



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 29, 2008

CBCA 1101

ALLIANCE BUSINESS ENTERPRISES LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Frank Tang, President of Alliance Business Enterprises LLC, Eugene, OR, appearing for Appellant.

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

Before Board Judges **STERN**, **STEEL**, and **WALTERS**.

WALTERS, Board Judge.

Appellant, Alliance Business Enterprises LLC (Alliance), appeals the final decision of a General Services Administration (GSA or Government) contracting officer terminating three GSA contracts and assessing a total of \$2388.40 in liquidated damages for Alliance's alleged default in failing to pay for and remove three lots of generator sets awarded to Alliance in connection with an online GSA auction. Respondent, GSA, elected to submit its case on the record pursuant to Board Rules 18 and 19. Appellant elected a hearing and one was conducted by videoconference and teleconference on July 22, 2008. The parties submitted posthearing briefs, GSA an opening brief and Alliance a reply. The record closed following the filing of the reply brief.

Factual Findings

On October 13, 2007, GSA posted to its internet auction site, GSA Auctions®, several items for sale under internet sale number 61QSC108002. Among these items were three lots of generator sets, lots 967, 969, and 970, each lot consisting of two generator sets, or a total of six generator sets. The lots were described in the online posting as follows:

Lot 967

GENERATOR SETS, 100KW, CATEPILLAR [sic], APPRX 5974 HOURS, SN TY255074, 1 EA. APPRX 1988 HOURS, SN TY 363B73, 1 EA. (4765 1G-7213-0067), 1 LOT.

Lot 969

GENERATOR SETS, 100KW, CATEPILLAR [sic], APPRX 2674 HOURS, SN TY352B72, 1 EA, (SALVAGE), NO HOUR METER, SN TY332B72, 1 EA. (47651G-7213-0069) 1 LOT.

Lot 970

GENERATOR SETS, 100KW, CATEPILLAR [sic], APPRX 7211 HOURS, SN TY273B71, 1 EA, APPRX 2674 HOURS, SN TY271873, 1 EA. (47651G-7213-0070) 1 LOT

Appeal File, Exhibit 18 at 1. The posting called for the sale to close on October 23, 2007, for payment to be made to the Government by October 26, 2007, and for the items to be removed by November 7, 2007. *Id.* The generator sets in question were located at the Nebraska Agency for Surplus Property in Lincoln, Nebraska. *Id.* To register and submit bids at the GSA auction website, bidders are required to agree to GSA's standard Sale of Government Property Online Sale Terms and Conditions. *See* [http://gsaauctions.gov/html/AboutGSA Auctions.htm](http://gsaauctions.gov/html/AboutGSA%20Auctions.htm). These Terms and Conditions, *inter alia*, urge potential bidders to inspect the items being sold before submitting their bids and warn that the Government "does not warrant the merchantability of the property or its purpose." Appeal File, Exhibit 1 Replacement at 2. The only warranty provided by the terms and conditions with respect to an online auction sale is the following "Description Warranty":

Description Warranty. The Government warrants to the original purchaser that the property listed in the GSAAuctions.gov website will conform to its written description. If a misdescription is determined by the Contracting Officer of the sale, before payment, the contract will be cancelled without any liability to the bidder. 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/her expense to a location specified by the Sales Contracting Officer. The Refund Claim Procedure described below will be strictly followed for filing a claim. No refunds will be made, after property is removed, for shortages of individual items within a 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 purpose. 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 Replacement at 2.

The terms and conditions provide the following with regard to the nature and timing of claims of misdescription:

Refund Claim Procedure. To file a refund claim for misdescribed property, (1) submit a written notice to the Sales Contracting Officer within 15 calendar days from the date of award prior to payment, or 15 calendar days from the date of removal that the property was misdescribed, (2) if removed, maintain the property in the purchased condition until it is returned, and (3) if removed, return the property at your own expense to a location specified by the Sales Contracting officer. Written claims need to be filed to the Sales Contracting Officer, no verbal contact with the custodian or the Sales Contracting officer will constitute a notice of misdescription.

