



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: October 13, 2016

CBCA 5131

E INDUSTRY, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Moshe Bloorian of E Industry, Inc., Brooklyn, NY, appearing for Appellant.

Kasia Dourney, Office of Chief Counsel, United States Customs and Border Protection, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **WALTERS**, **SULLIVAN**, and **BEARDSLEY**.

BEARDSLEY, Board Judge.

E Industry, Inc. (E Industry) seeks to recover the purchase price of \$15,000 plus the shipping costs of \$3000 that it paid to purchase fabric in a Department of Homeland Security, United States Customs and Border Protection (CBP) online auction. Appellant also requests that the agency remove the fabric from appellant's facility. Appellant asserts that the fabric bought did not conform to the description in the sales catalog for bids. Respondent filed a motion to dismiss appellant's appeal for failure to state a claim upon which relief can be granted. We deny the motion.

Factual Background

On May 21, 2015, appellant was the successful bidder for the merchandise at issue in this appeal in an online auction held by CWS Marketing Group (CWS) on behalf of the agency. The merchandise was described in the online sales catalog for bids as “Lot 30 - Fabric: C/O China; Warehouse Viewing Only; 163 Rls, GO2105270493012. Imperial CFS/Torrance, CA.” The sales catalog also included six photographs of the merchandise. The agency appraised the value of the merchandise as \$8150. Appellant won the bidding with a bid of \$15,000.

The fabric was sold pursuant to the “Sale of Government General Order Merchandise, General Sale Terms and Conditions.” Clause 8 of the terms and conditions states:

The Government warrants to the original Purchaser that the merchandise listed in the sales catalog for bids will conform to its description. This warranty is in place of all other guaranties and warranties express or implied. The Government does not warrant the condition, quality, or merchantability of the merchandise or its fitness for any use or purpose. The condition of items offered varies from “NEW” to “SALVAGE.” The Purchaser understands and agrees that all merchandise is purchased and accepted “AS IS, WHERE IS” and “WITH ALL FAULTS.”

The terms and conditions of the sale limited the amount of recovery in the event of a misdescription “to the purchase price of the inaccurately described merchandise. The Purchaser is not entitled to any payment for loss of profit or any other money damages, including special, direct, indirect, incidental, or consequential.” If a misdescription is determined after removal of the merchandise, however, “the Government will refund any money paid if the Purchaser takes the merchandise at his/her expense to a location specified by the Contractor.” The merchandise must be in the same condition as when it was removed from the agency’s possession.

Bidders were “invited, urged, and cautioned to inspect the merchandise prior to submitting a bid.” Appellant, however, chose not to inspect the merchandise prior to bidding, despite a live preview held on May 20-21, 2015.

Appellant timely submitted a claim for reimbursement to CWS requesting a refund of the amount paid for the merchandise. On July 7, 2015, CWS denied appellant’s request for reimbursement. On July 24, 2015, appellant submitted a claim to the contracting officer requesting that the agency review CWS’s decision and refund the \$15,000 it paid for the merchandise, refund the \$3000 in shipping costs, and remove the items from appellant’s

facility.¹ The contracting officer denied appellant's claim based on the terms and conditions of the sale. The contracting officer determined that the merchandise conformed to the description and photographs in the catalog and noted that the appellant chose not to inspect the lot prior to purchase. On December 21, 2015, appellant appealed the contracting officer's final decision to the Board, asking that the Board reverse the agency's decision.

In its complaint, appellant asserts that the merchandise it purchased did not conform to the description in the sales catalog. It argues that there were no rolls of fabric but instead, 163 white burlap bags containing "326 cardboard tubes, each of which was wrapped with remnants, shreds and small pieces of assorted fabric." Appellant, however, has only opened approximately ten of the white bags and described the contents of the bags as fabric remnants "layered over each other or stuffed together." Appellant asserts that neither the white burlap bags nor the cardboard tubes could be considered rolls of fabric because a roll would, by definition and industry standard, be a continuous piece of fabric (40 to 100 yards) rolled up to form a single package. Rather, it states that the fabric scraps and remnants were packaged and pictured to look like rolls of fabric and are worthless.

The agency asserts that the 163 white burlap bags were the rolls referred to in the sales catalog description, and each roll or bag contained bolts of fabric, loose pieces of fabric material of irregular shapes and scraps of fabric. The agency also reads the written description to be fabric sold in the quantity of 163 rolls. The agency asserts that the photographs included in the sales catalog accurately depicted the merchandise.

Though appellant has raised claims of fraudulent misrepresentation, it seems to have abandoned these claims, stating in its final brief on the motion that appellant is "not hanging [its] hat on a claim of fraud. We are relying solely on whether the merchandise conformed to the description in the sales catalog."

