UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 17, 2026

CBCA 8787

YUANMING ZHANG,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Yuanming Zhang, pro se, Allen, TX.

Alexander Falciani, Office of General Counsel, General Services Administration, Philadelphia, PA, counsel for Respondent.

LESTER, Board Judge.

Appellant, Yuanming Zhang, purchased a vehicle at a General Services Administration (GSA) auction. He subsequently complained to the GSA contracting officer that, although the auction notice indicated that the hybrid battery in the vehicle was inoperable, it failed to disclose other problems with the vehicle, including broader engine damage, lubrication system deterioration, metallic oil contamination, abnormal engine noise, and evidence of prior non-standard oil system repairs. He seeks a refund of his purchase price, plus reimbursement of transportation and logistical costs associated with the vehicle acquisition and of his filing and litigation costs.

Mr. Zhang has requested resolution of this appeal through the small claims procedure identified in Board Rule 52 (48 CFR 6101.52 (published in eCFR)), and the parties elected to submit the appeal for decision on the written record pursuant to Rule 19 in lieu of a

hearing. In accordance with the Contract Disputes Act (CDA), 41 U.S.C. § 7106(b)(4), (5) (2024), and Rule 52(c), this decision is final and conclusive, cannot be set aside except for fraud, and is not precedential.

Findings of Fact

I. Auction Terms and Conditions

On August 25, 2025, GSA published a notice on its auction website, GSAAuctions.gov, offering to sell a government-owned vehicle—specifically, a 2009 Ford Escape Hybrid—that the United States Fish and Wildlife Service (FWS) had released as surplus property. *See* Appeal File, Exhibits 3 at 6, 12 at 62.[1] The notice on the website provided the following item description:

> 2009 Ford Escape Hybrid. A= 575115. VIN: 1FMCU49369KD10785. Total mileage is 87,812. 4-cylinder gas electric hybrid engine with automatic transmission. Power window, cruise control, alarm system, power drivers seat. The hybrid battery is inoperable which is not allowing the back right window to roll up.

Exhibit 3 at 6. The notice further indicated that the original unit acquisition cost of the vehicle was $25,223.74, that the fair market value at that time was $4500, and that the condition of the vehicle was "[u]sable." *Id.* The notice provided contact information for a FWS employee who bidders could contact "[f]or more information." *Id.* Photos of the exterior and interior of the vehicle accompanied the notice. *See id.* at 5, 8-18.

Any individual who wanted to place a bid for the vehicle first had to register with the GSAAuction.gov website. *See* Exhibit 11 at 38 ("Users/Bidders must complete the Bidder Registration and Bid Form included in the [Invitation for Bids (IFB)] and provide the specified deposit such as bid deposit and performance bond before they will be allowed to bid on that property."). To register, the bidder had to provide specific personal information, create a username and password, and agree to GSA's "Online Sales Terms and Conditions," which, in addition to providing several pages of specific written provisions applicable to the auction sales, incorporated the "General Sales Terms and Conditions" from Standard Form (SF) 114C. *See id.* ("If a bidder does not agree to the presented terms and conditions they cannot place bids on property. . . . By accepting the GSA Auctions® Terms and Conditions,

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[1] All exhibits are found in the appeal file unless otherwise noted. Page citations are to the Bates numbers on the exhibits.

bidders are also agreeing to the General Sales Terms and Conditions (Standard Form 114C, April 2001)."); *id.* at 41 ("To participate in the GSAAuctions® bid process, an individual must acknowledge that they have read and accepted ALL terms and conditions detailed on this website.").

The "Online Sales Terms and Conditions" provided that "[a]ll property is offered for sale 'where is' and 'as is' and without recourse against the United States." Exhibit 11 at 55. They indicated that, although "[t]he Government warrants to the original purchaser that the property listed on GSAAuctions.gov will conform to its written description," that warranty did not extend to and excluded "[f]eatures, characteristics, deficiencies, etc. not addressed in the description." *Id.* GSA "further caution[ed] 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" but that "gross omissions regarding the functionality of items, failures to cite major missing parts and/or restrictions with regards to usage may occur." *Id.* Further, the "Online Sales Terms and Conditions" contained a provision entitled "Condition of Property" in which GSA expressly disclaimed any warranty of the vehicle's condition, represented that the absence of an indicated deficiency did not mean that no deficiencies existed, and advised bidders to conduct a physical inspection of the property being auctioned:

> *Condition 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*. Please also reference the Inspection of Property clause.

Id. at 54 (emphasis added). GSA also represented that "[t]he Government does not warrant the merchantability of the property or its purpose" and that "[t]he purchaser is not entitled to any payment for loss of profit or any other money damages—special, direct, indirect, or consequential." *Id.* at 55.