Appeal File, Exhibit 1 Replacement at 2. Further with regard to the written descriptions of lots being offered, the terms and conditions make plain that the “absence of any indicated deficiencies [within a description] does not mean that none exists” and that any “oral statement or representation by any representative of the Government, changing or supplementing the offering . . . is unauthorized and shall confer no right upon the bidder or purchaser.” *Id.* at 2-3. In the event of either default in payment or failure to remove lots of items sold, the terms and conditions call for the payment of liquidated damages in the amount of either \$200 or twenty percent of the contract price for each lot, whichever is greater. *Id.* at 5-6.

Appellant relates that, prior to bidding on the items at issue, it had purchased an Onan generator set via a GSA online auction and had been very satisfied with the purchase, and

that the Onan generator set had been manufactured in 1983. Appellant further relates that it had a customer for the generator sets being offered for sale in the present instance, and that the customer was particularly in need of American-made generator sets manufactured in the 1980s or later, since spare parts might not be readily available to it for earlier models. Transcript at 17-18; Appeal File, Exhibits 19 at 1-2, 13 at 27. Because the advertisement for the generator sets here was silent as to year of manufacture, among other things, appellant further relates, its Vice President, Ms. April Tang, contacted the custodian at the Nebraska Agency for Surplus Property, Mr. Michael Case, to inquire further about these matters. It appears that at least two telephone conversations took place between them, one of which related to the year of manufacture of the generator sets. Transcript at 187-89; Appeal File, Exhibit 14.

There is some confusion about precisely what Mr. Case stated to Ms. Tang regarding the year of manufacture of the generator sets. Mr. Case, by e-mail message dated November 6, 2007, confirmed “for the record” that he had “stated that they [the generator sets] **could be from the early ’80s . . .**” Appeal File, Exhibit 8 at 1 (emphasis added). By the same token, Mr. Case went on to state in that message: “[H]owever, I gave April [Tang] the model number from the motor. With that information, you need to contact the manufacturer and see what year the items were manufactured.” *Id.* Ms. Tang testified that, although she knows she spoke with Mr. Case more than once, she presently is unable to recall any details of her conversations with Mr. Case other than that Mr. Case “clearly” stated to her that the six generator sets in question “were made in the early ’80s,” and did not condition that statement in any way, e.g., saying it “could be from the early ’80s.” Transcript at 165, 183-84. At the time the statement was made by Mr. Case, she said, she noted it down “verbatim” on the side of a box (since Mr. Case had reached her on her cellular phone in an off moment, while away from her office). *Id.* at 183-85; Appeal File, Exhibit 37 (picture of box notes, which read: “Early 80’s, Genset model MDL D330A, Condition doesn’t know if runs or not”).

Ms. Tang’s testimony as to the lack of equivocation in Mr. Case’s statement regarding the ’80s is at odds with all other evidence in the record pertaining to their pre-bid telephone conversation. Ms. Tang’s contention that her box notes were a “verbatim” transcription of what Mr. Case had said simply does not wash.¹ It is obvious that some of Mr. Case’s words

¹ Appellant, in its reply brief, poses the question: “What is the difference of the wording of ‘**from** early 80’s’ and ‘**Could from** early 80’s’ [sic]?” Appellant’s Reply Brief at 9. This appears to acknowledge that Mr. Case might well have told Ms. Tang that the generator sets could have been from the early 1980s.

or phrases are missing from what she wrote: “Early 80’s, Genset model MDL D330A, Condition doesn’t know if runs or not.” Appeal File, Exhibit 37.

