ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Hadi Zeghuzi	)	ASBCA No. 53459
	)	
Under Contract No. 50-0714-0023	)	

APPEARANCE FOR THE APPELLANT: Mr. Hadi Zeghuzi
Walnut Creek, CA

APPEARANCE FOR THE GOVERNMENT: Leslie Ann Chen, Esq.
Associate Counsel
Defense Reutilization & Marketing Service (DLA)
Camp H.M. Smith, HI

OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In this appeal involving the sale of two surplus printing presses, appellant submitted the highest bid, did not pay for the presses, and was assessed liquidated damages. He contends principally that no contract was formed between the parties and that he should have been permitted to pay for and remove one of the presses. The parties have submitted the appeal on the record pursuant to our Rule 11. We deny the appeal.

FINDINGS OF FACT

1. By date of 24 April 2000, respondent issued Invitation for Bid International, Zone 7 Sealed Bid Sale, Sale No. 50-0714 (R4, tab 4). The IFB included the two printing presses designated as Item 23 and Item 24, respectively. Item 23 was described in part as a Heidelberg 1985 offset press, offered for $117,660. Item 24 was also described in part as a Heidelberg 1985 offset press, offered for $85,038. (R4, tab 4 at 9)

2. The IFB contained contract terms and conditions and incorporated others by reference (R4, tab 4). The IFB provided that the March 1994 edition of the pamphlet *Sale By Reference—Instructions, Terms and Conditions Applicable to Department of Defense Personal Property Offered for Sale by Defense Reutilization and Marketing Service* (R4, tab 1) was incorporated by reference. Among other things, the IFB provided that all provisions in Part 1 (with one exception not relevant here) and all provisions of Part 2 of the pamphlet, together with all provisions of Part 3, except Article A, Bid Deposits, and Article E, All-Or-None Bid, applied to the sale. (R4, tab 4 at 15)

3. The *Sale By Reference* pamphlet included Part 2, Sale of Government Property General Sale Terms and Conditions, which provided in pertinent part:

6. PAYMENT.

The Purchaser agrees to pay for property awarded to him in accordance with the prices quoted in his bid. . . . [P]ayment of the full purchase price . . . must be made within the time specified in the Invitation and prior to delivery of any of the property. . . .

7. TITLE.

Unless otherwise provided in the Invitation, title to the property sold hereunder shall vest in the Purchaser as and when removal is effected. . . .

8. DELIVERY, LOADING, AND REMOVAL OF PROPERTY.

. . . .

(b) Where it is provided in the Invitation that . . . the Purchaser will load [*see* finding 6], the Purchaser will make all arrangements and perform all work necessary to effect removal of the property. The Purchaser shall remove the property at his expense within the period of time allowed in the Invitation. . . .

9. DEFAULT.

If, after the award, the Purchaser breaches the contract by failure to make payment within the time allowed by the contract as required by Condition No. 6, or by failure to remove the property as required by Condition No. 8, then the Government may send the Purchaser a 15-day written notice of default (calculated from the date of mailing), and upon Purchaser's failure to cure such default within that period (or such further period as the Contracting Officer may allow) the Purchaser shall lose all right, title, and interest which he might otherwise have acquired in and to such property as to which a default has occurred. The Purchaser agrees that in the event he fails to pay for the property or to remove the same within the prescribed period(s) of time, the Government shall be entitled to retain (or collect) as liquidated damages a sum equal to the *greater* of (a) 20 percent of the purchase price of the item(s) as to which the default has occurred, or (b) $25, or the

> purchase price of such item(s) if the purchase price is less than $25 . . . .

Part 2 also contained Additional General Sales Terms and Conditions, which included:

> 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.

(R4, tab 1 at 5, 6, 8) (emphasis in original)

4. The *Sale By Reference* pamphlet also included Part 3, Special Sealed Bid Conditions, which contained Article D, Award of Contract, providing in part:

> . . . A written award mailed (or otherwise furnished) to the successful Bidder within the time for acceptance provided in the Invitation shall be deemed to result in a binding contract without any further action by either party.

(R4, tab 1 at 10)

5. Instruction 20 in the IFB provided:

> Facsimile Notification Of Award**:** The bidder may request facsimile notification or [sic] award by checking the appropriated [sic] block on the Item Bid Page. When requested by the bidder, facsimile notification will be sent simultaneously with the mailing of the contract and will include the contract number and item(s) awarded.

(R4, tab 4 at 13)

6. The IFB contained Article BO1, Bid Deposits and Payment, which provided that "[f]ull payment is required prior to removal" in accordance with the Payment clause in the *Sale By Reference* pamphlet. (*See* finding 3) The IFB also contained a Loading Table providing that Items 23 and 24 "must be removed by . . . 60 DAYS AFTER AWARD DATE." A Loading Legend in the IFB provided that "Purchaser must load" both items. (R4, tab 4 at 16, 20)

7. The IFB stated that bids would be accepted until the bid opening date of 9 May 2000 (*id*. at 1). On that date, appellant submitted a bid by electronic mail for $29,520, consisting of $14,860 on Item 23 and $14,660 for Item 24. Respondent received the bid the same day. (R4, tab 5) In submitting his bid, appellant did not employ the Item Bid and Award Page (R4, tab 4 at 23-24) and hence did not check the box for facsimile notification of award, as contemplated by Instruction 20 of the IFB (*see* finding 5). Appellant's bid stated, however: "Award Contracts sent by Fax: Yes" (R4, tab 5).

