



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 26, 2008

CBCA 752

JOSEPH M. HUTCHISON,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joseph M. Hutchison, pro se, Morgantown, WV.

Judith A. Bonner, Office of Regional Counsel, General Services Administration,
Philadelphia, PA.

Before Board Judges **PARKER**, **HYATT**, and **POLLACK**.

POLLACK, Board Judge.

Statement of Facts

1. On September 12, 2006, General Services Administration (GSA) sale no. 3BFBPC-06-524 was conducted at Bel Air Auto Auction in Bel Air, Maryland. Appeal File, Exhibit 1. Prior to the sale, vehicles were available for inspection on September 11 and September 12. *Id.* Mr. Joseph Hutchison (appellant) registered as bidder number 240. Appeal File, Exhibit 4. By signing the sales register, appellant acknowledged that the sale was subject to certain terms and conditions. Appeal File, Exhibits 1, 3, 4. As stated by Mr. Hutchison, although an inspection was permitted, the permitted inspection was limited to inspecting the vehicle in place, or as he characterized it, a “do not drive, do not move”

inspection. Accordingly, the vehicle was not available to be test driven. Appeal File, Exhibit 9.

2. In the presale announcement for the sale dated September 12, 2006, bidders were advised:

Please keep in mind that the vehicles being offered here today is (sic) offered without guarantee as to the conditions of any item. Vehicles are warranted as to description only. Condition is not guaranteed. I repeat, vehicles are warranted as to description only, condition is not guaranteed. Mechanical deficiencies, when known will be announced. However absence of announced deficiencies does not necessarily mean there are none. We strongly encourage you to inspect the vehicles before you bid. Appeal File, Exhibit 5.

3. The terms of the sale included the following provision:

DESCRIPTION WARRANTY: (Condition No. 2 of SF114C is deleted and the following applies). The Government warrants to the original purchaser that the property listed in the invitation for bids will conform to its description. If a misdescription is determined before removal of the property, the Government will keep the property and refund any money paid. If a misdescription is determined after removal, the Government will refund any money paid if the purchaser takes the property at his or her expense to a location specified by the Contracting Officer. No refund will be made unless the purchaser submits a written notice to the Contracting Officer within 15 calendar days of the date of removal that the property is misdescribed and maintains the property in the same condition as when removed. After property has been removed, no refund will be made for shortages of property sold by the "LOT." This warranty is in place of all other guarantees and warranties, expressed or implied. The Government does not warrant the merchantability of the property or its fitness for any use or purpose. The amount of recovery under this provision is limited to the purchase price of the misdescribed property. The purchaser is not entitled to any payment for loss of profit or any other money damages, special, direct, indirect, or consequential.

Appeal File, Exhibit 1.

4. Among the vehicles for sale was a 2002 Dodge GR Caravan SP, tag number G61-14193, listed on run number 93 with a mileage of 70,633 miles. Appeal File, Exhibit 1. According to the contracting officer (CO), the vehicle had been previously assigned for use to the Secret Service and referred for sale to GSA. Declaration of Amy Anthony (Dec. 11, 2007), Exhibit A. There is no evidence that information as to the prior user of the vehicle had been provided to either Mr. Hutchison or any other potential bidder.

5. At the auction, appellant submitted the high bid for the above vehicle. The vehicle was awarded to him on September 12, 2006. Appeal File, Exhibit 6.

6. The vehicle at issue was among the last few vehicles to be offered. By the time Mr. Hutchison and GSA completed the necessary paperwork and he made payment and was instructed with respect to departing the auction site, the sale had ended. As described by Mr. Hutchison, at that point all that he had ahead was a long ride back to his home in Morgantown, West Virginia, the ride being in two vehicles (the one that took Mr. Hutchison and his wife to the auction and the vehicle being purchased at auction). Mr. Hutchison stated in his letter to GSA dated February 27, 2007, that upon leaving the auction site, "it was quickly evident that the brake rotors were badly warped and one or more of the brake pads were apparently worn to the point of metal to metal contact." On what continued to be a tedious and difficult ride home, Mr. Hutchison identified other problems, stated that the rear brake light turn signals did not work, the vehicle appeared to be seriously out of alignment (with a significant pull to the left), there were constant vibrations, and the engine was weak on power. Mr. Hutchison described himself as both disappointed and angry at the experience, "considering that it was utterly impossible to have detected these flaws under the restrictive inspections in advance of purchase that were permitted by GSA." Nevertheless, he thought he could correct the problems by means of a brake job, a good four-wheel alignment, and an engine tune up. He stated that he was determined to postpone transferring the vehicle until such time as the vehicle was made road worthy and could pass a West Virginia inspection. Appeal File, Exhibit 9.