Notably, Mr. Frank Tang, appellant’s President, in an e-mail reply to Mr. Case’s message of November 6, 2007, expressly thanked Mr. Case for his “honesty.” Appeal File, Exhibit 8 at 1. Mr. Tang, as part of his hearing testimony, again characterized Mr. Case’s statement as reflecting “honesty.” Transcript at 22. Further, appellant’s complaint adopts Mr. Case’s version of his statement: “*We made a call to the contact person, Mr. Mike Case to find out more about the year. He told us, could be from early 1980’s.*” Appeal File, Exhibit 19, Alliance letter of February 29, 2008 at 2 (underscoring added). Mr. Tang testified that he interpreted the words “could be from early ’80s” to mean that the generators were definitely manufactured in the early ’80s or later. Transcript at 38-39. The Board finds such an interpretation strained at best. The words “could be” connote a mere possibility, rather than a certainty. Moreover, Mr. Tang, during his testimony, conceded that he subsequently attempted unsuccessfully to verify the year of manufacture with the manufacturer’s model number that Mr. Case had furnished Ms. Tang (“MDL D330A”), with a local Caterpillar equipment dealer. Nevertheless, he states, because the sale was about to close, he decided that Alliance would proceed with bidding anyway, based solely on Mr. Case’s statement regarding the year of manufacture. Transcript at 33, 207-11. The Tangs also both admitted that, prior to bidding, no representative of Alliance took the opportunity provided by GSA to inspect the generator sets. *Id.* at 25, 88-89, 204. The explanation for not doing so apparently was simply that a pre-bid inspection was not mandatory. *Id.* at 88-89, 205.

Alliance submitted bids on all three lots on October 23, 2007, in the amounts of \$4581 for lot 967, \$2353 for lot 969, and \$5008 for lot 970, which amounts were the highest (successful) bids received for those lots. Appeal File, Exhibit 2 at 1, 2, 4; Exhibit 3 at 10. Alliance’s bids were relatively close to those of the next highest bidders in each instance: \$4581 vs. \$4503 for lot 967; \$2353 vs. \$2306 for lot 969; and \$5008 vs. \$5002 for lot 970. Appeal File, Exhibit 2 at 1, 2, 4. As a result, Alliance was awarded GSA Contract Numbers GS06F08FBE0221, GS06F08FBE0223, and GS06F08FBE0224 for lots 967, 969, and 970, respectively. Appeal File, Exhibit 18.

After the award of the instant contracts, Alliance fully intended to go forward with the purchase of the three lots of generator sets, and had contacted Mr. Case on October 26, 2007, to inquire about the dimensions of the equipment, so that Alliance could make appropriate arrangements for shipment via its carrier, Yellow. Transcript at 20; Appeal File, Exhibit 8 at 4.

Alliance’s efforts to complete the purchase of the generator sets came to an abrupt halt, however. On October 30, 2007, Mr. Tang states, its customer notified Alliance that it

had learned that the year of manufacture of the generator sets was actually in the 1960s, and on October 31, 2007, the customer notified Alliance that it no longer wanted the generator sets. Transcript at 20. For that reason, Mr. Tang contacted Mr. Case on November 1, 2007, and, by e-mail letter of that date to Mr. Tim Gosnell, a GSA Supervisory Property Disposal Specialist, the GSA Heartland Region Sales Manager, and supervisor of Ms. Kathy Fann, the sales contracting officer for the instant online sale, to formally request in writing the withdrawal of its bids on the generator sets, alleging that “[t]he items were misrepresented” in that “we were told by Mike that these machines were manufactured in the early 1980s, and recently found out they were manufacture [sic] in the 1960s.” Appeal File, Exhibit 20 at 1.

Apparently, the November 1 e-mail letter was addressed to Mr. Gosnell, because Ms. Fann was absent from the office on that date. *See* Transcript at 48; Appeal File, Exhibit 8. Alliance’s Ms. Tang followed up on that November 1, 2007, e-mail letter by speaking with Mr. Gosnell on the phone on November 2, 2007. As to that conversation, Mr. Gosnell conceded that he had promised Ms. Tang that, if he were able to determine that Mr. Case had actually represented improperly to Alliance that the generator sets in question were manufactured in the 1980s, and Alliance had submitted its bids on that basis, GSA would cancel the sale, notwithstanding that the statement was made orally as a supplement to the description in the advertisement. Transcript at 80-82, 121.

Following his November 2, 2007, conversation with Ms. Tang, Mr. Gosnell spoke with Mr. Case to determine whether any such improper representation had been made by him to either Mr. or Ms. Tang. The Government has submitted, as a supplementation of the appeal file, a May 28, 2008, written statement from Mr. Gosnell that relates, in part, the substance of that conversation with Mr. Case:

I asked if he recalled making any reference as to year of manufacture, he said yes, she asked that, he told her that the only info he had was the manufacturer and model number. He suggested she contact the manufacturer to see if they had the year available.

