UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: November 14, 2008

CBCA 1213

MICHAEL C. LAM,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Michael C. Lam, pro se, Baltimore, MD.

Gabriel N. Steinberg, Office of Regional Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

BORWICK, Board Judge.

This is a small claims case involving a contract for the sale of personal property entered into by appellant, Mr. Michael C. Lam, and respondent, the General Services Administration. We grant the appeal having concluded that respondent breached the contract and that the limitation of damages in the Description Warranty clause does not apply. We award breach damages as stated below.

This decision is final and conclusive and shall not be set aside except in case of fraud. This decision shall have no value as precedent. 41 U.S.C. § 608(d) (2000); Board Rule 52(b).

Findings of Fact

On or about October 4, 2007, the Federal Emergency Management Agency (FEMA) reported twenty-five pallets of electric meter boxes, approximately 375 in number, as excess property to GSA. FEMA reported that the boxes were located at the Fort Pierce Emergency Housing Area, Port St. Lucie, Florida. Appeal File, Exhibit 1. The acquisition cost per unit was $50, for a total cost of $18,750. *Id*.

On or about October 9, 2007, respondent listed the items for sale on respondent's web site, GSAAuctions.gov. Appeal File, Exhibit 2; Appellant's Supplemental Appeal File, Exhibit 1 at 1-1. The website solicitation's first page was arranged in one print column on the left of the page with a picture of the item on the right of the page. Appellant's Supplemental Appeal File, Exhibit 1. The print column was divided into four sub-sections: (1) item description, (2) special inspection information, (3) property location and inquiries/questions regarding removal, and (4) contact information for inquiries and questions regarding payment and contractual issues. *Id.*

The item description in the solicitation read as follows:

> ONE LOT TO CONSIST OF ELECTRIC METER BOXES, 25 PALLETS, APPROXIMATELY 375, REPAIRS MAY BE REQUIRED, REPORT # 7031128003003
>
> THE CONDITION OF THE PROPERTY IS NOT WARRANTED

Appellant's Supplemental Appeal File, Exhibit 1 at 1-1. The property location section described the location of the items offered for sale:

> FEMA staging area
> 5580 Peacock Road
> Port St. Lucie, Florida, 34987
> Contact: [Name and phone numbers provided]

Id.

The solicitation contained the following Description Warranty clause:

> Description Warranty and Refunds.
>
> Description Warranty.

> The Government warrants to the original purchaser that the property listed in the GSAAuctions.gov website will conform to its written description. If a misdescription is determined by the Contracting Officer of the sale, before payment, the contract will be cancelled without any liability to the bidder. If a misdescription is determined by the Contracting Officer of the sale before removal of the property, the Government will keep the property and refund any money paid. If a misdescription is determined by the Contracting Officer of the sale after removal, the Government will refund any money paid if the purchaser takes the property at his/her expense to a location specified by the Sales Contracting Officer. The Refund Claim Procedure described below will be strictly followed for filing a claim. No refunds will be made, after property is removed, for shortages of individual items within a lot.
>
> This warranty is in place of all other guarantees and warranties, expressed or implied.
>
> The Government does not warrant the merchantability of the property or its purpose. The purchaser is not entitled to any payment for loss of profit or any other money damages - special, direct, indirect, or consequential.

Appellant's Supplemental Appeal File, Exhibit 2; Appeal File, Exhibit 3. The contract required the winning bidder to remove the property within ten business days of being notified of award by e-mail message. Appeal File, Exhibit 2.

Appellant submitted the high bid of $6000 for the item, under the name of "MCLAM." Appellant's Supplemental Appeal File, Exhibit 3 at 1-5. The sales contracting officer testified at the hearing on the merits of this appeal that she never talked to appellant before the award of the contract and never discussed with appellant his plans for use or sale of the electric meter boxes. Transcript at 62-63. Appellant admitted that he never discussed with the contracting officer his plans for re-use of the meter boxes. *Id.* at 47-48.

On October 16, 2007, respondent notified appellant by e-mail message that he was the winning bidder for the meter boxes. Appeal File, Exhibit 5. Respondent advised appellant that the property must be removed from its location within ten business days of receipt of the notification. *Id*. On October 17, appellant paid to respondent the $6000 he had bid. Appellant's Supplemental Appeal File, Exhibits 5, 9. Appellant requested and was granted an extension of time, until November 9, 2007, in which to remove the property. Appeal File, Exhibit 7.

