



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: February 28, 2013

CBCA 2748, 3237

EXPEDITERS WORLDWIDE USA, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Cory Frederick, Vice President of Expeditors Worldwide USA, Inc., Crescent City, FL, appearing for Appellant.

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

Before Board Judges **STERN**, **STEEL** and **WALTERS**.

WALTERS, Board Judge.

These appeals involve the default termination of a General Services Administration (GSA) auction sales contract. Appellant, Expeditors Worldwide USA, Inc. (Expeditors), seeks to overturn the default termination and to recover the \$10,000 bid deposit it submitted to respondent, GSA, in connection with its bid on a barge offered for sale through GSA's online auction process. GSA, in turn, seeks to retain that bid deposit and to recover an additional \$6858.25 as the balance of liquidated damages allegedly due. Expeditors has appealed contracting officer final decisions issued with respect to the default termination and both the Government's monetary claim and its own. For the reasons explained below, the Board grants the appeals.

Background

GSA, through its GSA AuctionsSM website, in September 2011, offered for sale under sale lot number 41QSC11449001, a barge obtained from the National Aeronautics and Space Administration (NASA) that NASA had used in conjunction with its Apollo and Space Shuttle programs. The rather sizeable barge, which had been docked at the Stennis Space Center (SSC) in Mississippi, was described in GSA's solicitation (denoted as an "invitation for bid") in part as follows: "Poseidon Barge, Hull #YFNB-40, vessel length: 265 [feet], vessel beam: 52 [feet] The vessel has a covered deck and *is in fair condition for transit.*" (Emphasis added.)

The present appeal involves a claim that the barge had been misdescribed, in that the invitation for bid's description failed to indicate the presence of 200,000 gallons of water in the barge's ballast tanks or what needed to be done with the water in order to render the barge capable of "transit." Although the invitation for bid's description mentioned "ballast tanks" on the vessel and stated that "corrosion preventative films/gels were applied in the ballast tanks . . . in [its] 1997 dry dock," it did not comment on whether any water contamination issue might be created by the "corrosion preventative films/gels," and it was completely silent as to the presence or quantity of water within the ballast tanks or as to what would have to be done in terms of ballast water removal in order to render the vessel capable of transit away from its dock.

The invitation for bid provided bidders with the opportunity to inspect the barge, but appellant did not avail itself of that opportunity. Nevertheless, it does not appear that a reasonable pre-bid inspection would have alerted Expeditors to the quantity of water present in the barge's ballast tanks or as to what a winning bidder would have to do with that water in order to take delivery of the barge.

In this regard, Mr. Cory Frederick, Expeditors' vice president, testified that he was able to view the barge at a later date – i.e., after Expeditors' contract had already been terminated and re-auctioned, in conjunction with a post-sale inspection of the barge by the second purchaser. At that time, Frederick testified, he could not see the water in the ballast tanks, because the tanks were located in the hold of the barge underneath metal plates that were bolted down. In an affidavit submitted with respondent's post-hearing brief, NASA's Mr. Eric Taylor, the individual named in the instant invitation for bid as the "custodian point of contact," refers to "multiple manholes directly accessible from the main covered deck" of the barge and urges: "[A]t least some of the manholes were supposed to be unbolted and/or have the covers removed for inspection when the purchaser's representatives inspected Poseidon after the second sale." Mr. Taylor, who did not participate personally

in any of the inspections, indicated that NASA's Mr. Richard Harris would have to confirm his impressions of what may have been visible on inspection. Mr. Harris had been the NASA employee designated in the instant invitation for bid as the "inspection point of contact." In an affidavit submitted by respondent with a supplement to its posthearing brief, Mr. Harris states: "[W]e removed all nuts that secured hatch covers. The potential bidders could remove the covers and look down in the ballast tanks." Mr. Harris does not say that he was actually present for the pre-bid inspections in October 2011, nor does he indicate whether bidders were told that the nuts were removed to allow them to view the ballast tanks or whether, to his knowledge, anyone actually removed hatch covers for that purpose during pre-bid inspections. Neither his affidavit nor that of Mr. Taylor indicates how difficult it would have been to remove unbolted hatch covers.