I asked him specifically if he had stated to anybody the the generators were made in the ’80s. He said the only thing he may have said to anybody is that he did not know if they were made in the 1960’s, 70’s, or 80’s and the bidder needed to do the research or come and view the generators themselves.

Appeal File, Exhibit 23. Although Mr. Gosnell states that he has “no problem with accepting responsibility for errors” on the part of GSA employees and property custodians, he determined that Mr. Case had not misrepresented the year of manufacture of the

generator sets, and that both he and Ms. Fann determined Alliance had not furnished enough evidence of such a misrepresentation. *Id.*; Transcript at 82-85.

As indicated above, Mr. Tang and Mr. Case exchanged e-mail messages on November 6, 2007, and, based on Mr. Case's concession "for the record" that he had told Ms. Tang that the generator sets "could be from the early '80s," Mr. Tang concluded that Mr. Case admitted he had misrepresented the year of manufacture and that, based on Mr. Gosnell's promise, the default should be cleared and Alliance relieved of liability for liquidated damages. In this regard, forwarding to Mr. Gosnell Mr. Case's November 6 e-mail message to him, Mr. Tang proclaimed: "Mike just admit[ted] it. The case is closed." Appeal File, Exhibit 8 at 1. Mr. Gosnell testified that he was not in agreement with this proclamation. Transcript at 85.

It is undisputed that Alliance failed to make payment by the specified October 26, 2007, due date, or, for that matter, at any subsequent date. Although, as noted previously, Mr. Tang testified that Alliance had not learned of the correct year of manufacture and had every intent to proceed with the purchase as of that date, he never explained why the payment was not made on October 26. As to removing the generator sets on the specified date, November 7, 2007, Mr. Tang had inquired of Mr. Case about the possibility of extending the removal date until November 17, 2007. Appeal File, Exhibit 8 at 4. Mr. Case had advised Mr. Tang that a request for an extension would have to be directed to GSA. *Id.* Apparently, once Alliance learned that its customer no longer was interested in the items, the matter of an extension was dropped.

In any event, Alliance never paid for or took possession of any of the generator sets. Accordingly, Ms. Fann sent Alliance notice on November 16, 2007, that it was in default on all three contracts and that payment of liquidated damages in the total amount of \$2388.40, representing twenty percent of the \$11,942 total of Alliance's contract prices under the three contracts, was to be made to the Government within thirty days, pursuant to the above-mentioned Terms and Conditions. Appeal File, Exhibits 4, 5. Mr. Tang, by letter dated December 3, 2007, took issue with this default notice, and forwarded to Ms. Fann copies of various prior e-mail communications, asserting again that the generator sets at issue had been misrepresented and that the matter had been cleared up with Mr. Gosnell, in Ms. Fann's absence. Appeal File, Exhibit 8.

Ms. Fann, upon receipt of this letter from Mr. Tang, conferred with Mr. Gosnell, Transcript at 86-87, and, by letter dated December 26, 2007, issued a contracting officer's final decision, finding Alliance in default on the subject contracts and liable to the Government for payment of liquidated damages in the amount of \$2388.40. Appeal File, Exhibit 10.

Subsequently, Ms. Fann attempted to reach an amicable resolution of the matter with Alliance. She sent Mr. Tang an e-mail message on January 30, 2008, indicating as much. Appeal File, Exhibit 12. Mr. Tang again forwarded to Ms. Fann the stream of e-mail messages among Alliance, Mr. Gosnell, and Mr. Case during early November 2007, and, by e-mail message dated January 31, 2008, Ms. Fann promised to review those e-mail messages and advise Mr. Tang of her conclusions. Appeal File, Exhibit 13. Ms. Fann apparently reviewed the messages and contacted Mr. Case who, on January 31, 2008, sent her a lengthy e-mail message providing additional detail on his various previous contacts with Alliance regarding the generator sets at issue. The message relates, in part, the substance of Mr. Case's post-award conversation with Mr. Tang:

After the auction closed was the first time I had any communication with Frank. . . . He was very adamant that I told him the generator sets were from the 80s. I told him that is why I gave him the model number, so he could be an informed buyer.

Appeal File, Exhibit 14.