7. Mr. Hutchison proceeded to have the vehicle repaired. Full repairs, however, were delayed, and as described by Mr. Hutchison, his pursuing the repair process had proceeded over time because of previously scheduled travel and other out of state travel for himself and his wife. As of the date of his letter of February 27, 2007, he stated that approximately \$1650 had been expended on various repairs and additionally, he had been advised as to other repair issues, the most significant being a broken drive shaft and the possibility that the frame was bent from a crash. The letter of February 27, 2007, was the first notification to GSA of the problems. Appeal File, Exhibit 9.

8. There is no dispute that there were numerous repair issues with the vehicle. Appellant in his letter of February 27 suggested the following remedies: return of the vehicle plus reimbursement of repair costs; exchange for a like vehicle; additional repairs to be arranged by appellant and paid for by respondent; or additional repairs to be undertaken and paid for by GSA, to appellant's satisfaction, and reimbursement to appellant for repair costs to date. Appeal File, Exhibit 9.

9. In further stating his position, Mr. Hutchison made the following point. He asserted "what is patently wrong under the "do not drive, do not move" inspection policy is a failure to disclose fully any and all substantial flaws that are not readily detectable under the allowable inspection system and should be readily detectable in the course of good, vehicle maintenance program. GSA could not have failed to be aware of these flaws in servicing the vehicle and certainly in getting it to the auction site." Appeal File, Exhibit 9.

10. The contracting officer replied to Mr. Hutchison's letter by final decision dated March 12, 2007, and denied appellant's claim. The basis of the denial was that the claim was untimely under the Description Warranty clause. More specifically, the CO stated that per the GSA Sale Terms and Conditions, as set out in the Description Warranty clause, Appeal File, Exhibit 12, condition of the property is not guaranteed and any claim for misdescription must be submitted to the CO within fifteen calendar days following removal of the property. Finally, although not set out in the final decision, the CO, after receiving Mr. Hutchison's letter of February 27, did inquire as to the repair and maintenance history of the vehicle. Documents as to that history were submitted by the CO as part of the Appeal File. One of the documents does show that the vehicle was in an accident, but does not fully describe the scope of the damage. Appeal File, Exhibits 10, 11, 15. Additionally, the CO provided a declaration with the Government's brief. In that declaration, the CO states that to the best of her knowledge, the referring agency (Secret Service) had not reported any mechanical or other deficiencies in the vehicle and she had no knowledge at the time of sale concerning any mechanical or other deficiencies regarding the vehicle. Anthony Declaration.

Discussion

The Description Warranty clause in the contract allows a purchaser to recover his money where the vehicle has been misdescribed and where the purchaser has submitted written notice of an actionable misdescription of the vehicle within fifteen days from the date the vehicle was removed from the auction site. In this instance, appellant removed the vehicle on September 12, 2006. Appellant did not provide any notice to the Government of claimed deficiencies until February 27, 2007, five months later. The Description Warranty clause addresses condition of the vehicles for auction and expressly excludes any

warranty of merchantability or fitness for any use or purpose with regard to condition. The announcement of sale provided a similar warning. The exclusion of the warranties should be a red flag, that appellant is not to look to the Government to guarantee the quality, usability, or fitness of the vehicle and that the vehicle is being purchased at the buyer's risk.

One of our predecessor boards, the General Services Board of Contract Appeals, clearly set out the law surrounding the above clause in *Michael Griffin v. General Services Administration*, GSBCA 16729, 06-1 BCA ¶ 33,274, a case where the purchaser made many of the same arguments put forth in this appeal. In *Griffin*, the board stated:

Although GSA warrants that the items purchased in their auctions are the items they are stated to be, it expressly disavows any warranty of condition. At best purchasers are told of any known deficiencies. *Chris Ward v. General Services Administration*, GSBCA 16473, 05-1 BCA ¶ 32,881; *Coleridge D. Henri v. General Services Administration*, GSBCA 13991, 97-2 BCA ¶ 29,187, at 145,161; *accord Rene Hernandez v. General Services Administration*, GSBCA 15448, 01-2 BCA ¶ 31,463; *William B. Wobig v. General Services Administration*, GSBCA 14424, 98-1 BCA ¶ 29,650.

Id. at 164,927. The decision continues:

In essence, the vehicle Mr. Griffin purchased required far more extensive repairs than he had planned for based on the description provided on line. As we noted above, in these sales, the buyer assumes the risks and uncertainties inherent in purchasing a used vehicle through the auction process. It is expected that the buyer will account for these risks and uncertainties, including the possible need for extensive repairs, in formulating the price that is bid for the property. If it is impracticable to inspect the property prior to submitting a bid, as Mr. Griffin says was the case here, the buyer should consider the possibility that, in the absence of a warranty as to condition, the article purchased may require substantial repairs. The terms and conditions of these auction sales do not provide a remedy for the optimistic bidder who is disheartened to learn, upon making arrangements to accept delivery of the property, that the repairs required are more extensive than he or she had anticipated. At that point the bidder has two choices - to breach the contract, decline to purchase the property, and pay the resulting liquidated damages, or to honor the contract, purchase the property, and remove it from the Government's premises. Once the property has been removed, the buyer has no alternative but to keep it, unless he or she can demonstrate a misdescription that would justify a full refund under the Description Warranty clause. The

contracting officer has no authority to provide any other relief and neither does the Board. *Chris Ward*, 05-1 BCA at 162,922.