The "Online Sales Terms and Conditions" contained a specific inspection clause providing bidders with an opportunity physically to inspect auction items and warning them about the risks of failing to do so:

> [B]idders have the opportunity to physically inspect the property prior to placing a bid and prior to the auction's closing date and time 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, failure to cite major missing parts and/or restrictions with regards to usage that would have been revealed by physical inspection.

Exhibit 11 at 49. The SF 114C terms and conditions incorporated into the "Online Sales Terms and Conditions" further cautioned the bidder about a failure to inspect: "The Bidder is invited, urged, and cautioned to inspect the property prior to submitting a bid. Property will be available for inspection at the places and times specified in the Invitation." Exhibit 15 ¶ 1.

Finally, the SF 114C terms and conditions provided that, if a purchaser established the Government's liability for breach of contract, the purchaser's maximum recovery against the Government could not exceed the price that the purchaser paid for the property, as follows:

> Except for reasonable packing, loading, and transportation costs (such packing, loading, and transportation costs being recoverable only when a return of property at Government cost is specifically authorized by the Contracting Officer), *the measure of the Government's liability, in any case where liability of the Government to the Purchaser has been established, shall not exceed refund of such portion of the purchase price as the Government may have received*.

Exhibit 15 ¶ 15 (emphasis added). Under the heading "Refund Claim Procedures" in GSA's "Online Sales Terms and Conditions," GSA indicated that, although "refunds are not a frequent practice of GSA Auctions®," a bidder could make "[a] request for refund . . . substantiated in writing to the Contracting Officer for issues regarding mis-described property, missing property and voluntary defaults within 15 calendar days from the date of award." Exhibit 11 at 56. The "Online Sales Terms and Conditions" provided that any such "refund is limited to an amount not to exceed the purchase price of the mis-described property." *Id.* They further identified specific procedures that a winning bidder who had paid for the auction property had to follow if it wanted a refund, including the need to return the property for which a refund was sought "in its purchased condition":

> When items are awarded and payment has been received, regardless of the removal status (removal may or may not have occurred), the successful bidder must submit a written notice to the Sales Contracting Officer within 15 calendar days from the date of payment e-mail (the Purchaser's Receipt). If property has been removed and the claim is accepted by the Sales Contracting Officer, the purchaser must maintain the property in its purchased condition and return it at their expense to the location designated by the Sales Contracting Officer or their designated official.

Id.

II. Mr. Zhang's Bid and Resulting Contract

Mr. Zhang submitted a bid in which he offered to pay $2522 for the vehicle. Exhibit 1 at 1. Prior to submitting his bid, Mr. Zhang did not physically inspect the vehicle. Exhibit 14 at 78, 79. GSA initially allowed Mr. Zhang's bid to expire because it did not meet the agency's reserve price. Exhibit 1 at 1. Nevertheless, through an exchange of emails on September 2, 2025, GSA informed Mr. Zhang that it was willing to accept his bid if he wanted to revive it, Mr. Zhang responded that he was, and Mr. Zhang's bid was accepted. *Id.* Mr. Zhang paid for and received title to the vehicle that same day. *See* Exhibits 4 at 19, 5 at 21. Nevertheless, Mr. Zhang did not remove the vehicle from the Government's storage facility until September 8, 2025, when he sent a third party to retrieve it. Exhibit 14 at 78; *see* Exhibit 6 at 22.

III. Mr. Zhang's Claim

On September 21, 2025, Mr. Zhang submitted a claim to GSA, requesting payment of $3582. Exhibit 7 at 25-26.[2] In the claim, he explained that, after repairing the hybrid battery, he discovered other problems with the vehicle's engine that GSA had not disclosed in the auction notice, which he attributed to an intentional effort to conceal the engine problems:

> While the auction listing accurately disclosed that the "hybrid battery is inoperable," it failed to disclose a critical, pre-existing mechanical defect that renders the vehicle undriveable and constitutes a material misrepresentation.
>
> Upon receipt of the vehicle, I successfully repaired the disclosed hybrid battery issue. When started, the engine immediately exhibited a severe knocking sound indicative of catastrophic internal failure. A subsequent inspection revealed the following:
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> 1. **Undisclosed Engine Damage**: The engine has suffered severe internal damage, confirmed by the presence of significant metal shavings in the

[2] On September 10, 2026, prior to submitting a refund claim, Mr. Zhang sent an email to the FWS representative, with a copy to the GSA representative, complaining as follows: "Engine knocking hard.....such big issue should be disclosed... Disappointed." Appellant's Exhibit filed June 9, 2026. He did not at that time request a refund or a monetary payment.

engine oil, which is consistent with connecting rod or lifter bearing failure.