The three lots in question were readvertised and sold to three separate purchasers for a total of \$5105. Appeal File, Exhibits 16, 22. When readvertised, the item descriptions were substantially more complete:

[Lot 967]

GENERATOR SETS, 100KW, CATEPILLAR [sic] MDL D330A, 4 CYL DIESEL MOTOR, APPRX 5974 HOURS, SN TY255074, 1 EA, APPRX 1988 HOURS, SN TY363B73. 1 EA. (ITEMS HAVE NOT BEEN RUN, UNKN WORKING CONDITION) (476516-7213-0067) (REPAIRS REQUIRED) 1 LOT

[Lot 969]

GENERATOR SETS, 100KW, CATEPILLAR [sic] MDL D330A, 4 CYL DIESEL MOTOR, (SALVAGE), APPRX 2674 HOURS, SN TY352B72, 1 EA, (SALVAGE), NO HOUR METER, SN, TY33SB72, 1 EA. (REPAIRS REQUIRED, UNKN WORKING CONDITION, ITEM HAS NOT BEEN RUN) (476516-7213-0069) 1 LOT

[Lot 970]

GENERATOR SETS, 100KW, CATEPILLAR [sic] MDL D330A, 4 CYL DIESEL MOTOR, APPRX 7211 HOURS, SN TY273B71, 1 EA, APPRX

2674 HOURS, SN TY271B73, 1 EA. (REPAIRS REQUIRED, UNKN WORKING CONDITION) (476516-7213-0070) 1 LOT

Appeal File, Exhibit 22.

According to Ms. Fann's File Memo of February 1, 2008, Ms. Fann and Mr. Gosnell had a telephone conversation with Mr. Tang on that date and, among other things, discussed Alliance's allegations regarding what Mr. Case, the "custodian," had said to Ms. Tang about the year of manufacture for the generator sets:

Tim [Gosnell] said the custodian had said the generators could have been from the 80's but that he supplied the model number so that Mr. Tang could contact the manufacture[r] and find out for sure what the year was. Mr. Tang continued to protest that the custodian had admitted in an email that the generators were from the 1980's and was adamant the lot had been misrepresented. I told Mr. Tang that he didn't even contact the custodian until 3 days after the sale had already closed. Mr. Tang told me that he had contacted the custodian many times and that he told him the generators were from the 80's. I told him to send me any emails he had showing that he contacted the custodian before the sale closed.

Appeal File, Exhibit 17. Significantly, the presiding judge, during a prehearing telephonic status conference in this appeal, had inquired as to whether there were any e-mail messages or other written communications to Alliance from Mr. Case prior to the closing of the sale that confirmed that the generator sets were manufactured in the '80s. Mr. Tang was to research his files and submit any such e-mail messages or written communications from Mr. Case. No such documents were ever presented to the Board.

By letter to the Board dated February 20, 2008, Alliance appealed the contracting officer's final decision.

Prior to the hearing, Alliance raised a new issue, an allegation of misdescription relating to the written language of the original advertisement. More specifically, Alliance asserted, the words "GENERATOR SETS, 100KW, CATE[R]PILLAR," as used in the October 13, 2007, online advertisement constituted a misdescription. In preparing to try this appeal, Alliance learned from one of the three purchasers of the readvertised lots, Mr. David Hughes, that, whereas the diesel motor powering the generators was a Caterpillar product (model D330A), the generators themselves each were manufactured by General Electric. Appeal File, Exhibits 28, 29, 30. The TYxxxxx serial numbers listed in the original advertisement, unbeknownst to Alliance, were, in fact General Electric (GE) serial numbers

and not those of Caterpillar. Transcript at 67-70; Appeal File, Exhibit 25 (shows the serial number for a GE 100 KW generator on sale by [www. machinerytrader.com](http://www.machinerytrader.com) as “TY261B71”).

