

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Charles Hartlerode ) ASBCA No. 52634  
 )  
Under Contract No. 00-0000-0000 )

APPEARANCE FOR THE APPELLANT: Mr. Charles Hartlerode  
Temecula, CA

APPEARANCE FOR THE GOVERNMENT: Joel A. Zimmer, Esq.  
Trial Attorney  
Defense Reutilization and Marketing  
Service (DLA)  
Battle Creek, MI

OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON MOTION TO DISMISS

This appeal arises from the reoffer of an item at an auction of surplus Government property. During the first round of bidding, the item was “sold” to appellant for \$25.00. The sales contracting officer (SCO) reoffered the item because, in her opinion, there was a dispute as to the amount bid. Appellant then purchased it for \$5,300.00. Appellant seeks to reinstate the original sale. In its answer, the Government asserted an affirmative defense of lack of jurisdiction. On 19 October 2001, the Board directed the parties to show cause why the appeal should not be dismissed for lack of jurisdiction.

FINDINGS OF FACT

1. On 9 June 1999, the Defense Reutilization and Marketing Office (DRMO) at March Air Force Base (AFB), California, conducted an auction of surplus Government property. Item 153, which is the subject of this appeal, consisted of a quantity of insect protector nets. (R4, tabs 2, 10; ex. G-2)

2. The “IFB Special Local Auction Conditions” (DRMS Form 90), which were posted in and around the auction room, stated, in part, as follows:

(3) The Auctioneer’s “knocking down” an item will constitute an award by the Contracting Officer to the successful Purchaser for each item except as otherwise herein specifically provided.

(4) In the event of a dispute as to the amount of the bid, item or item number, and/or paddle number of a Bidder, the Contracting Officer reserves the right to reoffer the item in question. . . .

(R4, tab 10; ex. G-4)

3. The “Local Auction Announcements,” which were also posted in and around the auction room, were read aloud by the auctioneer at the beginning of the auction. They contained the following relevant provisions:

3. This auction is being taped.

. . . .

9. A “**knock-down**” by the auctioneer constitutes a binding contract between you and the Government. Once an item is “**knocked-down**” the purchaser may not withdraw his/her bid. There is one exception; in the event of a dispute as to the amount bid, item or item number and/or paddle number of the bidder, the contracting officer reserves the right to reoffer the item in question. . . . [Emphasis in original]

(R4, tab 2; ex. G-1)

4. Item 153 was knocked-down to appellant for \$25.00 (R4, tabs 7, 10; ex. G-2).

5. Immediately following the knock-down, another bidder, Mr. Ted Abma, protested the sale to appellant, asserting that he had bid \$1,000.00 for item 153 prior to the knock-down (R4, tabs 9, 10, 11, 13; exs. G-1, -2).

6. The auctioneer stopped the auction and asked the SCO to resolve the matter. After listening to the tape, she concluded that Mr. Abma had bid \$1,000.00 prior to the knock-down and again as the auctioneer knocked-down the item to appellant. As a result, the SCO decided to reoffer item 153. (R4, tabs 9, 10, 12; exs. G-1, -2)

7. During the second round of bidding, appellant was awarded item 153 for \$5,300.00. On 10 June 1999 the SCO notified appellant of the award of Contract No. 44-9006-0019 including item 153 for \$5,300.00. (R4, tabs 1, 5, 6, 8; exs. G-1, -2)

8. On 21 July 1999, appellant “protested” the SCO’s decision to reoffer item 153 on the grounds that he was the only bidder for item 153, the item had been knocked-down to him and that, under clause 9 of the “Local Auction Announcements,” he had a binding

contract with the Government to purchase the item for \$25.00. Appellant requested that he be given item 153 for the original price of \$25.00. (R4, tab 7)

9. On 30 August 1999, the SCO affirmed her decision (R4, tab 6).

10. On 10 September 1999, appellant wrote the SCO that he did not accept her determination that his protest was denied (R4, tab 5).

11. The SCO denied appellant's "claim" on 16 November 1999, stating as follows:

My decision was based on a careful review of the bidding for the item. As you know, DRMO March records all auction sales to allow us to fairly address and resolve disputes that may arise. In the bidding for item 153, it was apparent a bidder did enter a bid of \$1000 for the item prior to the item being awarded to you. Due to an administrative oversight on the part of DRMO March personnel, the bid was not recognized and the item was awarded to you for \$25. The error was brought to my attention and the bidding for the item was reopened. The item was awarded to you for \$5,300.

(R4, tab 4)

12. Appellant appealed the SCO's decision to this Board on 11 February 2000 and the Board docketed it under Contract No. 44-9006-0019.

13. The Board has listened to the tape of the sale (R4, tab 13). Although we were unable to discern what was said, we heard another voice other than the auctioneer, prior to knock-down.

### DECISION

Appellant argues that the Board has jurisdiction to decide this appeal for two reasons. First, appellant asserts that, under clause 9 of the "Local Auction Announcements," he had a binding contract with the Government. Clause 9 states, in part, that a knock-down "constitutes a binding contract." Since it is undisputed that the auctioneer knocked-down item 153 to appellant for \$25.00, appellant concludes that he had a binding contract with the Government to purchase the item for that amount. Second, appellant argues that the SCO's reoffer of the item was improper because there was no *bona fide* dispute as to the amount bid. According to appellant, the tape of the sale indicates that he was the only bidder. As a result, appellant concludes that the Board has jurisdiction to decide this appeal. We disagree.

Our jurisdiction is derived from the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. Section 602(a) of the CDA limits our jurisdiction to contracts between the executive branch of the Government and a contractor. Thus, we do not have jurisdiction over bid protests because bid protests, by definition, involve disputes between the Government and a disappointed bidder. *Benson Aero-Motive, Inc.*, ASBCA No. 41749, 91-2 BCA ¶ 23,831; *Lewis & Michael, Inc. and United Moving and Storage, Inc.*, ASBCA No. 36671, 88-3 BCA ¶ 21,154.

We have jurisdiction to determine whether there was a binding contract prior to the decision to reoffer. After carefully considering the evidence and the arguments presented by appellant, we conclude that there was not. Although clause 9 states that a binding contract comes into existence when the auctioneer “knocks-down” an item to a bidder, it contains an exception. The exception authorizes the SCO to reoffer the item “in the event of a dispute as to the amount bid.” Contrary to appellant’s assertions, the tape did not establish that appellant was the only bidder. When we listened to the tape, we heard an unintelligible voice in the background prior to knock-down. That voice, coupled with Mr. Abma’s prompt assertion that he had submitted a higher bid prior to knock-down, was sufficient to justify the SCO’s finding that there was a dispute as to the amount bid. Accordingly, appellant did not have a binding contract to purchase item 153 for \$25.00.

In view of this result, we have deleted the reference to Contract No. 44-9006-0019 in the caption of this appeal.

The appeal is dismissed for lack of jurisdiction.

Dated: 17 December 2001

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ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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. 52634, Appeal of Charles Hartlerode, rendered in conformance with the Board's Charter.

Dated:

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