2. **Evidence of Prior Knowledge**: The root cause of this failure is a historically stripped oil drain plug hole. The plughole had been previously stripped and then tapped to a larger, non-standard size. This stripped plug hole would have caused a significant oil leak, leading to oil starvation and the engine damage I discovered.
3. **Concealment**: The engine oil was clean and new, indicating the oil was changed *after* the drain plug was repaired and *after* the internal engine damage had already occurred. This sequence of events proves the mechanical failure was known and actively concealed prior to the vehicle being offered at auction.

The absence of this material defect from the auction listing is a serious misrepresentation.

Id. He informed GSA that, "[g]iven that the vehicle has a fundamental, pre-existing engine defect that was not disclosed, I am requesting a full refund of my purchase price of **$2,522.00** and reimbursement for the **$1,060.00** I paid to ship a non-functional vehicle to Texas," for a total of $3582. *Id.* at 26.

On January 6, 2026, the GSA contracting officer issued a decision denying Mr. Zhang's claim on the basis that it was untimely (having been submitted to GSA more than fifteen days after Mr. Zhang had paid for the vehicle), that GSA had disclaimed any warranty of the vehicle's condition in the auction notice and resulting contract, and that Mr. Zhang had waived defects in the vehicle by failing to inspect it before bidding. Exhibit 10 at 32-36. The decision provided Mr. Zhang with notice of his appeal rights. *Id.* at 36.

IV. Proceedings Before the Board

Mr. Zhang filed a notice of appeal with the Board on January 15, 2026. In that notice, Mr. Zhang invoked the small claims procedure described in Board Rule 52, which requires the Board, if possible, to resolve the appeal within 120 days from the date of election. To allow for expedited proceedings, the Board issued an initial proceedings order designating Mr. Zhang's notice of appeal as the complaint, expediting the filing of GSA's answer and the Rule 4 appeal file, and requesting a joint proposed schedule that would allow the Board to issue a decision by the small claims procedure deadline. On February 18, 2026, the parties notified the Board that they had agreed to request a short period of time for discovery after which they would submit this appeal for decision on the written record pursuant to Board

Rule 19. Following a conference with the parties on February 26, 2026, the Board adopted the parties' proposed schedule, setting deadlines of March 20 for the close of discovery, March 27 for the submission of GSA's opening Rule 19 brief, and April 17 for the submission of Mr. Zhang's opening Rule 19 brief. Although Mr. Zhang subsequently requested and was granted an enlargement of the discovery period to allow him to attempt to resolve a document production dispute with the agency, GSA filed its opening Rule 19 brief on March 25, 2026.

On April 10, 2026, Mr. Zhang filed what he called an emergency motion to compel discovery, asking that GSA be required to obtain and produce documents from the FWS about the vehicle that he purchased and that he be granted an enlargement of time to file his opening Rule 19 brief until such time as his discovery demands were satisfied. Although recognizing that some of Mr. Zhang's production requests were served late (only days before discovery was set to close), the Board, in a published order dated April 28, 2026, exercised its discretion to allow the out-of-time requests to stand and ultimately granted Mr. Zhang's motion to compel. *See Yuanming Zhang v. General Services Administration*, CBCA 8787, 26-1 BCA ¶ 39,043, at 190,173-76. We noted, though, that "Mr. Zhang's decision to pursue new discovery now will affect the timing of the Board's ultimate decision in this appeal and push it beyond the 120-day deadline identified in Rule 52" but recognized it as "a choice that Mr. Zhang ha[d] made by making new discovery demands" late in the expedited discovery period. *Id.* at 190,173.

Subsequently, GSA asked the FWS to provide it with any documents responsive to Mr. Zhang's production requests, Exhibit 14 at 80-81, and the FWS did so on April 29, 2026, along with a written explanation from the FWS contact person who was responsible for placing the vehicle for auction about his knowledge of the vehicle's maintenance history. *Id.* at 78-79. The documents, supplemented by the FWS employee's written commentary, establish that the Ford Explorer had originally been used exclusively by an organization with which the FWS had partnered (an educational group called the Friends of Coastal South Carolina (FCSC)), rather than by the FWS itself, and the FWS provided a maintenance document, which the FWS obtained after approaching the maintenance service provider in response to Mr. Zhang's document request,[3] showing some engine work paid by FCSC in

[3] In his document production request of April 3, 2026, Mr. Zhang sought internal agency communications about service provided by "Honest-1 Auto Care" on January 21, 2020. Mr. Zhang represented that he learned of the Honest-1 Auto Care service from a CARFAX report that he obtained from the CARFAX website on February 11, 2026, using the vehicle's Vehicle Identification Number. Appellant's Rule 19 Brief at 4 & Exhibit D. The FWS could find no record of such service in its files, but, in response to the production