On October 31, 2007, appellant flew to Florida and rented a truck to pick up the items at the FEMA staging area at Port St. Lucie, Florida. Appeal File, Exhibit 9. Upon arriving at the FEMA staging area, the items for which appellant had bid could not be found. *Id.*, Exhibits 8, 9. There is no explanation in the record as to why the property was not on the site. Appellant called the sales contracting officer, advised her of the situation, and orally requested reimbursement of his travel expenses. *Id*., Exhibit 8. The contracting officer advised him that he would be refunded his purchase price, but that reimbursement of his travel expenses would have to be the responsibility of FEMA, since the terms and conditions of the contract limited appellant to refund of the purchase price. *Id*. By e-mail message of November 1, 2007, the contracting officer repeated to a FEMA official her conversation with appellant. *Id*.

Appellant incurred $1719.82 in expenses for his futile trip to Florida to retrieve what turned out be the non-existent electric meter boxes. Appeal File, Exhibit 6; Stipulation ¶ 10.

Appellant acknowledged at the hearing that he never signed any agreement with anyone other than respondent concerning the electric meter boxes. Transcript at 46-47. Appellant testified that he and his wife are contemplating starting a campground and that the meter boxes "would definitely be needed in that pursuit" after they decide whether to purchase raw land or to buy into an existing campground. *Id.* at 9. Appellant also stated that he had been approached by several managers of recreational vehicle parks who expressed interest in possible purchases of the meter boxes should appellant be successful in obtaining them. *Id.* at 10-11. Appellant was not able to identify any individual expressing such interest, nor did those individuals testify at the hearing. *Id.*

On or about November 5, 2007, the contracting officer refunded appellant his $6000 bid. Stipulation ¶ 8; Appeal File, Exhibit 9, ¶ 15. On February 9, 2008, appellant submitted a claim to the contracting officer demanding a refund of $1719.82 for his travel expenses to Florida. Appeal File, Exhibit 9. The contracting officer denied the claim in her decision of March 12, 2008. *Id*., Exhibit 10. She stated that appellant was not entitled to his travel costs to Florida because the Description Warranty clause limited appellant's damages to a refund of the purchase price. *Id*. At the hearing the contracting officer stated that the location of the items offered for sale was part of the item description because she considered everything on the website solicitation's first page to be included in the item description. Transcript at 82-84.

Appellant submitted an appeal to the Board dated June 1, 2008, which was received by the Board on June 6. Appellant elected the small claims procedure.

On or about July 1, 2008, respondent notified the Board that the parties had reached a settlement in the case and requested a suspension of proceedings. The Board suspended proceedings until August 4. The parties were unable to settle the case, however.

On or about August 22, respondent withdrew the contracting officer's decision and paid appellant the $1719.82 he had claimed, plus interest as calculated by respondent, for a total of $1775.04.[1]

Respondent then submitted a record submission memorandum pursuant to Rule 19 and suggested that the case was now moot. Appellant requested a hearing. In a subsequent filing, respondent acknowledged that the Board could not be divested of jurisdiction by withdrawal of the contracting officer's decision, but submitted that a hearing was not necessary in light of respondent's payment to appellant.[2] In a telephone conference, appellant maintained that he had the right to have his appeal adjudicated so that he might obtain reimbursement of his litigation expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) and Board Rule 30.

On September 16, appellant increased the amount of his claimed damages to $42,740.63, which appellant maintained was half the value of new replacement meter boxes, less the $6000 refund appellant already received. He arrives at this figure by taking a price he found on the internet for new meter boxes, arbitrarily cutting the price in half, and then subtracting the $6000 bid price. In his post-hearing brief, appellant presents quotes from an internet web site--www.RVPoweroutlet.com--showing a unit price for new surface mount meter boxes of $146.95 and amp pedestals of $243.95 for a total unit price of $390.90, or $146,587.50 for 375 units. Appellant's Brief, Attachment 18. The surface mount meter box is catalog number RVU75C. The amp unmetered pedestal is catalog number RVU75CP. *Id*.

On September 17, the Board scheduled a hearing to commence on October 6. Respondent objected to appellant's amendment; the Board denied the objection. *Lam v. General Services Administration*, CBCA 1213 (Oct. 1, 2008).