Id.

Applying the above to the case before us, appellant has no remedy here based on a warranty as to condition. The contract was clear in warning appellant of the risks of purchase.

We now turn to the remedy in the clause dealing with misdescription. The fact that the condition of the vehicle in this case was not what appellant expected or desired is not synonymous with a misdescription. Misdescription requires the Government to have made an error in describing what has been offered for sale. Under the facts of this case, GSA did not misdescribe the vehicle.

The auction identified the vehicle as a 2002 Dodge GR Caravan SP, tag number G61-14193, listed on run number 93 with a mileage of 70,633 miles. The vehicle was not described as being in any particular condition. The sale terms that described the vehicle, while limited, were accurate.

This is not a case where GSA specifically described the vehicle one way and in fact the vehicle was different. Here, Mr. Hutchison surmised or inferred that the vehicle would be in better mechanical condition than it was, relying on an expectation as to maintenance and on outward appearance. However, nothing in the description conveyed specifically that the vehicle was in good mechanical shape and would not require serious repair. It is also true that nothing said it was mechanically unsound, but the Government had no obligation to make such a representation, particularly when it disclaimed any warranty. Accordingly, appellant does not qualify for recovery under the misdescription portion of the clause.

Moreover, even were we to find a misdescription, which we do not, the failure to submit a claim within the requisite time-frame of fifteen days defeats any claim a purchaser might otherwise have under the Description Warranty clause. *Danny R. Mitchell v. General Services Administration*, GSBCA 16122, 04-1 BCA ¶ 32,511. The need to meet the fifteen-day limitation is well set out in *McNutt Used Cars v. General Services Administration*, GSBCA 16398, 04-2 BCA ¶ 32,668. There, based on undisputed facts, the mobile home in issue was misdescribed in that it was sold as a 2004 mobile home when it in fact was a 2002 model. However, McNutt failed to notify the CO of the misdescription within fifteen days of removing the mobile home from Government possession. Instead he notified the CO within thirty-five days. The Board ruled that the fifteen-day limit stated in the contract for return was controlling and the mobile home could not be returned.

As noted above, the contract specifically addresses the issues of condition of the vehicle and misdescription. There is, however, as addressed in *Danny R. Mitchell*, GSBCA 16209, 04-1 BCA ¶ 32,551, one other potential area of relief, albeit limited to very specific situations. In *Mitchell*, the board noted that in very limited instances, the disclaimer as to condition can be overcome, where the purchaser can establish that the Government made a misrepresentation of either a fraudulent or material nature and that the misrepresentation induced the purchaser to enter into the contract. *Id.* at 160,995 (citing *Morris v. United States*, 33 Fed. Cl. 733, 745 (1995)); accord *Roberto Gomez v. General Services Administration*, GSBCA 16700, 05-2 BCA ¶ 33,095. The evidence in this case does not support a finding of misrepresentation. To constitute misrepresentation the Government had to represent as true certain elements which it knew were false. That did not happen in this case. GSA described the model and the mileage and further told appellant and others that the Government was not warranting the merchantability of the property or its fitness for any use or purpose. The combination of the lack of specificity as to components and the disclaimer language clearly defeat any claim based on misrepresentation. It is unfortunate that Mr. Hutchison did not get a vehicle in the condition he expected. But the Government did not mislead him. Appellant did not realize his expectations, or he miscalculated the risk.

Appellant has also contended that GSA had to know of the vehicle's poor condition, since the vehicle was likely driven to the site of the auction, and as such GSA should have revealed that information to appellant. Appellant, however, has not shown that the contracting officials had such knowledge, cannot demonstrate through evidence how the vehicle behaved in transit, and finally cannot overcome the fact that the Government, while not providing specifics, gave ample warning to purchasers that what they were buying was not guaranteed as to mechanical soundness. In fact, in the declaration of the CO, she stated that she had no knowledge of the vehicle's condition or of any mechanical deficiencies having been reported by the referring agency. GSA was selling a used vehicle. It did not promise to appellant or any other bidder that the vehicle would be without flaws. Here, it was appellant who had expectations as to condition. GSA in the auction and in its sale documents recognized and identified the potential risks. In a similar vein, appellant has argued that we did not have an opportunity to fully inspect the vehicle and for that reason the Government should bear responsibility in this matter. Appellant was aware when he provided his price of the fact that he could not and did not test drive the vehicle. He had the choice to simply not bid.

Decision

Based upon the foregoing, this appeal is **DENIED**.

HOWARD A. POLLACK
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

CATHERINE B. HYATT
Board Judge