January 2020. *See* Exhibits 13 at 77, 14 at 78. The FWS representative explained that, beginning in March 2020 (when the COVID-19 pandemic hit), the vehicle sat idle for an extended period of time. Exhibit 14 at 78. When attempts were made to restart the vehicle in late 2020, the hybrid battery had died, presumably from non-use. *See id.* By September 2024, the battery had still not been replaced, and, because of a reduction in force that eliminated the need for the vehicle coupled with the expense of replacing the battery, the FWS decided to release the vehicle as surplus and to sell it "as is" through the GSA auction website. *Id.* When GSA placed the vehicle on the GSA auction site, neither GSA nor the FWS was aware of any problems with the vehicle beyond the dead battery. *Id.*

GSA added the newly produced documents to the Rule 4 appeal file on May 5, 2026. Given that GSA had completed its document production obligations, the Board ordered Mr. Zhang to file his opening Rule 19 brief and response to GSA's Rule 19 brief no later than May 27, 2026, a deadline that Mr. Zhang satisfied. GSA filed its response and reply brief on June 8, 2026, and Mr. Zhang filed his reply brief on June 9, 2026.

Discussion

I. Standard of Review

"The parties are entitled, under CBCA Rule 19, to include in the written record '(1) any relevant documents or other tangible things they wish the Board to admit into evidence; (2) affidavits, depositions, and other discovery materials that set forth relevant evidence; and (3) briefs or memoranda of law that explain each party's positions and defenses.'" *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 17-1 BCA ¶ 36,863, at 179,613 (quoting *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,551). "Based on the parties' submissions, the Board is authorized to make findings of fact, even if such findings require 'credibility determinations on a cold [paper] record, without the benefit of questioning the persons involved,' and can decide issues of law based on those factual findings." *Id.* (quoting *Bryant Co.*, GSBCA 6299, 83-1 BCA ¶ 16,487, at 81,967).

"Submission on the record under Rule 19 does not alter the rules as to burden of proof or relieve the parties from the necessity of proving the facts supporting their allegations or defenses." *Sylvan B. Orr*, 17-1 BCA at 179,613 (internal quotation marks omitted). "'While [the Board] can make inferences from th[e] evidence and either accept or deny the probative

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request, the FWS representative contacted Honest-1 Auto Care and obtained a service report/invoice, for which FCSC had paid. Exhibit 14 at 79.

value of documents, statements or other extrinsic evidence, in order for us to find for a party, that party's evidence must establish,' by a preponderance of the evidence, 'that it is entitled to relief."' *1-A Construction*, 15-1 BCA at 175,551 (quoting *Schoenfeld Associates, Inc.*, VABCA 2104, et al., 87-1 BCA ¶ 19,648, at 99,472).

Although we typically provide a pro se appellant with lenience regarding procedural matters, a party's pro se status does not alter its obligation to satisfy the required burden of proof at a hearing on the record. *1-A Construction*, 15-1 BCA at 175,552.

II. Timeliness

In this appeal, Mr. Zhang seeks a refund of his purchase price, plus the costs of transporting the vehicle that he purchased to Texas from the government site where it was being stored. The terms of Mr. Zhang's contract with GSA expressly limit his recovery for a misdescription to a refund. *See* Exhibit 15 ¶ 15 ("[T]he measure of the Government's liability, in any case where liability of the Government to the Purchaser has been established, shall not exceed refund of such portion of the purchase price as the Government may have received."); *see also* Exhibit 11 at 56 ("[R]efund is limited to an amount not to exceed the purchase price of the mis-described property."). "The terms of this clause on this point are strictly enforced." *Garrett J. Veenstra*, GSBCA 7251, 85-2 BCA ¶ 18,127, at 90,983; *see First Place Auto Sales, Inc. v. General Services Administration*, 24-1 BCA ¶ 38,534, at 187,310 ("[I]f there is an actionable mis-description, the purchaser's sole remedy is a refund of the purchase price.").[4]

Under the terms of Mr. Zhang's contract, he had fifteen days from the date on which he paid for the vehicle to notify the contracting officer of any defects in or misrepresentations about the vehicle and to request the only remedy available to him: a refund of his purchase price. Exhibit 11 at 56. Mr. Zhang paid for the vehicle on September 2, 2025, but he did not request a refund from the contracting officer until nineteen days later on September 21, 2025. The Board has recognized that "the failure to submit a claim within the requisite time-frame of fifteen days defeats any claim a purchaser might otherwise have." *Joseph M. Hutchison v. General Services Administration*, CBCA 752, 08-1 BCA ¶ 33,804, at 167,341. *See, e.g.*, *Brittani Wattiker v. General Services Administration*, CBCA 8362, 26-1 BCA ¶ 39,027, at

[4] Based on these provisions, even if Mr. Zhang could establish a basis for some kind of monetary relief, we would have to deny his request to recover the costs of shipping the vehicle to Texas from the government location where it was being stored at the time of the auction. *See First Place Auto Sales*, 24-1 BCA at 187,310 (finding that maximum potential recovery on an auction contract is a purchase price refund).

