

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Air Technology, Inc.) ASBCA No. 50469
)
Under Contract No. 31-6355-077)

APPEARANCES FOR THE APPELLANT: John J. Fausti, Esq.
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APPEARANCES FOR THE GOVERNMENT: Theodore R. Pixley, Jr., Esq.
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Trial Attorney
Defense Reutilization and
Marketing Service
Battle Creek, MI

OPINION BY ADMINISTRATIVE JUDGE LIPMAN

Air Technology, Inc. appeals the contracting officer’s denial of its claim for a refund of \$52,850, plus interest, the purchase price of items purchased from a Defense Reutilization and Marketing Service sale by catalog. Appellant’s claim arises from a reported misdescription of the property. The denial of the claim was based upon a contract term which provides that there is no relief for misdescribed property once that property is removed from Government control.

The Board has previously denied cross motions for summary judgment (98-2 BCA ¶ 30,028). The parties elected to waive a hearing and proceed on the record pursuant to Board Rule 11. In addition to the documentary evidence in the record, appellant has submitted into evidence an affidavit by its president, Mr. Mike Turner. Both parties have filed briefs.

FINDINGS OF FACT

1. On or about 19 June 1996, the Defense Reutilization and Marketing Service (DRMS, or the Government) issued an Invitation for Bids (IFB) for the sale of government property at locations throughout the United States. The DRMS agent for the sale was ADT Automotive, Inc. (ADT). (R4, tab 1)

2. The following terms and conditions of the sale, relevant to this appeal, were set forth in the IFB:

CONDITIONS OF SALE - SEALED BID

The General Information and Instructions and General and Special Conditions of Sale are hereby incorporated by reference and become a part of this Invitation for Bids and any contract resulting from acceptance of bid submitted pursuant to this Invitation for Bids as fully as though such instructions, Term and Conditions had been specifically set forth herein. The Instructions, Term and Conditions are contained in Defense Reutilization and Marketing Service pamphlet entitled "Sale by Reference - Instructions, Terms and Conditions applicable to Department of Defense Personal Property Offered for sale by Defense Reutilization and Marketing Service dated March 1994", and may be obtained upon request from DRMS International Sales Office., P.O. Box 5275, DDRC, 2163 Airways Blvd. Memphis, Tennessee 38114-5210. Copies are available through any activity of the Defense Reutilization and Marketing Service. The Specific instructions, Terms and Conditions applicable to this sale are contained in the publication as follows:

DRMS pamphlet "Sale by Reference March 1994"

....

Part 2: General Sale Terms and Conditions (Standard Form 114C, Jun 86 ed., and DRMS Form 84, Oct 93). All conditions except Condition 4, 30 and 33 apply to all items.

(R4, tab 1 at 161)

3. The IFB included the following pertinent conditions for sale referenced in the DRMS pamphlet Sale by Reference March 1994:

PART 2

SALE OF GOVERNMENT PROPERTY GENERAL SALE TERMS AND CONDITIONS

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.* (Emphasis in original)

....

Condition 30, which the IFB excluded from the applicable General Sale Terms and Conditions, provided, in pertinent part, as follows:

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 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 (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.

....

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. (Emphasis in original)

(R4, tab 2 at 5, 8-9)

4. The IFB, on the unnumbered rear of page 164 of the 167-page IFB, in print larger than other print in the IFB, included the following as the only text on that page:

CONDITIONS OF SALE

ARTICLE B73: LIMITED GUARANTEED DESCRIPTION

Notwithstanding the provisions of part 2, Condition 30, Sale by Reference, prior to the property being removed from Government control, the Government guarantees to the original purchaser of the property offered for sale will be as described in the Invitation of Bids. [sic] If a misdescription is determined to exist prior to removal of the property from Government control, the sole and exclusive remedy will be to cancel the

item from the contract and refund the purchase price paid. Subsequent to removal of the property from Government control, the provision of Part 2, Condition 2, Sale by Reference, apply (as-is, where-is) and there will be no further relief available under this article. The foregoing is in lieu of all other guarantees or warranties, expressed or implied. The Government does not warrant the merchantability of the property or its fitness for any use of [sic] purpose. The amount of recovery under this Article is limited to the purchased price of the misdescribed property. The purchaser is not entitled to any payment for loss of profit or any other monetary damages, special, direct, indirect or consequential.

The cover of the IFB made no reference to Article B73. (R4, tab 1)

5. The IFB described item number 369 as follows:

AIRCRAFT JET ENGINE & GAS TURBINE COMPONENTS:
Consisting of:

- F110 ENGINE, STAGE #4 COMPRESSOR VANES; 26 EA
Mfr code: 07482

General Electric Co. GF Aircraft Engines Div
P/N 9526M64G15

Contract # F34601-89-G-6673
NSN 2840-01-192-5416

- T56 ENGINE TURBINE WHEEL DISK & HUB; 7 EA Mfr
code: 63005

Allison Aircraft Engine Co., Inc.
P/N 6571571

.....