As part of an “Additional Submittal,” Alliance had requested that the Board grant it summary relief based on this additional claim of misdescription. The presiding judge refused to act on such a request, in part because the affidavit in support of it (Appeal File, Exhibit 28) had not been forthcoming from Alliance until some ten days prior to the hearing, which would not have allowed the Government sufficient time to prepare a response, let alone sufficient time for the Board to rule on the request. The presiding judge promised, however, to take the affidavit into consideration at the hearing, and indicated that the Government would have the opportunity to present contrary evidence. In this connection, on the morning of the hearing, just before commencement of the hearing, the Board received from the Government declaratory statements from GMRC Sales, Inc. Appeal File, Exhibit 31. In light of the Board’s promise to respondent to allow the submission of contrary evidence, the Board admitted such evidence over the objection of Alliance as to its having been untimely submitted.² By the same token, the Board finds the declaratory statements -- that GSA’s descriptions of the generator sets being sold as “Caterpillar” generator sets “aptly covered what you were selling” -- not particularly instructive.

They also seem to be an obvious effort by GMRC to curry favor both with GSA (“Keep up the good work; I have always enjoyed working with you and the rest of the people of Region Six.”) and with the Nebraska agency here involved (“You are very lucky to have Mike Cass [sic] as your employee at the Nebraska State Agency for Surplus Property. He has always been extremely helpful in providing answers to our questions, and we ask a lot of questions! He constantly goes beyond his call of duty to assist us and to make our business experience as pleasant as possible. He deserves to be commended for his efforts on behalf of customers like us.”). Furthermore, as Alliance points out, GMRC, though a frequent auction purchaser (Transcript at 154), is not a regular dealer in used generator sets. Mr. Gosnell conceded that he could not attest to the “expertise” of GMRC’s Mr. Greenberger in this regard. *Id.* In contrast, the exhibit previously furnished by Alliance in connection with its notification regarding the additional misdescription, i.e., the internet listing from Ritchie Bros. Auctioneers listed on [www. machinerytrader.com](http://www.machinerytrader.com), Appeal File,

² The submission of the declaratory statements was not untimely, given that GSA was submitting its case on the record and that Rule 19 expressly permits the initial submission on the record to be “no later than the commencement of the hearing” Moreover, the presiding judge expressly indicated that Alliance would be allowed to furnish additional affidavits relating to this issue with the submission of its reply brief. Transcript at 11, 16.

Exhibit 25, makes clear that it is the generator and not the motor that controls how a generator set is to be advertised -- in that case, while identification of the Caterpillar diesel motor, model Cat D330A (the same as used for the generator sets in this case), was included as additional information in the internet listing, the generator set was advertised as a "GE 100 KW Generator Set" with a GE serial number of TY261B71. Thus, the Board finds that there was, in fact, a misdescription of the brand name in connection with the instant sale. Nevertheless, for the reasons discussed below, this misdescription is without legal significance insofar as the present case is concerned.

Discussion

One of our predecessor boards, the General Services Administration Board of Contract Appeals (GSBCA), in *Chris Ward v. General Services Administration*, GSBCA 16473, 05-1 BCA ¶ 32,881, made the following observations as to the GSA online auction process:

Although GSA warrants that the items purchased in its auctions are the items they are stated to be, it expressly disavows any warranty of condition. Property that is listed for auction sale to the public is sold "as is" and, at best, purchasers are told of any known deficiencies. *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. Prospective bidders are strongly encouraged to inspect property in person prior to bidding and are cautioned that they cannot rely on the oral representations of Government representatives, who are not authorized to supplement or modify the auction terms or item description. The information allowing bidders to contact the property custodians is provided for the purpose of arranging to inspect the property in person. Talking to the custodian is not a substitute for a site inspection, and we can provide no relief in circumstances where the buyer asserts he or she was misled by the custodian as to the condition of property sold under the auction procedures.

Chris Ward, 05-1 BCA at 162,922.

Thus, the buyer in a GSA online auction assumes the risks and uncertainties inherent in purchasing used equipment. In this regard, the GSBCA went on to say:

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 being offered. If it is impracticable to inspect the property prior to submitting a bid, 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.

Id.

