



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 3, 2016

CBCA 4740

MARINE METAL, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Samuel Reyes, Jr., Vice President of Marine Metal, Inc., Brownsville, TX, appearing for Appellant.

Ashley S. Amano and Janis P. Rodriguez, Office of Chief Counsel, Maritime Administration, Department of Transportation, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **ZISCHKAU**, and **SULLIVAN**.

ZISCHKAU, Board Judge.

Marine Metal, Inc. (MMI) seeks to recover \$556,281 of the purchase price it claims that it overpaid for the purchase of an obsolete vessel, the *Vanguard*, on the ground that the Department of Transportation, Maritime Administration (MARAD or Government), did not reasonably represent the actual weight of the vessel in the public documentation MARAD made available prior to contract award. MARAD filed a motion for summary relief, asserting that the “as is” nature of the sale precludes appellant’s claim. For the reasons below, we grant MARAD’s motion and deny the appeal.

Background

MMI is a shipbreaking company located in Brownsville, Texas, that has been in business since 1997. It is one of a small number of qualified contractors for MARAD's ship disposal program.

On December 16, 2011, MARAD posted to its Virtual Office of Acquisition (VOA) portal a notice announcing that certain vessels in its ship disposal program (to be scrapped and recycled) were available for inspection by prospective offerors at its James River Reserve Fleet (JRRF) in Fort Eustis, Virginia. The *Vanguard* was among the listed vessels. The announcement indicated the vessels would be available for visits by prospective offerors from January 17 to January 27, 2012, for the purposes of inspection, hazmat sampling, and survey in anticipation of qualified contractors competing for the purchase of the obsolete vessels under Vessel Sales Solicitation SDPEXC-08001. Appeal File, Exhibit 2 at 66.¹ The announcement further provided:

REMINDER: Vessel(s) are offered in "AS IS" condition and "WHERE IS" location at their current mooring. The Government makes no guarantees or warranties regarding the condition of any obsolete vessel.

VESSEL VISITS

. . . . Electronic copies of some vessel specific or class drawings, surveys and tank soundings may be available on VOA. Other ship files may be available at the JRRF . . . and, when available, may be reviewed by offerors. . . . The Maritime Administration does not guarantee that any documentation provided is current, accurate or complete, or that it represents the "AS IS" condition of the vessel.

Id.

During the eleven-day vessel visitation period, MMI representatives undertook an inspection of the *Vanguard*. This inspection included visual inspections, physical sampling, and a calculation of the vessel's hull displacement. In the certified claim it would later submit to MARAD, MMI noted that it had calculated the vessel displacement utilizing a "recognized industry formula," which "yielded an estimated minimum weight of 15,937 tons,

¹ All exhibits are found in the appeal file, unless otherwise noted.

thus showing an acceptable displacement within the 10% variation and also within the range of previously recorded displacement figures.” See Notice of Appeal.

On or around June 4, 2013, in advance of its solicitation for offers, MARAD posted to the VOA portal various documents containing descriptions of the *Vanguard*. Exhibit 3. This documentation provided brief synopses of the vessel’s history. See, e.g., Exhibit 4 at 127, 155. The documents also indicated that, in its current configuration, the *Vanguard* had a length of 595 feet, a gross weight of 21,626 tons, and a light ship displacement weight of 13,882 tons. Exhibit 1 at 65-1.² These documents did not, however, make any specific representations as to the amount of recyclable tonnage offerors could expect to recover from the ship.

On June 5, 2013, MARAD formally solicited offers for the purchase of the *Vanguard* and other obsolete vessels. Section B.1 of the solicitation provided, “MARAD will not provide an estimate of hazardous materials/waste quantities and does not guarantee the amount of hazardous material/waste quantities indicated on any Government furnished information provided to the Offeror in the course of offer preparation, proposal submittal or ship checks for this project.” Exhibit 1 at 6. Section 3.2 of the solicitation noted (as had the vessel visitation announcement) the “as is, where is” nature of the solicitation:

The vessels are offered in an “AS IS” condition and “WHERE IS” location at their current mooring in the [JRRF]. The Government makes no guarantees or warranties regarding the condition of any obsolete vessel and does not guarantee that any documentation provided is current, accurate or complete in representing the “AS IS” condition of the vessel.

