 30 June 1999, the Defense Reutilization and Marketing Service (DRMS) issued an Invitation for Bids (IFB) for the sale of Government property at locations throughout the United States. The following terms and conditions of the sale, relevant to this appeal, were set forth in the IFB and documents 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.

....

15. LIMITATION ON GOVERNMENT'S LIABILITY.

Except . . . ( . . . 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:

. . . .

b. If a misdescription is determined to exist after removal of the property, the Government will adjust the purchase price paid for the property. . . 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 . . . .

. . . .

c. Should the Contracting Officer determine that a misdescription exists after removal of property . . . 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.

(R4, tab 2 at 6, 8-9)

2. The property listed in the IFB included a radar test set located at Fort Meade, Maryland. The description of this set in the IFB stated in relevant part: “Parts missing cannot be determined . . . Used-Fair Condition.” Technical data was not included in the item description. (R4, tab 1 at 36) The set was available for inspection beginning 30 June 1999 (R4, tab 1 at 1). On 1 July 1999, Mr. Germaine submitted a bid of \$500 for the set. He did not inspect the set before submitting his bid, and his bid took no exception to the advertised terms and conditions. (R4, tab 3)

3. On 23 July 1999, Mr. Germaine’s bid for the test set was accepted. He paid the \$500 bid price, and on 4 August 1999 he caused the set to be removed from Fort Meade and shipped to California. Upon receipt of the set in California, he found that many components had been removed and that the set was not repairable. (R4, tabs 5, 6) By letter to DRMS dated 16 August 1999, Mr. Germaine gave timely notice of misdescription, and expressed dissatisfaction with the contractually specified remedy (R4, tab 6).

4. On 25 August 1999, a DRMS employee inspected the set, determined that it had been cannibalized, and returned it to the DRMS office at Port Hueneme, California (R4, tabs 7, 8). On 27 August 1999, DRMS sent Mr. Germaine a proposed contract modification acknowledging the misdescription, and providing for refund of the purchase price with a general release by Mr. Germaine of “any and all claims, causes or actions which may have accrued, or may accrue, under [the sales contract]” (R4, tab 9).

5. Mr. Germaine refused the proposed modification. By letter dated 8 November 1999, he claimed reimbursement in the amount of \$1,191 for FAX, telephone, and freight services in connection with the sale and with attempts to secure technical data on the test set. This letter also claimed an unstated amount for postage and travel expenses to California. (R4, tab 13) By final decision dated 15 December 1999, the Sales Contracting Officer (SCO) denied the claim. This appeal followed.

## DECISION

In submitting his bid without exceptions, Mr. Germaine accepted the advertised terms and conditions of the sale. According to those terms and conditions, his remedy for the misdescription was limited to a refund of the purchase price upon return of the property. Absent bad faith by the Government, or other exceptional circumstances making enforcement unconscionable, Mr. Germaine is bound by his agreement. *See, Sidney Danziger*, ASBCA No. 37795, 89-3 BCA ¶ 22,125 at 111,286-87. Mr. Germaine has alleged no facts that would constitute bad faith of the Government in this transaction, or other exceptional circumstances making enforcement unconscionable. The IFB expressly “invited, urged, and cautioned” Mr. Germaine to inspect the property prior to submitting his bid. Had he done so he would have discovered the true condition of the set before bidding, and could have avoided the damages which he now claims. Moreover, his alleged difficulties in obtaining technical data on the set are irrelevant. Technical data was not included in the item on which he bid.

While Mr. Germaine is not entitled to damages, he, as far as we know, remains entitled to a refund of the purchase price. In this regard, we note that no provision of the contract requires him to execute a general release of claims as a condition of receiving the refund. However, since he did not include a demand for the refund in his claim to the contracting officer, our present decision is limited to his claim for damages.

The appeal is denied.

Dated: 21 March 2000

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MONROE E. FREEMAN, JR  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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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. 52537, Appeal of Arthur G. Germaine, rendered in conformance with the Board's Charter.

Dated:

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