Discussion

We have jurisdiction to decide this timely appeal under the Contract Disputes Act, 41 U.S.C. §§ 7107-7109 (2012). To survive a motion to dismiss, appellant had to "plead factual allegations that support a facially 'plausible' claim to relief in order to avoid dismissal for failure to state a claim." *Financial & Realty Services, LLC v. General Services Administration*, CBCA 5354, 16-1 BCA ¶ 36,472, at 177,720 (citing *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009)). We base this decision on appellant's

¹The Board notes that while the sales terms and conditions contemplates a refund of the purchase price, it does not provide for reimbursement of shipping costs or for the collection of the merchandise by the agency.

complaint and the attachments to the complaint. In considering a motion to dismiss for failure to state a claim, “materials attached to a complaint may be considered as exhibits that are part of the complaint for determining the sufficiency of the pleadings.” *Systems Management and Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,790 (citing *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1342 n.4 (Fed. Cir. 2006) and Fed. R. Civ. P. 10(c)).

In its motion, the agency does not cite to appellant’s complaint, but instead cites to documents in the appeal file. Most of the documents cited to by the agency in the appeal file, however, are also attached to appellant’s complaint. In addition, a tribunal “must consider . . . documents incorporated into the complaint by reference, and matters of which a [tribunal] may take judicial notice.” *Systems Management*, 15-1 BCA at 175,790 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). “Even where a document is not incorporated by reference, the [tribunal] may nevertheless consider it where the complaint ‘relies heavily upon its terms and effect,’ which renders the document ‘integral’ to the complaint.” *Id.* (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)). Here, although appellant did not attach the terms and conditions to its complaint, it repeatedly cites to, quotes from, and relies upon the sales terms and conditions in its complaint, rendering it integral to the complaint. Accordingly, we can look to the terms and conditions in considering the agency's motion to dismiss without converting it into one for summary relief. We evaluate this case under the terms and conditions of the auction, which upon the agency’s acceptance of appellant’s bid became the terms and conditions of a contract between appellant and the agency. *Mykola Shchupak v. General Services Administration*, CBCA 4380, 15-1 BCA ¶ 35,901, at 175,509 (citing *Darren R. Gentilquore v. General Services Administration*, GSBCA 16705, 05-2 BCA ¶ 33,117, at 164,115).

In addressing a motion to dismiss such as this, we must assume that the facts alleged in the complaint are true and construe them in favor of appellant. *CH2M Hill v. Department of Energy*, CBCA 708, 08-2 BCA ¶ 33,871, at 167,666 (citing *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002)). The agency warranted that the merchandise would conform to the description in the sales catalog. Appellant claims that the purchased merchandise did not conform to the description in the sales catalog. The sales catalog described the merchandise to be sold as 163 rolls of fabric. Appellant asserts that there were no rolls of fabric sold. It contends that neither the white burlap bags nor the cardboard tubes constituted rolls of fabric. Moreover, appellant asserts that, even if the cardboard tubes were considered rolls of fabric, there were not 163 rolls but were 326 rolls (two tubes in each bag). Appellant asserts that, regardless of which view is adopted, the description is in error because either there were no rolls of fabric or the number of rolls of fabric was incorrect. The agency asserts that the described “163 rls” equated to the 163 white burlap bags sold. It is not an intuitive conclusion that the 163 white burlap bags were the 163 rolls described.

“Misdescription requires the Government to have made an error in describing what has been offered for sale.” *Joseph M. Hutchinson v. General Services Administration*, CBCA 752, 08-1 BCA ¶ 33,804, at 167,341. Viewing the factual allegations in appellant’s complaint as true and drawing all inferences in favor of appellant, we find that appellant’s complaint alleges facts that plausibly support its claim and could entitle appellant to a legal remedy for misdescription of the merchandise.

The agency’s argument that by failing to inspect the merchandise prior to purchase, appellant assumed all of the risk of a misdescription lacks merit.

The provision to inspect prior to bidding was a warning only. It was followed or preceded by provisions stating that the condition of the property was not guaranteed, thus alerting bidders that inspection might reveal defects in the condition of the property. A claim for misdescribed property is different, however. It does not relate to the condition of the property. The language warning bidders to inspect does not vitiate the rights and obligations of the parties under the ‘Guaranteed Descriptions’ clause. The contract does not say that failure to inspect prior to bidding precludes recovery under the ‘Guaranteed Descriptions’ clause. . . . Thus, appellant’s rights under the clause exist whether or not a prebid inspection was made.

William A. Downs, GSBCA 4699, 77-1 BCA ¶ 12,428, at 60,179 (citing *Andy International, Inc.*, ASBCA 20397, 76-2 BCA 12,046, at 57,816). Under the warranty of description, a bidder’s failure to inspect the merchandise before bidding does not, of itself, preclude relief thereunder. *Id.*

Decision

For the foregoing reasons, respondent’s motion is **DENIED**.

ERICA S. BEARDSLEY
Board Judge

We concur:

RICHARD C. WALTERS
Board Judge

MARIAN SULLIVAN
Board Judge