



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 18, 2011

CBCA 2520

GEORGE HOWELL dba EARTH SENSE, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

George Howell, President of Earth Sense, Inc., Elizabethtown, KY, appearing for Appellant.

Gabriel N. Steinberg, Office of Regional Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **DRUMMOND**.

VERGILIO, Board Judge.

On August 8, 2011, the Board received from George Howell dba Earth Sense, Inc. (purchaser) a timely-filed notice of appeal. 41 U.S.C.A. §§ 7101-7109 (West 2011)). The purchaser successfully competed in an auction held by the respondent, the General Services Administration (agency). By email, the agency provided notice of the award in accordance with the contract. The purchaser did not pay for the item. The contracting officer issued a notice of termination for default and assessed liquidated damages of \$325. The purchaser seeks to be relieved of the debt and to be compensated for expenses.

The purchaser knew he was the awardee and did not pay for the item. The termination and assessment of damages are in accordance with the terms of the contract--the purchaser did not pay within two business days from the date and time the email notification was sent or the extended period. The purchaser unsuccessfully attempts to shift blame to the agency. While the purchaser maintains that the agency sent notification of the award to an old, non-working email address, the purchaser had two auction accounts. For this purchase, the purchaser utilized the account with the outdated email address, not the newer account. The purchaser's explanations do not account for the failure to pay in accordance with the terms of the contract. The Board upholds the default determination and the assessment of damages.

Findings of Fact

1. In June 2011, the agency held an on-line auction, conducted pursuant to written terms and conditions, including the following:

Registration

A credit card is required for all registered users in our online community. . . . This card number is recorded but will not be automatically charged if a bidder is the successful bidder of an item.

Submission of Bid

. . . . It is the responsibility of the bidder to follow-up on the status of his/her bid.

Notification of Sale Results

Successful bidders will be notified by email and must contact the regional sales office within 2 business days from the date and time the award email notification was sent. Bid results will not be furnished via telephone or fax. It is the bidder's responsibility to follow-up on the status of his/her bid and to ensure that his/her email address and all registration data are kept accurate and up-to-date.

Forms of Payment

Credit card payments can be made via GSA Auctions from the "My Summary" page utilizing the "Trades" feature. Online payments are processed through the Department of Treasury's electronic payment service via GSA Auctions[.]

Exhibit 1 at 1-2, 6 (exhibits are in the appeal file).

2. The written terms and conditions include a provision addressing default:

Default

If you are awarded an item on GSA Auctions, you have a responsibility to pay for the item or lot that you were awarded within 2 business days from the date and time the award email notification was sent and promptly remove it within 10 business days from the date and time the award email notification was sent, unless otherwise specified in the contract. If you fail to meet either of these two conditions, you will be in violation of the online sale terms and conditions of your contract with the Government and will be considered “in default.”

As a defaulted bidder, you will be responsible for the payment of liquidated damages, an administrative fee for the processing and re-handling of the item for which you neglected to pay for and/or remove. A breakdown of the fee structure follows: [specifying the assessed fee of \$325 for a purchase price within the inclusive range of \$325 to \$100,000.]

Exhibit 1 at 5.

3. The purchaser has two auction accounts (here called “account one” and “account two”) with the agency. The name, company, and email address are different for the two. Account one has a non-functioning email address. Account two has the purchaser’s current email address. The purchaser has not logged onto account two since June 2010; thus, the bid for this auction did not utilize account two. Exhibit 22.

4. A computer-generated bidder report for the auction identifies this purchaser as the successful bidder on air conditioning equipment (lot 25) for \$1411. The identifying information for the purchaser (name, company, and email address) is consistent with the information in account one but not account two; the non-functioning email address is listed on the bidder report. Exhibits 3, 22.

5. The contracting officer sent an email message on June 14, 2011, to the purchaser, with the same identifying information as in the bidder report. The email is notification to the purchaser that he is the successful bidder. It specifies that the property must be paid for within two, and that the property must be removed within ten, business days from the date and time of the email notification. Exhibits 2, 3.

6. The purchaser did not pay for the item within two business days. The contracting officer sent an email message, again to the non-functioning address, but consistent with the bid information, extending the time for payment. Exhibit 4.

7. The purchaser did not pay within the extended period of time. The contracting officer sent by mail a notice of termination with an assessment of \$325 to be paid within thirty days. Exhibit 5.

8. The purchaser's statements in correspondence with the contracting officer establish additional facts: "We were aware that we were the high bidder because we [were] on the site an[d] submitted the last bid at closing time. Once again we thought the payment was automatic. We bid on so many sites that are automatic that we can not remember all the rules[.]" Exhibit 19. The registration clause of the contract specifies that charges are not automatically made against a charge card. Finding 1.

9. In support of the assertion that the agency is responsible for the incorrect email address (and non-receipt by the purchaser of the notices of award and of failure to pay), the purchaser references a purchase made on March 16, 2011. Exhibit 13. However, the notice of award for the referenced purchase utilizes information from the purchaser's account one, not account two. Exhibit 15. The agency has not altered the information in the accounts.

10. The Board finds as fact that the purchaser utilized account one to make the purchase. The agency sent notification of the award to the email address identified in that account. The purchaser did not pay for the item.

11. By its notice of appeal, the purchaser disputes the default determination and assessment of damages. In an amended appeal the purchaser seeks to recoup what it characterizes as its expenses of \$1614; however, no underlying claim or supporting documentation has been presented to the contracting officer.

Discussion

The agency provided notice of award consistent with the information provided in the account utilized by the purchaser for the winning bid. The triggering date for payment is the sending, not the receiving, of the email message. The agency satisfied its contractual obligations. The purchaser failed to pay (within the initial and extended periods). The purchaser was in default by failing to fulfill its obligations. The agency is not responsible for the purchaser's inactions. The purchaser has only established its own responsibility; it knew it was the awardee, but did not make the payment. Its default is not excusable.

The Board upholds the default. The agency assessed damages in accordance with the terms of the contract. There is no basis for this Board to reach and deny the purchaser's counterclaim for expenses, because there has been no underlying claim to the contracting officer. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010).

Decision

The Board **DENIES** the appeal, thereby upholding the termination for default and the assessment of damages.

JOSEPH A. VERGILIO
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

JEROME M. DRUMMOND
Board Judge