190,059; *Badland Truck Sales, Inc. v. General Services Administration*, CBCA 7281, 22-1 BCA ¶ 38,143, at 185,264-65; *Yasmin Saighi v. General Services Administration*, CBCA 3693, 15-1 BCA ¶ 35,920, at 175,586-87, *aff'd*, 645 F. App'x 993, 999 (Fed. Cir. 2016). That fifteen-day time limit "is an enforceable provision within the standard GSA online terms and conditions for auctions." *Brittani Wattiker*, 26-1 BCA at 190,061; *see AHTNA Environmental, Inc. v. Department of Transportation*, CBCA 5456, 17-1 BCA ¶ 36,600, at 178,304 (2016) (discussing enforceability of contractually imposed time limitations that are shorter than the general statute of limitations).

With his reply brief, Mr. Zhang provided the Board with a copy of an email that he sent to the FWS representative, with a copy to the GSA representative, on September 10, 2025, complaining that he was hearing loud knocking noises in the engine and was "[d]isappointed." Appellant's Exhibit filed June 9, 2026. Although he sent that email within the fifteen-day time limit for seeking a refund, Mr. Zhang did not request a refund or any monetary compensation in that email. His contract required that he request any refund with fifteen days after paying for the vehicle. *See Joseph M. Hutchison*, 08-1 BCA at 167,341. His subsequent request for repayment came too late.

III. Mr. Zhang's Allegations of an Implied Warranty Breach

Even if his challenge were timely, Mr. Zhang could not overcome the fact that GSA, as set forth in its "Online Sales Terms and Conditions," sold the vehicle at issue here "'where is' and 'as is' and without recourse against the United States." Exhibit 11 at 55. GSA also expressly disclaimed any warranty of the vehicle's condition. *Id.* at 54. "The word 'condition' refers to 'the state of something, esp. with regard to its appearance, quality, or working order.'" *First Place Auto Sales*, 24-1 BCA at 187,309 (quoting https://www.encyclopedia.com/social-sciences-and-law/law/law/condition).

The Uniform Commercial Code (U.C.C.), which "is applicable to the field of public contracts," *John C. Kohler Co. v. United States*, 498 F.2d 1360, 1367 n.6 (Ct. Cl. 1974),[5] provides that, "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is' . . . or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no

[5] One of our predecessor boards, the General Services Board of Contract Appeals (GSBCA), "recognized the applicability of the [U.C.C.] to Government sales of surplus automobiles." *Marsha Nygaard*, GSBCA 7340, 1984 WL 13528 (June 28, 1984) (citing *A. Mansour Vahdat*, GSBCA 5916, 81-2 BCA ¶ 15,199, and *Robert Komor*, GSBCA 5418, 80-2 BCA ¶ 14,687, *reconsideration denied*, 81-1 BCA ¶ 15,108).

implied warranty." U.C.C. § 2-316(3)(a).[6] That is, "in ordinary commercial usage," the use of an "as is" disclaimer is "understood to mean that the buyer takes the entire risk as to the quality of the goods involved." U.C.C. § 2-316 cmt. 7; *see General Textile Corp. v. United States*, 76 Ct. Cl. 442, 466 (1932) (finding no government liability where "the surplus merchandise in question was sold 'as is,'" with "no warranty by the Government or anyone authorized to act for it that the [merchandise] would be of the quality for which the plaintiff now contends"); *Pell City Wood, Inc. v. Forke Brothers Auctioneers*, 474 So. 2d 694, 695 (Ala. 1985) ("This 'as is' language has been held to place with the buyer the entire risk as to the [condition] of the goods purchased."); 7 Am. Jur. 2d *Auctions & Auctioneers* § 15 (2025) ("An auction brochure which conditions the property to be sold 'as is' operates to allocate the risk of mistake to the auction bidders."). "The very term 'as is, where is' tells the buyer to beware—to investigate." *United States v. Hathaway*, 242 F.2d 897, 901 (9th Cir. 1957). Such disclaimers are enforceable. *Keeneland Association, Inc. v. Eamer*, 830 F. Supp. 974, 986 (E.D. Ky. 1993).