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[1] The Board extended the due date for issuance of its decision to December 17, 2008, because of the suspension of proceedings for settlement negotiations and an earlier suspension due to appellant's vacation during the established schedule for the processing of this appeal.

[2] *See AT&T Corp. v. Department of the Treasury*, GSBCA 13931-TD, 98-2 BCA ¶ 29,897.

Discussion

In this failed personal property sale case, appellant maintains that he is entitled to he costs of his travel to Florida -- $1719.82 -- in addition to the refund of his purchase price. The parties do not dispute that the $1719.82 figure represents the actual and reasonable costs of appellant's trip to Florida.

Appellant says he is entitled to interest on the $1719.82 as calculated by the Department of the Treasury from November 1, 2007, the date of the contracting officer's e-mail message to FEMA, until paid. Appellant also maintains that he is entitled to additional damages of $42,740.63, which is the alleged value of the meter boxes appellant did not obtain.

Despite respondent's payment of the $1719.82, plus interest as calculated by the contracting officer, the contracting officer maintains that by virtue of the Description Warranty clause appellant is not entitled to damages save a refund of the purchase price.

Respondent entered into a binding contract with appellant for sale of the electric meter boxes. Respondent's failure to deliver them to appellant entitles appellant to breach of contract damages, unless the actions causing breach are covered by an exculpatory clause in the contract. *See generally Western Aviation Maintenance, Inc. v. General Services Administration*, GSBCA 14165, 00-2 BCA ¶ 31,123.

Here, the contracting officer argues that the sale of phantom electric meter boxes is covered by the Description Warranty clause because everything on the first page of the on-line solicitation is to be considered part of the description warranty, including the location of the property. We disagree. We are to construe the Description Warranty clause narrowly so as to avoid "absolving the Government from all damages where it breaches the contract, without good reason, because it disagrees with the contractor over the meaning of some provision of the agreement." *Freedman v. United States*, 320 F.2d 359, 366 (Ct. Cl. 1963); *Stoner-Caroga Corp. v. United States*, 3 Cl. Ct. 92, 96 (1983). To read the Description Warranty clause in an unlimited fashion would come close to the "pit of voidness." *Freedman*, 320 F.2d at 366.

Respondent might have unmistakably designated everything on the page as part of the item description, but it failed to do so in this instance. Instead, the item description only covers the two or three lines clearly designated as "Item Description." Consequently, the Description Warranty clause applies to only that specific section, not to the whole page, and specifically, not to the separate section which identifies the location of the property. The item description speaks to the quantity and condition of the electric

meter boxes, not to their availability. The location and availability of the property is addressed in the separate section of that page, entitled property location. For whatever reason, when appellant reached the site where the meter boxes were located, they were not available for delivery to him. The respondent's sale to appellant of lost or unavailable property is a serious breach, not covered by the Description Warranty clause. Appellant is thus not limited to the refund of the purchase price, but is entitled to foreseeable, reasonable, and non-speculative breach damages. *Western Aviation Maintenance*; *Anthony J. Butterhof*, GSBCA 5485, 81-1 BCA ¶ 15,085.

Generally, the measure of damages for non-delivery of contracted-for goods or repudiation of a contract of sale by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price, together with any consequential damages. *Everett Plywood Corp. v. United States*, 512 F.2d 1082, 1091 (Ct. Cl. 1975); *Precision Pine & Timber, Inc. v. United States*, 72 Fed. Cl. 460, 485 (2006); U.C.C. § 2-713. However, this remedy is dependent on proof of a market price. U.C.C. § 2-713. Here, appellant's proof of market value is lacking, as it is based on an internet quote of new electric meter boxes, which appellant arbitrarily reduces by about half to account for the used condition of the sold property. Generally, market value must be established by numerous transactions of extensive quantities of similar items. Isolated sales of property do not establish a market. *Golden West Refining Co*., EBCA C-9208134, et al., 95-2 BCA ¶ 27,925, at 139,456. Appellant has not presented reliable proof of the market value of the items appellant actually purchased from respondent.