Accordingly, although there is a description warranty in connection with GSA online auctions, where the written description of the property being offered for sale is silent as to age or condition, a bidder proceeds at its peril if it chooses to bid based on its own assumptions as to either age or condition of the property or even upon supplementary information orally furnished by the property custodian. An incomplete description is not a misdescription. *Larry J. McKinney v. General Services Administration*, GSBCA 16720, 05-2 BCA ¶ 33,119. As noted above, the online terms and conditions, which became part of the contract with GSA's acceptance of Alliance's bid, *id.* at 164,127 (citing *Darren R. Gentilquore v. General Services Administration*, GSBCA 16705, 05-2 BCA ¶ 33,117), warned Alliance that the "absence of any indicated deficiencies [within a description] does not mean that none exists" and that any "oral statement or representation by any representative of the Government, changing or supplementing the offering . . . is unauthorized and shall confer no right upon the bidder or purchaser." Appeal File, Exhibit 1 Replacement at 2-3. Thus, in the present case, Alliance assumed the risk of submitting its bids without conducting a pre-bid inspection or without otherwise first confirming the year of manufacture for the generator sets. Even if Mr. Case, the custodian, during their pre-bid telephone conversation had unequivocally represented to Ms. Tang that the generator sets in question "were made in the early '80s," such an oral representation would have been unauthorized, and Alliance would have had no legal right to rely upon it. From the Board's perspective, property custodians have only two roles with respect to GSA's online auctions: (1) to arrange for pre-bid inspections of the items offered and (2) to arrange for removal of the property by awardees.

In the present appeal, however, the matter was complicated when GSA's supervisory contracting officer, Mr. Gosnell, conditionally offered to waive the assessment of liquidated

damages. In that context, the substance of Mr. Case's oral pre-bid statement to Ms. Tang might have had legal significance. This is so, because Mr. Gosnell, as the GSA Heartland Region Sales Manager, holds an unlimited contract warrant and had the authority and discretion to waive GSA's contract rights, if he deemed the waiver to be in the Government's best interests. Alliance's complaint implies that Mr. Gosnell effectively waived liquidated damages in this case. In this regard, Mr. Gosnell, in his written statement, advised the Board prior to the hearing that he has "no problem with accepting responsibility for errors" on the part of GSA employees and property custodians. Appeal File, Exhibit 23. The matter of waiver here was clearly in dispute, and the presiding judge determined that a hearing, with testimony from both Ms. Tang and Mr. Gosnell, would be needed in order to clarify whether Mr. Gosnell had, in fact, waived Alliance's liquidated damages, as Alliance was contending. During the hearing, Mr. Gosnell testified that, when he spoke with Ms. Tang, he promised her that "if we find that the government is at fault, we will cancel the contract," and, in response to the presiding judge's questions, agreed that he was fully prepared to cancel Alliance's contracts and waive the assessed liquidated damages in this instance, provided that Mr. Case had represented the generator sets in question as having been "made in the early '80s." Transcript at 80-82. But, as indicated above, Mr. Gosnell did not find this to be the case, *id.* at 82-85, and neither does the Board. Indeed, we find that Mr. Case did not misrepresent the year of manufacture of those generator sets, nor did he misrepresent their operating condition. Moreover, we find that Mr. Gosnell never waived the assessment of liquidated damages here.

Waiver has been defined as an intentional relinquishment of a known right. *United Technologies Corp.*, ASBCA 46880, et al., 97-1 BCA ¶ 28,818, at 143,795 (citing *Shearson Hayden Stone, Inc. v. Leach*, 583 F.2d 367, 370 (7th Cir. 1978), and 5 S. Williston, A Treatise on the Law of Contracts § 678 (3d ed. 1961)); *see also Helmsley-Spear, Inc.*, GSBCA 7357, et al., 85-3 BCA ¶ 18,277, at 91,746 (citing *Continental Real Estate Equities, Inc. v. Rich Man Poor Man, Inc.*, 458 So.2d 798 (Fla. App. 1984)). Where, as here, there is no document such as a contract modification expressly waiving a right, a claim of waiver must be "supported by clear, decisive, and unequivocal conduct or statements of [authorized] government officials." *Adelaide Blomfield Management Co. v. General Services Administration*, GSBCA 12851, 95-1 BCA ¶ 27,514, at 137,115; *see also Matter of Edwards*, HUDBCA 90-4765-L248, 1990 WL 265067 (July 26, 1990). Alliance has failed to sustain its burden of proving waiver in this case. The condition Mr. Gosnell placed on any possible waiver here (Mr. Gosnell's determination that Mr. Case had, in fact, stated to Ms. Tang as a certainty that the generator sets were manufactured in the early '80s) was never satisfied, and Alliance has failed otherwise to show that Mr. Gosnell, through clear, decisive and unequivocal conduct or statements, intentionally relinquished the Government's rights to liquidated damages.