In a counter-affidavit submitted by Mr. Frederick with appellant's posthearing rebuttal brief, he reiterated that, when he inspected the barge in early January 2012, "there were no open or unbolted hatch or manholes" that would give visual "access to any of the 24 ballasting tanks." Photographs of the Poseidon barge provided by Mr. Frederick with his affidavit do not depict open or unbolted hatches or manholes in the deck. Both the Harris and Taylor affidavits indicate that, if the barge were resting on the "dock lip," there had to be water in the ballast tanks. In this regard, the Taylor affidavit states: "A quick inspection would reveal whether or not a vessel is ballasted down upon this 'lip'." The Taylor affidavit is accompanied by photos of the dock lip. Expeditors contends that the lip was not visible with the barge moored to the dock, and points to the photos accompanying Mr. Frederick's counter-affidavit, in which the lip is not visible. Regardless of whether or not the lip was visible, we cannot see that a pre-bid inspection would have disclosed the quantity of water present in the tanks or what would be required to unseat the barge from the dock lip in order to move it away from the dock.

The invitation for bid called for bid deposits of \$10,000 to be received no later than noon on October 3, 2011. Expeditors, with its bid of \$337,165, submitted its \$10,000 deposit and ultimately was determined to be the high bidder. The GSA AuctionsSM terms and conditions, to which Expeditors had agreed as part of the bidder registration process and by submitting its bid, specifically required that, if the bid were accepted, Expeditors was "to pay for and remove the property by the dates and times specified in the contract award email notification." On October 4, 2011, GSA awarded appellant sales contract no. GS04F11FBEE103 in the amount of \$337,165. Notification of award was accomplished by email message dated October 4, 2011, transmitted at 10:10 p.m., and in that message Expeditors was told that it was expected to make payment to GSA for the barge within two business days and to remove it within ten business days of the date and time of the email notification, i.e., by October 19, 2011.

By response email message transmitted on the afternoon of October 6, 2011, Expediters advised the GSA contracting officer that it considered sale lot number 41QSCII1449001 to have been misdescribed. In this regard, Expediters contended that the photos accompanying the invitation appeared to depict “two vessels side by side.” In the email message, even though Expediters maintained that it had bid on what it purportedly perceived as two vessels, it nevertheless offered to proceed with the purchase, but at a reduced price of \$150,000, in light of the alleged “misdescription.” The contracting officer flatly rejected Expediters’ offer of a downward price adjustment within minutes of receiving it, notified Expediters that it would be placed in default status if it failed to pay the balance of the sales contract (i.e., \$327,165) in full by the close of business, October 11, 2011, and strongly encouraged appellant “to read the terms and conditions of the sale [contract].” Several additional email communications were exchanged between Expediters and the contracting officer on October 6, and the contacting officer made it plain that she would not yield to Expediters’ request for a price adjustment and that her intent was to terminate Expediters’ sales contract for default if payment of the balance due was not forthcoming by the deadline of October 11 she had established.

Mr. Frederick, who had submitted the bid on behalf of Expediters, testified that, based on the contracting officer’s warnings and his review of the auction contract terms, he had decided to accede to GSA’s position, to pay the contract balance and take delivery of the barge. To see what would be required to coordinate removal of the barge from its SSC dock, he states, he attempted to contact NASA’s Mr. Taylor, but was unable to reach him. Instead, he says, he was able to speak by telephone with Mr. Harris, the NASA “inspection point of contact.” During their telephone conversation, which took place very early in the morning on October 7, 2011, Mr. Frederick relates, Mr. Harris revealed to him not only that there were 200,000 gallons of water contained in ballast tanks on the barge that would require removal before the barge could be moved from the dock, but that the water was “contaminated” with “hazardous chemicals.” According to Mr. Frederick, Mr. Harris further explained that NASA had pumped the water into the barge’s ballast tanks in order to permit the barge to be seated securely onto a shelf (the above-mentioned “dock lip”) that had been designed to permit safe loading and unloading of sensitive cargo needed for the space shuttle, including the shuttle’s booster rockets. The post-hearing Harris affidavit appears to confirm the accuracy of Mr. Frederick’s testimony about his conversation with Mr. Harris: “I recall saying, to potential bidders, that there was approximately 200,000 gallons of water in the ballast and had been there about ten years. I also said there was some anti-rust additive so there might be a chance of contamination.”