(R4, tab 1 at 149)

6. Item 369 was made available for inspection at a designated location and times (R4, tab 2 at 147, 159).

7. Appellant's president has been involved in the purchase of surplus property from DRMS under local, regional and national IFBs since 1981. He "almost exclusively" uses part numbers to identify parts for purchases and for inventory management purposes. In his experience, when DRMS uses new clauses in the IFB and Buyer's Catalog, it generally lists them in a conspicuous manner and notes them on the cover page of the catalog, and, "to the

best of [his] knowledge,” it has not been the DRMS practice to use a Limited Guaranteed Description clause in its national sales brochures. (Turner affidavit) On 19 June 1996, appellant bid \$52,850 for Item 369. The bid included the following signed statement by appellant’s president: “I confirm that ‘I agree to be bound by all the terms and conditions of this invitation for bid’.” Appellant did not inspect the property prior to the sale. (R4, tab 3)

8. The Government awarded appellant Item 369, DRMS Sale # 31-6355 on 20 June 1996. The notice of award stated that the property had to be removed by 8 July 1996. (R4, tab 5)

9. Appellant arranged for the property to be removed from its sale location. By letters sent by facsimile on 9 and 16 July 1996, appellant notified DRMS that the T56 engine turbine wheel disks and hubs were misdescribed in the IFB as 6571571 and that appellant had actually received P/N 6871571. Further, appellant made “a claim to return [item 369] for a refund.” (R4, tabs 6, 7)

10. It is undisputed (a) that the part number was misdescribed as alleged, (b) that the part number described in the IFB did not exist, and (c) that the remainder of the IFB’s description was accurate. We so find.

11. By letter dated 19 July 1996, the Government’s sales contracting officer notified appellant that there was “no authority under the contract to consider [appellant’s] request to return property for a refund” in view of Article B73 of the IFB providing that “[s]ubsequent to removal of the property from Government control, the provision of Part 2, Condition 2, Sale By Reference, apply (as-is, where-is) and there will be no further relief available under this article” (R4, tabs 2, 8).

12. Following correspondence (R4, tabs 9-11), appellant submitted a claim by letter dated 16 September 1996 (R4, tab 12). We find that the contracting officer received the claim on 18 September 1996. On 19 December 1996, the contracting officer issued a decision denying the claim. Appellant made timely appeal.

DECISION

In this surplus sale case, after removing the property appellant seeks the refund of its purchase price because of the Government’s misdescription of the part number. The Government has denied the claim based upon the LIMITED GUARANTEED DESCRIPTION clause of the IFB, which provides that, following removal of the property, the sale is an “as-is, where-is” transaction and that there is no remedy for the misdescription.

Appellant’s primary contention pertains to the applicability of the LIMITED GUARANTEED DESCRIPTION clause. It maintains that the Government had a duty, consistent with the prior practice of DRMS, to highlight any changed or unusual terms or conditions of

the standard sales contract. Appellant argues: that the LIMITED GUARANTEED DESCRIPTION clause is rarely used by DRMS and any historical use has been in connection with local sales and auctions rather than national sales, such as this sale; that the IFB did not highlight the inclusion of the LIMITED GUARANTEED DESCRIPTION clause; and, that the clause was placed in an inconspicuous location in the IFB in contravention of the contractual obligation of ADT, which provided property disposal services to DRMS, to clearly identify to prospective buyers terms or conditions which differ from those previously used.

We have found that the IFB's Sale by Reference March 1994 pamphlet expressly provided that, unless otherwise provided, the sale was "as is" and "where is," the Government made no warranties, and no request for adjustment in price or sale rescission would be considered. The GUARANTEED DESCRIPTIONS clause, which would have modified the "as is" and "where is" provision to permit adjustment of the purchase price in the event of a misdescription, was clearly excluded from the IFB. Consequently, even were we to accept appellant's contentions and read the LIMITED GUARANTEED DESCRIPTION clause out of the contract, an issue which we need not reach, we would have to conclude that the transaction was entered into on an "as is" and "where is" basis, as those terms would not have been modified by another clause of the sale.

We note, further, that appellant would have been unable to recover even under the terms of the GUARANTEED DESCRIPTION clause, which disclaims, among other things, any warranty or any guarantee of information in the item description pertaining to part number. Such an exclusionary clause is valid and may be enforced. *See Armstrong Glass Company, Inc.*, ASBCA No. 12812, 68-1 BCA ¶ 6783.

In short, we are faced with a situation where the Government offered for sale aircraft parts which were correctly described with the exception of the part number. The part number listed did not exist and appellant, despite its stated practice to rely upon part numbers in purchasing, must have based its decision to enter into this transaction upon other detailed descriptive data in the catalog. It did not inspect the item prior to sale and did not notify the Government of the misdescription until after removal of the property. Under the terms of this surplus sale appellant is not entitled to recover the purchase price.

The appeal is denied.

Dated: 8 February 2001

RONALD JAY LIPMAN
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
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. 50469, Appeal of Air Technology, Inc., rendered in conformance with the Board's Charter.

Dated:

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