Exhibit 5 at 159. While the solicitation noted offerors had been permitted to visit the vessel during the initial inspection period in January 2012, and that it did not anticipate requiring purchasers to revisit the ship, MARAD indicated “requests for vessel visitations will be considered on a case-by-case basis.” *Id.* It does not appear from the record that MMI requested a second opportunity to inspect the ship.

On June 27, 2013, MMI submitted a proposal offering \$1,374,318 for the purchase of the *Vanguard*. Exhibit 6. Besides a breakout of \$497,750 for various administrative costs, MMI’s bid did not include a breakout of any other costs or estimates which reflected how it arrived at its total price. Some items are listed as “Job” and indicate a quantity without an associated price. “Ground Cutting,” for example, is listed as a quantity of

² On August 27, 2015, MARAD submitted an amendment to the appeal file to add to Exhibit 1 four pages it had inadvertently omitted, which it designated as pages 65-1 through 65-4.

13,882, which is the same figure reflected in VOA documents as the vessel's light ship displacement weight. *Id.* MARAD accepted MMI's offer on September 6, 2013.

On September 25, 2013, the parties entered into contract no. 14-325 for the sale of the "Obsolete Vessel M/V VANGUARD." Exhibit 7. Various provisions of the agreement reiterated the "as is" nature of the sale. For example, section 2 of the contract's introduction provided: "The Buyer acknowledges and agrees that the Government does not warrant or guarantee, by expression or implication, the size, tonnage, or other description of the Obsolete Vessel. The Buyer relies solely on its own inspection with respect to the particulars of the Obsolete Vessel." *Id.* at 196. Article I, section 1, regarding transfer of title, stated, "[MARAD] conveys, sells, and transfers the whole of the Obsolete Vessel to the Buyer, 'AS IS[.]'" *Id.* at 197. Finally, Article XIII of the contract stated:

1. AS IS, WHERE IS.

The Buyer agrees to accept delivery of the Obsolete Vessel, "AS IS, WHERE IS" at such location and in the condition as of the date and hour of this Contract[.] Thereafter, the Buyer shall not be entitled to make or assert any claim against the Government or the Administrator, on account of any agreements, representations, or warranties, express or implied, with respect to the condition of such Obsolete Vessel. The delivery of the Obsolete Vessel by the Government and the acceptance thereof by the Buyer shall constitute full performance by the Government of all obligations under this ARTICLE VIII [sic] with respect to such obsolete vessel.

Id. at 208.

Upon delivery of the *Vanguard* to MMI on November 5, 2013, MMI undertook dismantling of the vessel and recycling its materials. In its progress report³ dated April 10, 2014 – when the project was approximately sixty percent completed – MMI noted, "MMI notified MARAD that there seems to be some discrepancies in the tonnage documented on the MARAD/VOA documents. MMI is concerned but is patient and will wait till the end of the vessel to make formal complaint, if any." Exhibit 10 at 254. This notation also appeared

³ The solicitation directed offerors to prepare a technical compliance plan and performance schedule for dismantling the vessel to demonstrate that the bidder had the capacity to timely and safely perform the work. Exhibit 1 at 4-5. Pursuant to the contract, MMI was required to report its progress to the contracting officer's technical representative (COTR) to document its compliance with the proposed plan and schedule. Exhibit 7 at 223-24.

in subsequent reports, dated April 24, May 12, and May 21, 2014. Exhibit 11 at 271; Exhibit 12 at 294; Exhibit 13 at 315.

In its July 2, 2014 closeout report to MARAD, MMI detailed the quantities of abated, disposed, or recycled materials it had projected to recover compared to the quantities of materials it actually recovered. Exhibit 14. MMI emphasized the comparison between the documented displacement weight of the *Vanguard* as shown in the VOA documents (13,882 tons) and the weight of recycled materials actually removed from the vessel (7308 tons). *Id.* at 341.