"In cases where the vehicle is sold 'as is,' the warranty of description is satisfied when the advertisement provides an accurate year, make, model, and VIN number." *Godwin Anagu v. General Services Administration*, CBCA 5626, 17-1 BCA ¶ 36,812, at 179,413. "Of course, if the goods delivered were not in fact the goods contracted for," the buyer would be entitled to relief. *Standard Magnesium Corp. v. United States*, 241 F.2d 677, 679 (10th Cir. 1957). But Mr. Zhang is not complaining that the vehicle he received is not the one that he purchased. He is complaining about the working order of the vehicle that he purchased, a condition for which GSA, in the parties' contract, expressly disclaimed any warranty. GSA's "as is" and "where is" warranty disclaimer precludes the Government's liability under an implied warranty theory for damages for defects in the vehicle's working order. *First Place Auto Sales*, 24-1 BCA at 187,309.

IV. Mr. Zhang's Allegations of an Express Warranty Breach

A. Inverse Implications of Expressly Disclosed Conditions

The fact that the Government disclaims all implied warranties does not necessarily preclude the Government from making an express warranty. "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall

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[6] "An implied warranty is something the law reads into a contract to save the parties the trouble of having to negotiate an express term; it is an off-the-rack term. If the parties don't like it, . . . they are free . . . to disclaim the implied warranty." *Bushendorf v. Freightliner Corp.*, 13 F.3d 1024, 1027 (7th Cir. 1993).

conform to the description." U.C.C. § 2-313(1)(b). "[I]n essence a warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself." *Dale Construction Co. v. United States*, 168 Ct. Cl. 692, 699 (1964). It "amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue." *Id.*

"Different criteria are established and set forth by the [U.C.C.] for disclaiming an express warranty[] than for an implied warranty." 3 Patricia F. Fonseca & John R. Fonseca, Williston on Sales § 20:1, at 237-38 (5th ed. 2006) (footnote omitted). "[I]t is difficult for a seller of goods to disclaim express warranties," once established, "because express warranties generally form the basis of the bargain and, therefore, would be unreasonable to disclaim." *Rock Hill Mechanical, Inc. v. Liebert Corp.*, 707 F. Supp. 2d 998, 1006 (E.D. Mo. 2010). Under the U.C.C., "[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other," but "negation or limitation [of an express warranty] is inoperative to the extent that such construction is unreasonable." U.C.C. § 2-316(1).

Nevertheless, to create an express warranty, the Government must first have provided a description, U.C.C. § 2-313(1)(b), and a breach of that express warranty must involve a misdescription, which "requires the Government to have made an error in describing what has been offered for sale." *Stephen D. Bradley v. General Services Administration*, CBCA 5040, 16-1 BCA ¶ 36,327, at 177,114 (quoting *Joseph M. Hutchison*, 08-1 BCA at 167,341). Misdescription is "an inaccurate—meaning an erroneous or incorrect—description of something with which the describer is familiar." *T.K. Hughes Auto Sales, Inc. v. General Services Administration*, CBCA 5397, et al., 17-1 BCA ¶ 36,747, at 179,110 (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.*

Mr. Zhang raises arguments in his briefing that we interpret as claiming GSA's breach of express warranties that the vehicle at issue had no engine problems. Specifically, Mr. Zhang alleges that, by making "a specific affirmative representation" about the "inoperability as a hybrid battery issue," GSA implicitly represented that "the vehicle's primary mechanical condition had not otherwise been identified as suffering from severe internal engine deterioration." Appellant's Rule 19 Brief at 3. "Having volunteered a specific diagnosis," Mr. Zhang argues, GSA "was obligated to ensure it had a sound factual basis and did not omit broader known mechanical defects." *Id.*

Mr. Zhang's interpretation of the representations in the auction notice as creating some kind of an inverse express warranty of the vehicle's condition directly conflicts with GSA's express and unambiguous disclaimers of any such warranties. The parties' contract makes clear that "[c]ondition of property is not warranted." Exhibit 11 at 54. That means that, although GSA represented that the hybrid battery did not work, it was not somehow warranting or making implicitly express representations about the condition of the rest of the vehicle. To the contrary, the auction notice expressly indicated that, although "[d]eficiencies, when known, have been indicated in the property descriptions," the "absence of any indicated deficiencies does *not* mean that none exists." *Id.* (emphasis added). GSA's identification of one known problem with the vehicle was not an implicit or inverse promise or warranty that no other problems existed. GSA "clearly and unambiguously stated that it was not extending a warranty regarding any aspect of the vehicle, and it [would be] incongruous to find that [GSA] impliedly warranted what it expressly disclaimed." *Agredano v. United States*, 595 F.3d 1278, 1282 (Fed. Cir. 2010).

