



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 15, 2013

CBCA 3052

FREE&BEN,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Randy Paul Emosivbe, President of Free&Ben, Brussels, Belgium, appearing for Appellant.

Charles McCarthy and Margaret M. Haggerty, Office of Regional Counsel, General Services Administration, San Francisco, CA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **DRUMMOND**.

DRUMMOND, Board Judge.

Appellant, Free&Ben, disputes the final decision of a General Services Administration (GSA) contracting officer defaulting GSA contract GS09F12FBE6774 (contract) and assessing a total of \$325 in liquidated damages for appellant's failure to pay for and remove a Donaldson industrial dust collector and components (dust collector). Appellant seeks to be relieved of the debt and to be compensated for anticipatory profits totaling \$2855.

GSA moves for summary relief on the basis that the above-captioned appeal contains no genuine issues of material fact and that GSA is entitled to relief as a matter of law. Appellant opposes the motion.

For the reasons discussed below, we grant GSA's motion and deny the appeal.

Findings of Fact

The following facts are undisputed. In June 2012, GSA offered a dust collector for sale through its online auction site, www.gsaauctions.gov. The written terms and conditions of the auction included the following:

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 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.

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 [sic] 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.]

2. Consistent with the applicable terms and conditions, appellant was informed via email message dated July 3, 2012, that it had submitted the winning bid of \$3855 for the dust collector and was therefore awarded the contract. Appellant was instructed to pay for the dust collector within two business days and remove it within ten business days.

3. Appellant did not pay for the dust collector within two business days. GSA extended the time for payment.

4. Appellant subsequently made a partial payment of \$2400 and GSA extended the period for appellant to pay the balance. Appellant did not pay the balance within the extended period. The contracting officer sent by email a notice of termination with an assessment of \$325 in liquidated damages.

4. On October 1, 2012, GSA refunded \$2075 (\$2400 partial payment minus \$325 liquidated damages) to appellant's credit card.

5. Appellant appealed the default termination and assessment of liquidated damages. Appellant also seeks \$2855 for what it characterizes as the cost of settling claims arising out of the termination.¹ The claim for lost profits was not presented to the contracting officer for a decision before appellant filed this appeal.

Discussion

Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party shoulders the burden of proving that no genuine issues of material fact exist. *Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820.

To defeat a motion for summary judgment, more than bare assertions and conclusory statements are necessary to raise a genuine issue of fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). The non-movant must submit, by affidavit or otherwise, specific evidence that could be offered at trial. Failing to do so may result in the motion being granted. *Id.*

¹ Appellant claims to have sold the dust collector to a third party for \$6456 and seeks anticipated profits.

In this case, GSA has met its burden. Appellant failed to pay (within the initial and extended periods). Appellant was in default for failing to fulfil its obligations. GSA is not responsible for a purchaser's inactions. *George Howell v. General Services Administration*, CBCA 2520, 11-2 BCA ¶ 34,862. While appellant asserts that GSA (1) waived its right to strict compliance with the two-day payment rule absent further notification; (2) breached its implied covenant of good faith and fair dealing; and (3) violated the Termination clause by failing to provided appellant with a show cause notice or cure notice, these assertions do not present disputes of material fact, nor do they justify appellant's failure to pay in accordance with the terms of the contract. Accordingly, we find that appellant's default is not excusable.

Moreover, there is no basis for this Board to decide appellant's demand 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 grants GSA's motion for summary relief. This appeal is **DENIED**.

JEROME M. DRUMMOND
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ALLAN H. GOODMAN
Board Judge