Finally, we turn to the more recent assertion of misdescription and its legal implications. The Board does find that the characterization of the generator sets as “Cate[r]pillar” generator sets within the written online posting here technically constituted a misdescription. Still, Alliance cannot avoid liability for its default in payment and its failure to remove the items in question. Aside from the fact that this new claim of misdescription was never considered by the contracting officer as a possible defense against the Government claim for liquidated damages when she rendered her final decision in this case, based on the evidence in the record, the Board does not see that Alliance would not have bid on the generators being offered, simply based on their “General Electric” brand name. From the complaint and Mr. Tang’s testimony, it seems that the primary focus and motivation for Alliance was to purchase American-made generator sets manufactured in the ’80s or later, in order to satisfy the expressed needs of its customer. Transcript at 17-18; Appeal File, Exhibit 19, Alliance appeal letter/complaint of February 20, 2008, at 1. There is no evidence that the customer specifically sought out Caterpillar generators, as opposed to GE generators. Further, Alliance repeatedly underscored how happy it had been to have purchased a 1983 Onan generator set as part of an earlier GSA online auction. Appeal File, Exhibit 19, Alliance appeal letter/complaint of February 20, 2008, at 1-2; Transcript at 18. In appellant’s post hearing reply brief, it again emphasized that its customer was interested “in purchasing ONLY brand name Generator[s],” and, in this regard, did not specifically exclude General Electric generators. Appellant’s Reply Brief at 1. The Board takes note of the fact that General Electric is among the most widely recognized American brand names for electrical products.

More importantly, however, the description warranty upon which Alliance relies here is hardly an unlimited warranty. To assert a claim under that warranty, a bidder must do so “within 15 calendar days from the date of award” Appeal File, Exhibit 1 Replacement at 2. Failure to comply with the fifteen-day notice provision in GSA’s standard online Terms and Conditions precludes recovery. *Joseph M. Hutchinson v. General Services Administration*, CBCA 752, 08-1 BCA ¶ 33,804, at 167,348 (“[T]he 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.”); *see also Greg Carlson v. General Services Administration*, CBCA 999 (Aug. 28, 2008); *Everett M. Myers v. General Services Administration*, CBCA 940, 08-1 BCA ¶ 33,841; *Danny R. Mitchell v. General Services Administration*, GSBCA 16209, 04-1 BCA ¶ 32,551; *Benno Stein v. General Services Administration*, GSBCA 15517, 01-2 BCA ¶ 31,490, and cases cited therein. The Board has considered and rejects as unfounded Alliance’s position that the fifteen-day rule should be interpreted as allowing for relief, so long as the claim of misdescription is submitted within fifteen days of the bidder’s actual discovery of the misdescription. *See* Transcript at 148.

A single exception to the fifteen-day rule has been identified, namely where, through misrepresentation of either a fraudulent or material nature, the Government induces the purchaser to enter into the contract, *Mitchell*, 04-1 BCA 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. In this regard, this Board has stated that, “to constitute [fraudulent] misrepresentation, the Government had to represent as true certain elements which it knew were false.” *Hutchinson*, 08-1 BCA at 167,348. Here, no evidence has been advanced that would establish that GSA knew that the generator sets in question should have been listed as “General Electric” at the time they were being advertised as “Cate[r]pillar” sets. Moreover, in terms of materiality, as indicated above, Alliance has failed to establish that it was induced to bid on the generator sets based only on the Caterpillar brand name and that it would not have submitted bids had GSA been offering 1980’s General Electric generator sets. Thus, Alliance cannot avail itself of this narrow exception, and its recent claim regarding name brand misdescription must fail as untimely.

Decision

For the foregoing reasons, the appeal hereby is **DENIED**.

RICHARD C. WALTERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

CANDIDA S. STEEL
Board Judge