B. GSA's Identification of the Vehicle's Condition as "Usable"

In describing the condition of the vehicle in the auction notice, GSA indicated that the vehicle was "[u]sable." Exhibits 3 at 6, 12 at 63. In the purchaser's receipt that Mr. Zhang's representative signed when taking the vehicle from the government site, GSA represented that "[l]ot is in Usable condition" but that "[p]arts may be missing, and repairs are required." Exhibit 6 at 22. In his claim to GSA, Mr. Zhang represented that the "critical, pre-existing mechanical defect" with the engine that GSA failed to disclose "renders the vehicle undriveable" and essentially *not* usable. Exhibit 7 at 25. On its face, assuming (without deciding) the accuracy of Mr. Zhang's representations about the vehicle's defects, that appears to be a misrepresentation about the vehicle's condition.

As noted above, "[a]ny description of the goods" can create "an express warranty that the goods shall conform to the description" if it "is made part of the basis of the [parties'] bargain." U.C.C. § 2-313(1)(b). That being said, it is impossible to divorce GSA's representation of the vehicle as usable from Mr. Zhang's knowledge, through the terms and conditions to which he agreed as a condition of bidding, not only that the vehicle was being sold "as is" but also that "[c]ondition of property [was] not warranted." Exhibit 11 at 54. "It is axiomatic that before there can be an express warranty there must be some understanding between the parties that an express warranty was intended." *Jacob Siegal*, 47 Comp. Gen. 509, 514 (1968). "If the seller does not wish to create an express warranty, the best landmark for success [is] . . . to so express [in] the contract that the seller's words do not create the expectation in the purchaser that a warranty is being given on the goods." 3 Patricia F. Fonseca & John R. Fonseca*, supra*, § 20:8, at 269; *see Duquesne Light Co. v. Westinghouse Electric Corp.*, 66 F.3d 604, 615 (3d Cir. 1995) (finding that "[a] plain

reading" of a disclaimer of all warranties, express or implied, contained in the original contract between the parties "precludes [appellant's] contractual argument" that the appellee made an express warranty through that contract, given that it would contradict the words that the parties used in their contract.).

It has long been recognized that the inclusion of language like GSA included here—specifically, that the condition of property is not warranted—in an auction notice and resulting contract precludes the creation of an express warranty regarding the condition of the property even if the Government makes references to a perceived condition in the auction notice. In *American's Sanitary Rag Co. v. United States*, 161 F. Supp. 414 (Ct. Cl. 1958), an auction solicitation described the items being auctioned—there, approximately 60,000 sun helmets—as "miscellaneous usable material" and as "[a]pparently unused, in good condition," but it also provided that all property was sold "'as is' and 'where is,' and without recourse against the Government," and that "the Government makes no guaranty, warranty, or representation, expressed or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property." *Id.* at 415. After discovering that one third of the helmets were used, mildewed, and not usable, the purchaser claimed that the agency had breached its warranty that the helmets were "usable material" and "in good condition." The Court of Claims rejected the existence of such a warranty "[u]nder the above-described terms of the invitation to bid and the contract documents," which, when read in combination, it held, placed "the risk as to the actual condition of the sun helmets . . . squarely upon the purchaser." *Id.*; *see Jacob Siegal*, 47 Comp. Gen. at 510, 514 (finding that, where the agency, in a solicitation, had identified weights and percentages of elements contained in composite material being sold but also stated that information was "believed to be correct, but no warranties are made as to these analyses," "there would be no basis for a purchaser to construe the analyses as indicating an intention on the part of the Government to give an express warranty of the composition of the material."); *F.C. Krysher*, 18 Comp. Gen. 594, 595 (1939) ("While the Government's description of the equipment may have been inaccurate it was prepared in good faith from available data and there was no warranty that the property was as described. It was classified as junk and the invitation specifically stated that there was no guaranty or warranty relative thereto as to quantity, kind, character, condition, suitability for use, or in any other respect whatsoever, the property being sold 'as is[']and 'where is.'").