Shortly after learning of this situation, Mr. Frederick, by email message transmitted at 6:48 a.m. on October 7, 2011, notified the contracting officer that Expediters considered the presence of 200,000 gallons of contaminated water within the barge to be an additional

instance of “misrepresentation” by the Government, since NASA had been aware of the large quantity of water prior to the auction sale and had failed to disclose its existence. The email message indicated that, because removal of the water from the barge was necessary in order for Expeditors to be able to take delivery of the barge and move it away from the dock and into the river, and since removal and disposal of the purportedly contaminated water in accordance with “EPA guidelines” (presumably he was referring to guidelines issued to implement the Clean Water Act) could entail considerable cost, Expeditors expected NASA to perform such water removal at its own expense and at no cost to Expeditors.

Upon receipt of this message from Mr. Frederick, the contracting officer contacted NASA and forwarded a copy of Mr. Frederick’s message, seeking a response. An internal NASA email communication from a NASA official distributing the Frederick message reads, in part:

I need to speak with you concerning [Expeditors’ message] below. I just got off[f] the phone with GSA and the sale of Poseidon may go south because of purchaser’s claim. Like to set up a telecom between you and GSA Region 9 to resolve issue as soon as possible around 9:30 am CT. NASA should cease all conversations with the purchaser. GSA handles any disputes.

The same NASA official also forwarded the Frederick message to NASA’s Mr. Taylor, with the following request:

Per our teleconference call a few moments ago, can you please respond to the claim from the purchaser – that NASA misrepresented the description for the Poseidon Barge sale (below). In your response, please explain why the water is loaded in the barge and to his claim “removal of the water would be big money if disposed of by EPA guidelines, because Hazardous chemical was also pumped into the water by NASA.” Also, address the removal of the water by NASA and anything else you consider pertinent.

GSA needs your statement to dispute the purchaser’s claim because the purchaser is trying to back out of the sales contract.

A detailed response was provided to the requesting NASA official and to the GSA contracting officer by email message on the afternoon of October 7, 2011. The response, issued by a Mr. Farley Davis, who appears to have been Mr. Taylor’s supervisor at NASA, states:

The location at SSC where Poseidon is currently moored is considered a safe harbor to protect it from hurricanes and other tropical events. The water level in the SSC canal system is carefully controlled, which prevents sudden and/or large magnitude changes. Part of the preparations to protect NASA barge Poseidon here during hurricane season includes ballasting the stern lip down onto a compatible recess in the dock. This is achieved by filling one or more of the ballast tanks with water from the canal by using the ballast pumps on board. The appropriate amount of water is required to be removed from these tanks not only to remove it from the dock, but to allow the proper vessel draft to navigate through the SSC canal system and the East Pearl River.

Referencing the email from Mrs. Janette Gordon SSC/RA02 that you received earlier today, permission has been verified to allow pumping of the required ballast water into the SSC canal system, *with the precautions noted*. With this permission, *it will take approximately 1-2 days to remove the ballast water utilizing the ballast pumps on board, assuming the generators and ballast pumps function*. I suggest that enough ballast water be removed to lift the stern lip from the dock and to provide the appropriate even keel draft to transit out of the SSC canal system and through the SSC lock. *As a best practice, that would minimize the amount of ballast water discharged into the SSC canal system*. The purchaser shall determine and provide the means to appropriately ballast Poseidon for transit in the East Pearl River and beyond. Therefore, there are no unexpected costs imparted to the purchaser regarding removal of the ballast water. *NASA/MSFC/AS42 does have the capability to remove the ballast water while Poseidon is at the SSC dock, if required*. [Emphasis added.]

The surfaces of the ballast tanks that contain the water were last treated with a common marine corrosion preventative, Eureka Fluid Film Gel BW, in 1999 at its last shipyard/retrofit period. Poseidon completed service for the Space Shuttle Program in September 2001, and was retired to its current location shortly thereafter. For many reasons and at many times since, Poseidon has been ballasted, de-ballasted, and moved within the SSC canal system. The source of the water currently in the ballast tanks was taken in from the SSC canal system.

Curiously, this NASA response was not forwarded to or shared with Expeditors. Instead, the GSA contracting officer furnished the following terse response to Mr. Frederick's message:

The water is not contaminated.

You are still required to have your payment submitted by close of business on Tuesday [October 11, 2011].

I will not discuss this any further with you. You will have the right to appeal this decision before the Civil Board of Appeals.^[1]

GSA will not accept any further excuses.

Mr. Frederick, during the hearing, testified that he was prepared to proceed with the contract, to pay the balance of Expeditors' bid and retrieve the barge, provided the Government agreed to take care of removing the water from the barge's ballast tanks at government cost, and had so indicated in his message of October 7 to the contracting officer. It was because the contracting officer failed to respond to his demand regarding water removal and did not advise him that NASA had stated it had the capability of removing the ballast water, he said, that Expeditors believed that it could not go forward with contract payment and with removal of the barge and thus did not do so.²

By letter to Expeditors dated October 12, 2011, the contracting officer furnished Expeditors with a termination of contract notice, advising Expeditors that the contract was terminated for default, that the \$10,000 bid deposit was being retained in partial satisfaction of liquidated damages, and that the balance of liquidated damages, \$6858.25³, was due within thirty days of receipt of the termination notice. The notice discussed alternative

¹ It seems the contracting officer intended a possible appeal to this Board.

² In his affidavit, NASA's Mr. Taylor makes clear not only that NASA had the capability of draining the water from the ballast tanks, but that NASA always intended to do so and would have brought in personnel from remote NASA facilities to accomplish the water removal: "The 'one to two days' [Mr. Davis had advised would have been] required to remove the water was not determined [by Mr. Davis] by the amount of water to be removed, but by logistics. The removal required personnel from Marshall Space Flight Center (MSFC) in Huntsville, AL or personnel from the Michoud Assembly Facility (MAP) near New Orleans, LA. This required planning and travel. The personnel at SSC were only tasked to provide access to the property and the barge as required."

³ The contract specified as liquidated damages due the Government in the event of a contractor default an amount equal to 5% of the contract award. Here, 5% of the \$337,165 award equals \$16,858.25.

means of making payment of the \$6858.25 and advised that Expediters' file had been turned over to the GSA finance office for further collection action.

The contracting officer, on December 14, 2011, issued a final decision under the Contract Disputes Act (CDA). That decision addressed the default termination and the related government claim for the \$6858.25 liquidated damages balance. Expediters timely filed its appeal from that decision to this Board, and the Board docketed the appeal as CBCA 2748. The matter proceeded to a hearing,⁴ which was conducted on October 16, 2012. Subsequently, at the Board's suggestion in order to avert a possible jurisdictional issue,⁵ Expediters submitted its own claim to the contracting officer for a refund of the \$10,000 bid deposit, and the contracting officer, by letter dated January 28, 2013, issued a second final decision denying that claim. Expediters timely filed an appeal of that denial, and the Board docketed the appeal as CBCA 3237, consolidating it with CBCA 2748.

Discussion

The terms and conditions of the parties' contract provide the following with respect to the Government's warranty as to the accuracy and adequacy of its description of auctioned property and a bidder's claims to refunds for alleged misdescription:

Description Warranty & Refunds

The Government warrants to the original purchaser that the property listed in the GSAAuctions.gov website will conform to its written description. Features, characteristics, deficiencies, etc. not addressed in the description are

⁴ The hearing was conducted by telephone, with only Expediters' Mr. Frederick presenting oral testimony. GSA chose to proceed with its case solely on the written record, which consisted of the appeal file and documents contained in two supplemental binders offered by the parties without objection. Subsequently, a January 28, 2013, contracting officer final decision and the Taylor affidavit which it incorporated (both documents included with respondent's posthearing brief) were added to the record of the consolidated appeals, as were the Harris affidavit and the affidavit and photographs provided by Mr. Frederick.

⁵ The Board's suggestion was prompted by the decision of the United States Court of Appeals for the Federal Circuit in *M. Maropakos Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), which discusses the obligation of a contractor to submit its own CDA claim for liquidated damages withheld, notwithstanding that the initial claim to liquidated damages is that of the Government.

excluded from this warranty. GSA further cautions 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, failure to cite major missing parts and/or restrictions with regards to usage may occur.

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.

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Refunds Claim Procedures

Please be advised that refunds are not a frequent practice of GSA Auctions. A request for refund must be substantiated in writing to the Sales Contracting Officer for issues regarding mis-described property, missing property and voluntary defaults within 15 calendar days from the date of payment.

Refund Amount

The refund is limited to the purchase price of the misdescribed property.

Claims of Misdescription.

If items have been awarded but not paid for and the successful bidder feels that the property is mis-described, he/she must follow these procedures: A written claim needs to be submitted to the Sales Contracting Officer within 15 calendar days from the date of award requesting release of contractual obligation for reasons satisfying that of a mis-description. No verbal contact with the custodian or the Sales Contracting Officer or any other federal official will constitute a notice of misdescription.

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 award email notification. If property has been removed and the claim is accepted by the Sales Contracting Officer, the purchaser must maintain the property in the purchased condition and return it at their [sic] expense to the location designated by the Sales Contracting Officer.

Expediters asserts that the omission of information about the quantity and content of the barge's ballast tank water from the description in the invitation for bid constituted a misdescription⁶ and that it is entitled to a refund of its bid deposit on this basis. This claim of misdescription was timely, i.e., Expediters furnished written notice of the claim to the cognizant GSA sales contracting officer within the fifteen calendar day period required.

The description of the Poseidon barge in the invitation for bid did not disclose that the winning bidder would have to contend with 200,000 gallons of ballast tank water, and, as indicated above, such information would not have been readily discernible from a reasonable pre-bid site inspection had Expediters chosen to perform one. Also, the invitation for bid did not indicate that, in order to remove sufficient water from the ballast tanks to allow for the barge's transit into the river, NASA-specified "precautions" for ballast water pumping would have to be followed, to limit the quantity of water discharged into the canal. Indeed, what was ultimately made clear from the post-hearing Taylor affidavit is that the removal of ballast water from the barge's tanks would have required not only NASA permission, but also direct involvement of NASA personnel who would have to be brought to Mississippi from a remote NASA facility in either Huntsville, Alabama, or New Orleans, Louisiana, in order to perform or to oversee the pumping operation.

The GSA contracting officer did not share with Expediters her knowledge of NASA's requirements for ballast pumping and of NASA's concern about the need to "minimize the amount of ballast water discharged into the SSC canal system." Moreover, she chose to ignore Expediter's express demand for assistance from NASA in the barge removal process, and failed to disclose to Expediters that NASA would have the capability itself to drain the water from the ballast tanks. In this manner, she created the clear impression that Expediters would be left entirely on its own to deal with the ballast tank water. In short, Mr. Frederick was kept in the dark about everything that would be required and the assistance that would have been forthcoming from NASA – assistance, it seems, NASA always intended to provide⁷ – in order for Expediters to be able to take delivery of the barge and move it away from the SSC dock.

⁶ Expediters no longer is pursuing its original "misdescription" allegation, that pertaining to whether the auction was for two vessels rather than one.

⁷ Mr. Taylor states in this regard: "There was never any attempt [by NASA] to conceal onboard water. There was always the intent [by NASA] to discharge the water required to release Poseidon from the dock so that it could be relocated."

Because critical information concerning restrictions on the purchaser's ability to take possession and make immediate use of the barge had been omitted from the invitation for bid description of the barge, the description of the barge as being in "fair condition for transit" constituted a misdescription that would entitle Expeditors to a full refund of its \$10,000 bid deposit. The present case is unlike the situation where a bidder is simply dissatisfied with the condition of an auctioned vehicle, but nevertheless is able to take possession of it and remove it. *E.g., Steven A. Groshong v. GSA*, CBCA 1324, 09-1 BCA ¶ 34,104 (Board rejected a claim of misdescription, where the bidder removed an auctioned automobile from the Government lot and was able to drive it to a tire dealer, to replace purportedly bald tires, and then home 1139 miles, despite several other alleged mechanical deficiencies).

Furthermore, under the circumstances here, where the GSA contracting officer demanded immediate payment and removal of the vessel without furnishing the information and guidance needed to accomplish that removal and without responding meaningfully to Expeditors' inquiry about what NASA would do about the ballast water, it was entirely inappropriate and in breach of the implied duty of cooperation inherent in all contracts, for the agency to proceed to terminate Expeditors' contract for default and to retain that deposit. *See CH2M HILL Hanford Group, Inc. v. Department of Energy*, CBCA 1187, 08-2 BCA ¶ 34,002, at 168,152 (citing *S.A. Healy Co. v. United States*, 576 F.2d 299, 306 (Ct. Cl. 1978), and cases cited therein).⁸

⁸ Respondent, while submitting two post-hearing affidavits of NASA employees, did not furnish an affidavit of the GSA contracting officer. Thus, her actions have never been explained or justified.

Decision

For the foregoing reasons, the appeals are **GRANTED**.

RICHARD C. WALTERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

CANDIDA S. STEEL
Board Judge