On July 9, 2014, based on the actual quantities of materials it removed compared to the amount estimated, MMI submitted to MARAD a request for equitable adjustment (REA). In its request, MMI described the methodology used to prepare its bid, which included evaluating analysis reports of materials sampled during ship inspections, conducting its own visual assessments, and reviewing information available from the Navy registry. Exhibit 15 at 366. Regarding the information available for the *Vanguard*, MMI observed that VOA documents “depicted a lightship weight displacement for this vessel at 13,882 gross tons,” while the Navy registry listed different, heavier weights than the VOA records. *Id.* Although it conceded that “there are always deviations from records versus actual weight,” MMI indicated that its REA was “based on the fact that the deviation of actual weight in comparison to records [is] ‘grossly different.’” *Id.* Accordingly, MMI calculated its damages as the difference between the weight indicated in the VOA records (13,882) minus the gross weight of all materials (recycled and non-recycled) it actually recovered (8263), multiplied by \$99 per gross ton (a figure MMI computed by dividing the offered price of \$1,374,318 by the light ship displacement weight of 13,882 tons listed in VOA documents), to yield its claimed amount of \$556,281.

By letter dated August 22, 2014, MARAD denied MMI’s REA. Exhibit 17 at 370. First, MARAD noted that the VOA documents showed the *Vanguard*’s tonnage over its service life, which included several modifications and conversions. MARAD stated, “It is evident the vessel was extensively modified from its original configuration which would explain the differences between the vessel weight in 1943 and after its mid-body conversion.” *Id.* Additionally, the Government noted, “[MMI used] the term GT (gross ton) interchangeably with the term light ship weight displacement and the actual weight of the recycled material from the vessel. These terms all have different connotations and may result in different vessel weights depending upon the applicable calculation methodology.” *Id.* Second, MARAD explained that the lack of certainty in vessel documents is why the Government offers its vessels “as is” and does not guarantee the accuracy of any documentation. *Id.* Further to this point, MARAD referenced provisions of the solicitation, contract clauses, and bill of sale, all of which indicated the “as is” nature of the sale. Because MMI was aware of this condition of the sale and still elected to submit an offer,

MARAD concluded that the express terms of the contract precluded any equitable adjustment. *Id.* at 372.

On September 15, 2014, MMI submitted a certified claim to MARAD seeking \$556,281. MMI based its claim on substantially the same grounds as listed in its REA. However, MMI further claimed that, while discrepancies in tonnage are expected in vessel documents, “a shortfall in excess of 40% is not reasonable nor is it one that [MMI] or any other bidder of MARAD would have anticipated.” Exhibit 23 at 387. Additionally, MMI claimed this discrepancy was a mutual mistake of fact by both parties, which entitled it to the equitable adjustment. *Id.* at 388.

MARAD issued a contracting officer’s final decision on February 6, 2015, denying MMI’s claim. The contracting officer noted that the Government sold the vessel on an “as is, where is” basis. Accordingly, the contracting officer concluded that “[t]he contract contains no provision for a sales price reduction based on discrepancies between the actual amount of tonnage dismantled during the recycling of the vessel as compared to any public documentation which describes the tonnage of the vessel in any configuration prior to contract award.” Exhibit 25 at 391. As to the claim of mutual mistake, MARAD found that the contract made no warranties as to the *Vanguard*’s size, tonnage, or other description of the vessel, and that the “as is, where is” sale placed all risks associated with the difference in the estimated and actual tonnage solely on MMI. Therefore, there was no mutual mistake.

On April 27, 2015, MMI appealed the final decision to the Board.

Discussion

MARAD has filed a motion for summary relief, asserting that MMI’s appeal should be denied because (1) the “as is, where is” provisions of the contract preclude appellant’s requested relief, and (2) the parties were not mutually mistaken as to the weight of the ship because the Government made no representations as to the vessel’s weight. In its response to MARAD’s statement of uncontested facts, appellant acknowledges that the “as is, where is” language was found in the vessel visit announcement, solicitation, contract, and bill of sale, Opposition to Respondent’s Motion for Summary Relief ¶¶ 3-5, 7, and does not dispute the remainder of the Government’s statement of uncontested facts. *Id.* ¶¶ 9-21 (“Appellant agrees with the content of each of the remaining bullet points with the Statement of Uncontested Facts.”). Instead, MMI argues that the “as is, where is” language is ambiguous and should be limited to the vessel’s location and seaworthiness, rather than its tonnage. Additionally, MMI claims that enforcing these provisions would be inequitable due to the limitations it alleges MARAD placed on the type of and number of days allowed for vessel inspections – especially where, as here, the contractor experienced a gross disparity in estimated and actual tonnage. Finally, MMI argues that during the many years in which it has been a contractor in the MARAD ship disposal program, under contracts with the same

or similar terms and conditions, it and other disposal contractors have come to rely on information about the ships posted by MARAD. According to MMI, this information is “deemed as a starting point used to gain proposals from towing companies, insurance quotes, and subcontracted remediation companies” and is used to “prepare dismantling schedules, specifically using size and weight to appropriately arrive at timeframes.” Opposition to Respondent’s Motion for Summary Relief at 2.

The rules applicable to motions for summary relief are well established. Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based upon undisputed material facts. *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 3632, 15-1 BCA ¶ 35,949, at 175,683. The moving party bears the burden of demonstrating the absence of genuine issues of material fact and all justifiable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A material fact is one that will affect the outcome of the case. *Anderson*, 477 U.S. at 247. “[T]he party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

As noted above, there is no dispute as to any of the material facts. Appellant, however, asserts that the “as is, where is” contract language is ambiguous. Contract interpretation is a legal question amenable to resolution on summary relief. *Charleston Marine Containers, Inc. v. General Services Administration*, CBCA 1834, 10-2 BCA ¶ 34,551, at 170,398 (citing *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002)). Interpretation begins with the plain language of the contract. *Id.* (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). We construe a contract so as to supply reasonable meaning to all its parts, and an interpretation that gives reasonable meaning to the contract as a whole is preferred to one that renders a portion of the contract meaningless or in conflict with another provision. *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285, at 176,954 (citing *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965)).

We disagree with MMI that the “as is, where is” language is ambiguous and should be narrowly read to refer only to the ship’s location and seaworthiness. The contract specifically states: “The Buyer acknowledges and agrees that the Government does not warrant or guarantee, by expression or implication, the size, tonnage, or other description of the Obsolete Vessel. The Buyer relies solely on its own inspection with respect to the particulars of the Obsolete Vessel.” Reading the contract as a whole, it is clear that the contract shifts to the buyer all risks associated with the purchase of the vessel, including the size, tonnage, or other description of the vessel. MMI admits that it was fully aware of the risk-shifting nature of the “as is, where is” clauses in MARAD’s ship disposal contract.

MMI points us to no language supporting any narrow reading of the clauses, and we see no support in any of the provisions for such a narrow reading that would place the risk of variations in the ship's weight on MARAD.

We also see no basis for recovery simply because of MMI's claimed shortfall of 5619 tons salvaged during the ship's dismantlement. When a purchaser challenges the sale of Government property sold on an "as is, where is" basis, tribunals apply the doctrine of caveat emptor, and deny relief to buyers who claim to have suffered a loss due to the condition of the property being purchased. *Lithium Corp.*, AEC BCA 54-2-68, 68-1 BCA ¶ 7058, at 32,629-30. An "as is, where is" provision in such a sale "is a strong provision and, as interpreted by the Court of Claims, the purchaser 'takes his chance on the quality of the goods and the quantity as well.'" *Id.* at 32,630 (footnote and citation omitted). "The very nature of an 'as is' and 'where is' contract serves notice upon a prospective purchaser that the risk of loss is on the purchaser. In other words, 'Let the buyer beware.'" *Rochester Iron & Metal Co. v. United States*, 168 Ct. Cl. 422, 427 (1964).

MMI concedes that it was on notice of the "as is, where is" provisions in the solicitation documents, sales contract, and bill of sale. Nevertheless, MMI argues it is entitled to an equitable adjustment because the weight of the *Vanguard* listed in VOA documents and the actual weight of material it recovered from the vessel is "grossly different" and the forty percent shortfall it realized is unreasonable. However, in an "as is, where is" sale, a variance in what the purchaser expects to receive and what it actually salvages does not vitiate the effect of the "as is, where is" provision. *See Lithium Corp.*, 68-1 BCA at 32,628-31 (finding for Government when actual amount of lithium the contractor recovered was 34.5% less than estimated); *Alloys & Chemicals Corp. v. United States*, 163 Ct. Cl. 229, 230-33 (1963) (same; quantity of aluminum silicon was 45% less than estimated); *Rochester Iron*, 168 Ct. Cl. at 429-30 (same; approximate 20% shortage of steel); *Aircraft Associates & Manufacturing Co. v. United States*, 174 Ct. Cl. 886, 891-92 (1966) (same; approximate 12% shortfall on aircraft materials). "It is well settled that in such a contract the vendee has no right of recovery because it develops that the quantity available is less, *even greatly less*, than the estimate." *Alloys & Chemicals Corp.*, 163 Ct. Cl. at 232 (emphasis added). Thus, MMI cannot avoid the effect of the "as is, where is" terms of its contract because a "substantial variance between estimate and actuality is of itself insufficient." *Id.* at 233.