The absence of an express warranty of the vehicle's condition is further shown by the language in the terms and conditions for the auction, to which Mr. Zhang had to agree as a condition of bidding, that placed on bidders the obligation to inspect the vehicle prior to bidding to identify its condition. "It is well established that purchasers cannot recover under a misdescription claim for deficiencies that could reasonably have been observed in a proper inspection of the property to be purchased." *Carl W. Poole v. General Services*

Administration, GSBCA 12320, 94-1 BCA ¶ 26,396, at 131,316 (1993). In its briefing, GSA reports, and Mr. Zhang does not dispute, that Mr. Zhang did not conduct a physical inspection of the vehicle before submitting his bid or even before removing it from the Government's possession. Respondent's Brief ¶ 8. Although Mr. Zhang asserts that "[a] pre-purchase visual inspection would not reasonably have revealed internal metallic contamination, lubrication-related deterioration, hidden VCT-related engine problems, or prior non-standard oil pay repair," Appellant's Rule 19 Brief at 3, it is not clear from the record why a qualified inspector or mechanic brought to inspect the vehicle would not have discovered such defects. Under the "Inspections" clause in the "Online Sales Terms and Conditions," bidders were notified that they "ha[d] the opportunity to physically inspect the property prior to placing a bid" and that, if they waived that opportunity, they would "bear the risk for any gross omissions regarding the functionality of items, failure to cite major missing parts, and/or restrictions with regards to usage that would have been revealed by physical inspection." Exhibit 11 at 49. In any event, we cannot know what defects would have been identified because Mr. Zhang made no effort to inspect the vehicle. The importance of pre-bid inspection, as set forth in the auction notice, coupled with the notice's express statement that the vehicle's condition was not warranted, supports the absence of any intent by GSA to provide an express warranty of that condition.

V. GSA's Alleged Obligation to Investigate the Vehicle's Condition

Mr. Zhang does not contend that any of the FWS or GSA employees involved in placing the vehicle into the auction was personally aware of defects in the vehicle other than the inoperable hybrid battery. Although he complains that the Government did not provide past inspection reports or repair receipts as part of the auction notice, those reports show nothing more than that, at some point, FCSC paid for some engine work. There is nothing in those documents showing the specific vehicle damage that Mr. Zhang alleges here or that mechanical issues that occurred in the past were not repaired in the past. To the extent that Mr. Zhang contends to the contrary, we find no support for his position in the historical maintenance and repair documents that are in the record.

Beyond that, it appears that Mr. Zhang may be suggesting that the FWS had a broader obligation to conduct a more in-depth investigation into the vehicle's condition before placing it for auction and that any knowledge that the FWS should have had should be imputed to GSA. *See* Appellant's Rule 19 Brief at 3 (arguing that the Government's auction representations were made "without an adequate factual investigation"). We disagree. There is no "requirement that the Government undertake a mechanical inspection of a vehicle prior to selling it at auction on an 'as is' basis. Indeed, to impose such a requirement would be antithetical to the very nature of a sale in which warranties are expressly disclaimed." *Rene A. Hernandez v. General Services Administration*, GSBCA 15448, 01-2 BCA ¶ 31,463,

at 155,338. "When the government sells surplus goods[,] it is trying to dispose of a vast miscellany of used and unused property in an effort, so far as may under the circumstances be possible, to minimize its loss." *United States v. Hoffman*, 219 F. Supp. 895, 902 (E.D.N.Y. 1963). "Buyers of such surplus property know perfectly well that there is always the chance of buying property that may turn out to be of little value, or may develop into a great bargain with a huge windfall of profit. Accordingly, the government very properly [protects] itself by formulating its contract for the sale of such surplus property so as to shift the risk from itself to the buyer." *Id.* at 903. Mr. Zhang cannot shift that risk of vehicle defects back to the Government by imposing an inspection-and-disclosure requirement on the Government that is inconsistent with the Government's warranty disclaimers.

VI. Other Issues Raised in the Appeal

In his claim to GSA, Mr. Zhang complained about what could be described as fraudulent concealment of defects in the vehicle and a past effort, shown by the current condition of the vehicle, to hide those defects through improper and ineffective temporary repairs. There is no evidence in the record that either the FWS or GSA was responsible for or knowledgeable about those alleged activities, and Mr. Zhang did not pursue that issue in his Rule 19 briefing. Because those arguments appear to have been abandoned, we need not further address them here.

In its Rule 19 brief, GSA argued that, even if Mr. Zhang could somehow overcome other barriers to the success of his claim, the fact that he has modified the vehicle since purchasing it—that is, he repaired the inoperable hybrid battery—bars him from returning it to GSA or seeking compensation for it, citing to the contract clause that identifies that limitation. Given that we have denied Mr. Zhang's claim for the reasons discussed above, we need not consider that additional argument.

Mr. Zhang seeks to recover his filing and litigation costs. Only if he were a "prevailing party" in this appeal and satisfied the other requirements of the Equal Access to Justice Act, 5 U.S.C. § 504, could Mr. Zhang recover litigation expenses. Because he is not a prevailing party in this matter, he is not entitled to such expenses.

Decision

For the foregoing reasons, Mr. Zhang's appeal is **DENIED**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge