



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 20, 2017

CBCA 5575

NANCY McBROOM,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Nancy McBroom, pro se, Pagosa Springs, CO.

Leigh Ann Bunetta, Office of Regional Counsel, General Services Administration, Denver, CO, counsel for Respondent.

Before Board Judges **SHERIDAN, O'ROURKE**, and **CHADWICK**.

SHERIDAN, Board Judge.

Appellant, Nancy McBroom, appeals the denial of her claim for compensation for repairs needed to be done to a vehicle purchased through the General Services Administration (GSA) auction website or, in the alternative, for a full refund of the purchase price. Appellant alleges that the vehicle was knowingly misdescribed, in breach of the GSA Fleet Vehicle Sales Terms and Conditions for Internet Sales Description Warranty, because the description did not disclose an engine manifold leak. Appellant contacted the contracting officer nine months after the date of removal seeking the above-mentioned relief. GSA denied this request on the grounds that the claim was untimely submitted, that the vehicle was altered, and that the vehicle was not misdescribed.

The parties have agreed to submit the case on the record, pursuant to Rule 19 (48 CFR 6101.19(a) (2015)). As we find that appellant did not timely submit her claim, failed to maintain the vehicle in the same condition as it was upon removal, and failed to prove misdescription, the appeal is denied.

Background

On January 13, 2016, the GSA offered for sale through its auction website (gsaauctions.gov) one 2010 Dodge wagon. The full description stated:

DODGE POWER WAGON 2500 4DR 4X4 GAS AUTO TRANS WHITE I426755 DAMAGES – SCRATCHES, SCUFFS, CHIPS, DINGS AND DENTS CONSISTENT WITH FIELD USE – MAY HAVE SMALL HOLES IN DASH, CONSOLE, FLOOR, ROOF FROM EQUIPMENT REMOVAL, MAY HAVE STAINS AND WEAR ON CARPET AND SEATS. SOLD AS IS. BIDDERS ARE STRONGLY ENCOURAGED TO VIEW VEHICLE BEFORE BIDDING.

The Department of the Interior (DOI) owned the vehicle prior to the auction.

In order to place bids, prospective bidders are required to register with the GSA auction website by providing personal information, creating a username and password, and agreeing to the Online Sales Terms and Conditions. By agreeing to the Online Sales Terms and Conditions, bidders also agree to the General Sales Terms and Conditions of the standard form 114C.

The Online Sales Terms and Conditions contain an inspection clause, a condition warranty, a description warranty and refunds clause, a disputes agreement, and an available relief clause. Under the inspection clause:

[b]idders agree to physically inspect the property upon which they bid or thereby waive the opportunity to conduct a physical inspection. In waiving their inspection rights, bidders bear the risk for any gross omissions regarding the functionality of items, failures to cite major missing parts and/or restrictions with regards to usage that would have been revealed by physical inspection.

The condition warranty of the Online Sale Terms and Conditions replaces the condition warranty in standard form 114C with:

[c]ondition of property is not warranted. Deficiencies, when known, have been indicated in the property descriptions. *However, absence of any indicated deficiencies does not mean that none exists.* Therefore, the bidder should ascertain the condition of the item through physical inspection.

Upon any sale of a government fleet vehicle, bidders, in addition to the Online Sales Terms and Conditions, are bound by the Fleet Vehicle Sales Terms and Conditions for Internet Sales, which includes a description warranty that states:

The Government warrants to the original purchaser that the property listed in the invitation for bids will conform to its description. 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 or her expense to a location specified by the Contracting Officer. No refund will be made unless the purchaser submits a written notice to the Contracting Officer within 15 calendar days of the date of removal that the property is misdescribed and maintains the property in the same condition as when removed The Government does not warrant the merchantability of the property or its fitness for any use or purpose. The amount of recovery under this provision is limited to the purchase price of the misdescribed property. The purchaser is not entitled to any payment for loss of profit or any other money damages, special, direct, indirect, or consequential.

GSA selected Ms. McBroom's bid of \$16,210 as the winning bid for the 2010 Dodge wagon under contract number GS08F16FBE2386. Ms. McBroom did not conduct a physical inspection prior to bidding on the vehicle. Title to the vehicle passed to Ms. McBroom on February 13, 2016, and Ms. McBroom received a purchaser's receipt on February 14, 2016, detailing the contracting officer's and the owning agency's contact information. GSA required Ms. McBroom to take possession of the vehicle by February 26, 2016. Ms. McBroom and her spouse, Mr. Richard McBroom (the McBrooms), removed the vehicle via a trailer on February 14, 2016, despite being denied a request to test drive the vehicle before its removal.