8. By date of 10 May 2000, the sales contracting officer issued a Notice of Award, Statement and Release Document (DRMS Form 1427) for Contract No. 50-0714-0023, covering both Items 23 and 24, to appellant for the total price of $29,520 (R4, tab 6). In block 9, "PROPERTY MUST BE REMOVED BY (Final date of removal)," the entry "See Block 10" appears (*id*.). In block 10, under the description of each item, the entry "Free Removal Date: 07/10/00" appeared (*id*.). In terms similar to those employed in the IFB, the Notice of Award also stated the requirement that "[p]ayment of amount due . . . must be made prior to removal of any material" (*id.; see also* finding 6).

9. In his letter to the Board dated 17 August 2001, which we have treated as his complaint, appellant alleges that he received the faxed Notice of Award on 10 May 2000. (Compl. at 2) While he further alleges that the Notice "was not clear or Readable" (*id*.), we find no evidence to support this allegation. Appellant further alleges that he called respondent to verify the contract numbers and amounts and to ask that a better copy of the award be mailed to him (*id*.). He alleges he was told that the award would be mailed to him and that he then contacted his "client" to inform him that "we got the presses" (*id*.).

10. We find no evidence that the Notice of Award was mailed to appellant. In her declaration, the sales contracting officer attests, and we further find, that she "sent Appellant the contract award by facsimile since he had marked on his bid sheet, 'Yes' after the statement 'Award contracts sent by fax'" (Clark decl., ¶ 6). She adds that, to her knowledge and recollection, appellant never requested that a copy of the Notice of Award be sent to him by mail (Clark decl., ¶ 14). She also avers that agency "policies and regulations" do not require that the Notice of Award be sent to successful bidders by mail (Clark decl., ¶ 8).

11. In his complaint, appellant alleges that, shortly after being informed that "we got the presses," his client advised him that Item 23 had been manufactured in 1984 rather than

1985 as described in the IFB. He further alleges that he thereafter advised the sales contracting officer both by telephone and by facsimile that the item had been misdescribed and requested that it be removed from the contract. (Compl. at 2)

12. Appellant did not pay for or remove Items 23 and 24 by the 10 July 2000 date specified in the Notice of Award (Clark decl., ¶ 9) (*see* finding 8). On 12 July 2000, the sales contracting officer sent appellant a Notice of Default. This Notice gave appellant until 27 July 2000 to cure the default. It informed him that if the default was not cured by that date, he would lose all right, title, and interest in the Items and that he would be subject to liquidated damages. (R4, tab 9 at 1) The record indicates that the Notice was successfully transmitted to appellant by facsimile on 12 July 2000 (*id*. at 2, 3; *see also* Clark decl., ¶ 9).

13. Appellant did not cure the default (Clark decl., ¶ 10). On 28 July 2000, the sales contracting officer sent him a Statement of Account for Liquidated Damages in the amount of $5,904, representing 20 percent of the total of his $29,520 bid for both Items 23 and 24 (*see* finding 3). The record indicates that the Statement was successfully transmitted to appellant on 28 July 2000. (R4, tab 10; Clark decl. ¶ 10)

14. On 27 November 2000, appellant contacted the sales contracting officer and an attorney for respondent, alleging that Item 23 had been misdescribed in the IFB because it had been manufactured in 1984, rather than in 1985 (R4, tabs 12-13). While appellant asserted during the conversation that he had faxed something to her "about a month ago," we find that appellant had not informed her previously of the misdescription of Item 23 (R4, tab 12; Clark decl. ¶ 12).

15. After confirming with Heidelberg USA, Inc., that Item 23 had been manufactured in 1984 and that Item 24 had been manufactured in 1985 (R4, tab 14), the sales contracting officer advised appellant by letter dated 15 December 2000 that, pursuant to the GUARANTEED DESCRIPTIONS clause (*see* finding 3), Item 23 would be canceled from the contract and the liquidated damages (*see* finding 13) reduced (R4, tab 15 at 2). The new assessment was $2,932, representing 20 percent of appellant's $14,660 bid on Item 24 (*see* finding 7), plus interest (*id*.). By letter dated 11 January 2001, respondent informed appellant of the new liquidated damages assessment, again advising him that, "[u]ntil this debt has been satisfied, you will not be eligible to participate in the surplus property sales program (local or national)" (R4, tab 17 at 1). The letter further stated that, if appellant failed to satisfy the debt within ninety days, his name would be forwarded to another office for consideration of other actions, including submission of appellant's name for "placement on the list of contractors indebted to the United States" and collection action (*id*.).