Additionally, it appears that appellant misstates the items he had purchased from the respondent. In his brief, appellant argues that "the 375 units purchased were unmetered 50/30/20 amp pedestals like those on the RV Power Outlet website and the catalog number is RVU75CP." Appellant's Brief, Attachment 8, at 2. However, the quote sheet at appellant's attachment 18 -- part of the RV Powercom website -- distinguishes between the surface mount box and the amp pedestal. Indeed, that quote sheet gives widely different unit prices for both items. The contract's item description references electric meter "boxes" and does not reference amp pedestals. Consequently, appellant has not demonstrated that the item description in the contract included amp pedestals. Furthermore, there is a vast disparity between the unit price--$146.95--of the new surface mount box listed on the web site and the acquisition cost--$50--of the electric meter boxes the respondent auctioned. This provides further doubt as to whether appellant's claimed damages have any real relationship to the actual items appellant purchased from respondent.

Appellant's claim of damages based on the market value of the property thus fails for two reasons. Appellant has not established that his claim for damages is based upon

the item he actually purchased. Further, appellant has not presented reliable proof of market value of the item he did purchase.

To the extent that the figure of $42,740.63 represents lost profits on a contemplated resale of the electric meters, appellant could only recover if he proved that respondent knew or should have known that appellant would resell the meters. *Stoner-Caroga*, 3 Cl. Ct. at 96; *National Controls Corp. v. National Semiconductor Corp.*, 833 F.2d 491, 495 (3d Cir. 1987). In this case, the contracting officer only knew appellant's online bid name and had no discussions with appellant about his contemplated future use for the electric meter boxes. Furthermore, appellant had no contract or other commitment for the sale of the electric meter boxes to recreational vehicle park owners, making any claim for lost profits speculative. *HGI Associates, Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 880 (11th Cir. 2005).

On a breached contract for sale of personal property, appellant would also be entitled to recover as consequential damages any loss resulting from his general or particular requirements which respondent at time of contracting had reason to know about and which could not be prevented by cover. *National Controls Corp.*, 833 F.2d at 495; U.C.C. § 2-715. ("Cover," in this context, means "[t]he purchase on the open market, by the buyer in a breach-of-contract dispute, of goods to substitute for those promised but never delivered by the seller." Black's Law Dictionary 372 (7th ed. 1999).

Here, it was foreseeable that appellant would travel to Florida to retrieve the property, because the contract required him to do so. It is not disputed by the parties that appellant incurred $1719.82 of reasonable and necessary costs for that trip and appellant is entitled to that amount as breach damages.

The case relied upon by appellant for the award of an additional $42,740.63 of breach damages is inapposite. In *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993), the Court held that the Government owed plaintiff damages for rescheduling launch services after the Challenger disaster. The Court was faced with a contract interpretation question, i.e., whether article IV of the Launch Services Agreement (LSA) bound the Government to schedule launch services for plaintiff or whether article XV of the LSA gave the Government greater flexibility than article IV in delaying or terminating launch services to plaintiff. The Court found that article IV, not at Article XV, was controlling. *Id.* at 957-58. The Court also held that the sovereign acts defense did not apply in that case. *Id.* at 958. The Court stated that the case "simply involves the question of how liability for certain contingencies was allocated by the contract." *Id.* That case did not consider the issue presented in this case, which is

the amount of breach damages due under a failed contract for the sale of personal property.

Appellant is entitled to interest as provided by the Contract Disputes Act (CDA) on the $1719.82 of proven damages. Regarding interest, the CDA provides:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

41 U.S.C. § 611. Section 605(a) provides in pertinent part:

> (a) Contractor claims. All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. . . . The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor.

41 U.S.C. § 605(a).

Appellant argues that interest starts to run from November 1, 2007, the date of the contracting officer's e-mail message to FEMA stating what the contracting officer had earlier told appellant in a telephone conversation. Appellant's argument is frivolous. The CDA provides that interest starts to run from the date the contracting officer receives a written claim submitted by a contractor pursuant to 41 U.S.C. § 605(a). Appellant submitted a written claim dated February 9, 2008. Interest starts to run on the amount found due when the contracting officer received the claim submitted on February 9, 2008, not on November 1, 2007, as appellant maintains.

Decision

The appeal is **GRANTED IN PART**. Appellant is awarded $1719.82 in breach damages, plus interest calculated in accordance with the Contract Disputes Act, less amounts for the travel costs respondent has already paid appellant.

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ANTHONY S. BORWICK
Board Judge