On February 22, 2016, Ms. McBroom wrote a letter to DOI, stating that shortly after returning home with the vehicle and driving it she noticed a leak in the engine manifold, that the check engine light came on, and that the shocks were "completely and dangerously worn out." She alleged that these defects were known to GSA prior to auctioning the vehicle and that GSA failed to disclose these issues. Ms. McBroom requested compensation for the necessary repairs to the vehicle. Ms. McBroom did not receive a response to the letter.

On November 16, 2016, Mr. McBroom called the contracting officer, seeking a response to the letter submitted February 22, 2016. Following the phone call, via an email message, Mr. McBroom stated he had put “minimal miles on the truck,” that “[he] had to install 4 shocks immediately, . . . waxed [the vehicle] 3 [times], changed the differential fluids in front, rear axles, transmission fluid and the 2 transmission filters . . . [and] had to have a sensor/module removed and replaced (after 1 mile).”

The contracting officer responded to Mr. McBroom’s email message, stating that “there [was] nothing [he] could do at [that] point” because Mr. McBroom had altered the vehicle’s condition. Mr. McBroom claimed that he mis-spoke and that he had not altered the vehicle and that he did not replace the shocks or sensor. The contracting officer again denied Mr. McBroom’s request for compensation, explaining that even if Mr. McBroom made no alterations to the vehicle, notice of such misdescription was not timely received.

Ms. McBroom, following communication with the contracting officer, appealed to this Board the contracting officer’s decision not to compensate the McBrooms for the needed repairs. The appeal alleged that GSA knew of the mechanical defects of the vehicle prior to putting it up for auction, evidenced by a service record obtained by Mr. McBroom, and that this failure to disclose constitutes a violation of the description warranty clause.

Ms. McBroom, after a conference call with the Board, submitted a claim to the contracting officer on January 27, 2017, for the total cost of repairs of \$5017.81, or, alternatively, a full refund of the purchase amount \$16,210. The contracting officer denied this claim in its entirety on February 3, 2017, arguing that no misdescription occurred. The contracting officer stated that a service report from just prior to the vehicle being auctioned did note a leak in the engine manifold, but the annual inspection, conducted on the same day, indicated that all aspects of the vehicle were satisfactory. The contracting officer’s denial, however, was ultimately based on Ms. McBroom failing to timely file her claim.

After failing to reach a settlement, both parties elected to waive a hearing and submitted the case on the record for disposition, pursuant to Rule 19. The McBrooms argued that their claim was submitted within the fifteen-day period but was sent to the wrong recipient and they are deserving of leniency. The McBrooms also argue that they did not alter the vehicle (outside of actually driving it, changing fluids, and waxing the vehicle), that GSA knew of the vehicle’s defects, that GSA failed to disclose those defects, and that this failure breached the description warranty. They requested the cost of repairs or rescission of the sale. GSA’s submission reiterated that: (1) Ms. McBroom failed to timely submit her claim; (2) Ms. McBroom is claiming “a problem associated with condition”; (3) the GSA, pursuant to the sales terms and conditions, only warranted the description of the vehicle, not

its condition; and (4) Ms. McBroom modified the vehicle in violation of the misdescription claim procedure. Ms. McBroom reiterated in her response that the McBrooms did not alter the vehicle and that GSA knew of the defects prior to auctioning the vehicle.

Discussion

Both parties agreed to submit this case on the record for disposition without a hearing, pursuant to Rule 19. Because appellant failed to timely submit a claim to the contracting officer, failed to maintain the vehicle in the same condition as when it was removed, and failed to prove misdescription, the appeal is denied.

Untimely Claim Submission

Appellant's appeal is denied because she failed to submit a claim within the time required by the contract. The Fleet Vehicle Sales Terms and Conditions for Internet Sales description warranty states: "No refund will be made unless the purchaser submits a written notice *to the Contracting Officer within 15 calendar days* of the date of removal . . ." "The terms and conditions of vehicle auctions are strictly enforced." *Danny R. Mitchell v. General Services Administration*, GSBCA 16122, 04-1 BCA ¶ 32,511, at 160,828 (denying claim because appellant failed to submit claim within fifteen days of removal even though he attempted to call the contracting officer within fifteen days). It is well established that claims of misdescription must be submitted to the contracting officer within fifteen calendar days of removal. *See, e.g., T.K. Hughes Auto Sales, Inc. v. General Services Administration*, CBCA 5397, et al., 17-1 BCA ¶ 36,747, at 179,109; *Stephen D. Bradley v. General Services Administration*, CBCA 5040, 16-1 BCA ¶ 36,327, at 177,114-15; *Joseph M. Hutchison v. General Services Administration*, CBCA 752, 08-1 BCA ¶ 33,804, at 167,341; *Mitchell*, 04-1 BCA at 160,827-28.

While appellant did send a letter to DOI within the fifteen day period, the contracting officer never received it. It was not until November 16, 2016, almost nine months later, that Mr. McBroom called the contracting officer and informed him that Ms. McBroom had mailed a letter to DOI on February 22, 2016. Because appellant failed to send the claim to the contracting officer within fifteen days of the date of removal, this appeal is denied.

Failure to Maintain Vehicle in Same Condition

Moreover, appellant's appeal is denied because the vehicle was altered after removal. The terms of the refund procedure clearly states that the property must be maintained "in the same condition as when removed." Appellant altered the vehicle after the purchase date. Appellant cannot make changes to the vehicle and maintain a claim for misdescription. *See*

Frances Spicer v. General Services Administration, CBCA 1532, 09-2 BCA ¶ 34,195, at 168,993 (appeal based on misdescription is denied because appellant did not timely submit her claim, made various repairs to vehicle, and drove the vehicle 4600 miles).

Claim of Misdescription

Even if appellant had made a timely submission, she fails to make a misdescription claim. Under the Fleet Vehicle Sales Terms and Conditions for Internet Sales, the Government only warrants that “the property listed in the invitation for bids will conform to its description.” Moreover, the Online Sales Terms and Conditions agreement warns bidders “that GSA’s written description represents GSA’s best effort to describe the item based on the information provided to it by the owning agency. Therefore, gross omissions regarding the functionality of items, failures to cite major missing parts and/or restrictions with regards to usage may occur.”

In order to have a successful claim of misdescription, appellant must show the vehicle was misdescribed. *See Bradley*, 16-1 BCA at 177,114 (“Misdescription requires the Government to have made an error in describing what has been offered for sale.” (quoting *Hutchison*, 08-1 BCA at 167,341)); *see also Mykola Shchupack v. General Services Administration*, CBCA 4380, 15-1 BCA ¶ 35,901, at 175,508 (“The written description was correct, and therefore cannot be deemed a misdescription.”). Misdescription is “an inaccurate – meaning an erroneous or incorrect – description of something with which the describer is familiar.” *T.K. Hughes Auto Sales, Inc.*, 17-1 BCA at 179,109 (quoting *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631, at 166,572). “Failure to disclose the vehicles’ condition does not amount to a mis-description.” *Id.* (citing *Spicer*, 09-2 BCA at 168,994).

Appellant makes no assertion that the vehicle purchased was inaccurately described at the time of sale and therefore does not make a claim of misdescription. Appellant’s claim is based on the vehicle needing repairs that the Government did not disclose in the vehicle’s description, not that a specific detail in the description was inaccurate. While it is unfortunate that the vehicle was not in the condition appellant expected, this is a claim regarding the condition of the vehicle, not the description. *See Bradley*, 16-1 BCA at 177,114. The condition warranty puts the bidder on notice that GSA does not warrant the condition of the vehicle and deficiencies may exist even though they are not disclosed.

Moreover, appellant mistakenly relies upon a prior, and since abandoned, interpretation of misdescription warranty claims. *Compare Benno Stein v. General Services Administration*, GSBGA 15517, 01-2 BCA ¶ 31,490, at 155,473 (finding that in order to recover on a claim of misdescription, appellant must show that issues “were known to the

Government prior to the sale and that the information was not disclosed to prospective buyers.” (quoting *Dorothy & Al Audycki*, GSBCA 9309, 88-3 BCA ¶ 21,112, at 106,574)) with *T.K. Hughes Auto Sales, Inc.*, 17-1 BCA at 179,109 (“Failure to disclose the vehicles’ condition does not amount to a mis-description.”); see generally *Bradley*, 16-1 BCA at 177,114 (“Misdescription requires the Government to have made an error in describing what has been offered for sale.”). As stated above, to establish a claim of misdescription, appellants must show that the description GSA provided was inaccurate in some respect. Appellant failed to do so.

Decision

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

PATRICIA J. SHERIDAN
Board Judge

We concur:

KATHLEEN J. O’ROURKE
Board Judge

KYLE E. CHADWICK
Board Judge