16. In her declaration, the sales contracting officer attests, and we find, that, to her "knowledge and recollection, Appellant never informed [her] during the removal and cure periods for [the contract] that he wanted to pay for and remove Item 24, nor did he ever request an extension to remove Item 24" (Clark decl., ¶ 17).

17. By decision dated 20 April 2001, the sales contracting officer rendered her decision asserting a Government claim for $2,932, plus interest, and advised appellant of his appeal rights (R4, tab 18). Appellant thereafter brought this timely appeal. Both parties subsequently agreed to a submission on the record under our Rule 11. While the Government has filed a brief, appellant has not done so.

DECISION

From his complaint (*see* finding 17), we understand appellant to be arguing two major propositions. First, appellant contends that no contract for the purchase of Items 23 and 24 came into existence because the Government did not mail him a copy of the Notice of Award. Second, and seemingly alternatively, appellant urges that Item 23 was misdescribed and only belatedly canceled, and he was not afforded the opportunity to pay for and remove Item 24. We address these arguments in turn.

A. We reject appellant's first argument that there was no contract because "[t]he Contracting Officer did not mail [a] Copy of the Contract to me as I requested" (compl. at 4). It is true that there is no evidence of mailing (finding 10). Nonetheless, respondent has established contract formation. *Cf. C & L Petroleum Co., Inc.*, ASBCA No. 39844, 91-1 BCA ¶ 23,490 at 117,822 (where notice is to be mailed, respondent "bears the burden of proving the fact and date of mailing an award or acceptance of a bid when the putative contractor denies receipt of such award").

Part 3, Article D of the *Sale By Reference* pamphlet provided that "[a]written award mailed (or otherwise furnished) . . . shall be deemed to result in a binding contract without any further action by either party" (finding 4). It is undisputed that the sales contracting officer transmitted the Notice of Award to appellant by facsimile on 10 May 2000 and that he received it the same day (findings 9-10). We regard facsimile notification of award as "otherwise furnished" under Part 3, Article D because it was expressly contemplated by the IFB. Instruction 20 provided that "[t]he bidder may request facsimile notification [of] award by checking [a] block on the Item Bid Page" (finding 5), and it is also undisputed that, while appellant did not employ the bid page form (finding 7), he did request facsimile notification (*id*.). Accordingly, we conclude that the parties entered into a binding contract by the facsimile notification of award to appellant.

B. We also reject appellant's second argument that "Item # 23 was not removed from the contract till NOV. 2000" and respondent "did not give me the opportunity to pay for and remove the remaining item (# 24)" (compl. at 4).

The contract provisions regarding the interrelated requirements of payment and removal are explicit. The PAYMENT clause provided that "payment of the full purchase price . . . must be made within the time specified" in the IFB and before delivery (finding 3). The time specified in the IFB for removal was "60 DAYS AFTER [the] AWARD DATE," and

Article BO1 of the IFB provided that "[f]ull payment is required prior to removal" (finding 6). The DELIVERY, LOADING, AND REMOVAL OF PROPERTY clause also provided that "[t]he Purchaser shall remove the property at his expense within the period of time allowed in the Invitation. . . ." (*Id*.) The "Free Removal Date" specified in the notice of award was 10 July 2000 (finding 8), which was the first business day after expiration of the sixty day period following award. The DEFAULT clause provided that noncompliance with either the PAYMENT clause or the DELIVERY, LOADING, AND REMOVAL OF PROPERTY clause constituted a breach (finding 3).

Appellant failed to comply with the PAYMENT clause and the DELIVERY, LOADING, AND REMOVAL OF PROPERTY clause, and he did not cure his default by the 27 July 2000 cure date (findings 3, 8, 12-13). In consequence, under the terms of the DEFAULT clause (*see id*.), appellant lost "all right, title, and interest which he might otherwise have acquired in and to" both Items 23 and 24 on the cure date (finding 3).

On this record, appellant has no basis to complain that "Item # 23 was not removed from the contract until NOV. 2000" (compl. at 4). We have found that he did not raise the misdescription issue regarding Item 23 until 27 November 2000 (finding 14). We conclude that respondent's verification of appellant's assertions regarding the date of manufacture, and the ensuing cancellation of Item 23 from the contract by date of 15 December 2000, which reduced the liquidated damages assessment (finding 15), was accomplished with reasonable speed.

In addition, appellant has no basis to complain that respondent "did not give me the opportunity to pay for and remove" Item 24 at some unspecified time (compl. at 4). We have found that he made no request to do so during either the removal period or the cure period (finding 16), which ended on 27 July 2000 (finding 12). After that date, he had no further entitlement to Item 24.

C. While appellant does not in terms challenge the liquidated damage assessment, dissatisfaction with it is certainly implicit in his complaint. We have accordingly examined the assessment (*see* finding 15). We conclude that the $2,932 ultimately assessed represents 20 percent of appellant's $14,660 bid on Item 24 (*id*.), which amount is within the limits prescribed in the DEFAULT clause (*see* finding 3).

CONCLUSION

The appeal is denied.

Dated: 3 May 2002

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 53459, Appeal of Hadi Zeghuzi, rendered in conformance with the Board's Charter.

Dated:

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