We also are unpersuaded by appellant's arguments related to the alleged restrictions placed on MMI's inspection of the ship. Appellant's argument appears to be that the agency, in the materials provided, misdescribed the weight of the ship, and that, because there was no way for an offeror to determine the proper weight during the limited time allowed for inspection, it was incumbent upon the agency to provide accurate information. Appellant has not pointed to any evidence that the Government furnished an estimate of the amount of

recyclable tonnage a contractor could expect to recover, and there is no evidence in the record that such an estimate was provided. Both the visit announcement and the solicitation advised prospective buyers that the documentation MARAD provided concerning the description of the vessel was based on “available” information, and that it made no guarantee or warranty as to the currentness, correctness, or completeness of that information. Exhibit 2 at 66; Exhibit 5 at 159. Moreover, the contract made clear that the Government neither expressly nor impliedly warranted the “size, tonnage, or other description” of the ship, and that the “[b]uyer relies *solely on its own inspection* with respect to the particulars” of the vessel. Exhibit 7 at 96 (emphasis added). In its certified claim, MMI notes that it undertook an initial inspection and formulated its own estimate of the ship’s weight. Yet, MMI has not alleged that MARAD in some way precluded MMI’s ability to adequately survey the ship during the initial eleven-day inspection period, or that MMI was prevented from conducting an additional reinspection of the ship when it was provided the opportunity.

MMI’s argument that, historically, it has come to rely on information about the ships posted by MARAD in preparing its proposal and receiving proposals from its subcontractors and vendors, is not well taken. There is no exception in the contract’s “as is, where is” provisions for a contractor’s reliance on the displacement weight posted by MARAD. Nor is there an exception in the contract terms for any historical or industry practice in using the weight data provided by MARAD. MMI has not identified any remedy-granting clause in the contract that permits an equitable adjustment for variations in the ship’s weight as identified in the information posted by MARAD versus the weight of material actually recovered by the contractor.

Although not raised in its appeal, MMI’s prior reliance on mutual mistake is also unavailing. In very similar circumstances, and involving the same parties as the instant appeal, we explained the elements of mutual mistake: “The elements of mutual mistake, warranting contract reformation, are: (1) the parties to a contract were mistaken in their belief regarding a fact; (2) the mistake constitutes a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of the mistake on the party alleging mistake.” *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554, at 166,176. There, MMI sought an upward equitable adjustment under a firm-fixed price contract for asbestos removal from a vessel when the amount of asbestos it removed was substantially more than the amount its abatement subcontractor had estimated. Under a similar “as is, where is” contract – in which MARAD made no representations concerning the quantity of asbestos to be remediated and did not guarantee the accuracy of the information it furnished – we concluded there was no mutual mistake because the “as is, where is” provision placed the burden of mistake solely on the appellant. For the same reasons, MMI’s claim of mutual mistake fails here. Moreover, as noted above, MMI does not dispute MARAD’s assertion, found at paragraph

19 of its statement of uncontested facts, that MMI was “fully aware of the risk-shifting nature of ‘As-Is’ clauses in MARAD ship disposal contracts[.]”

MMI has failed to raise any genuine issues of material fact. The “as is, where is” clause precludes recovery by MMI as a matter of law. Accordingly, MARAD is entitled to prevail on its motion for summary relief.

Decision

MARAD’s motion for summary relief is granted. MMI’s appeal is **DENIED**.

JONATHAN D. ZISCHKAU
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

MARIAN E. SULLIVAN
Board Judge