



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 21, 2016

CBCA 5254, 5255

SEA SHEPHERD CONSERVATION SOCIETY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

William A. Shook of The Law Offices of William A. Shook PLLC, Seattle, WA, counsel for Appellant.

Stephen T. O'Neal, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **KULLBERG**.

DANIELS, Board Judge.

Sea Shepherd Conservation Society (SSCS) bought from the General Services Administration (GSA), at auction, two decommissioned United States Coast Guard vessels. Several months after consummating the transaction, SSCS claimed that it should have been permitted to buy the vessels at lower prices than those it actually paid. A GSA contracting officer denied the claims, and SSCS appealed from those decisions.

GSA moves to dismiss both appeals for lack of jurisdiction. Both parties move for summary relief in each of the appeals. For the reasons expressed below, we deny the motion

to dismiss for lack of jurisdiction, grant GSA's motions for summary relief, deny SSCS's motions for summary relief, and deny the appeals.

Undisputed Facts

In early December 2014, GSA conducted an auction through its GSAAuctions.gov website at which two former Coast Guard vessels, the USCGC Pea Island and the USCGC Block Island were offered for sale. The Pea Island was described in the auction catalog as WPB-1347 (and alternatively, as WPB-134), and the Block Island was described as WPB-1344.

As a condition of participation in the auction, each bidder was required to "recognize that [it is] subject to the Online Sale Terms and Conditions, General Sale Terms and Conditions (Standard Form 114C, April 2001) and the Special Requirements and Conditions, and that they are applicable to any item offered on the GSAAuctions.gov website." One of the terms and conditions, entitled "Eligibility of Bidders," stated:

Bidders must be at least 18 years of age. Bidders will be required to provide their birth date at registration. A bidder's birth date will be used only to verify bidder's eligibility. This information is protected by the Privacy Act, 5 U.S.C. 552a. In addition, bidders must not be debarred from doing business with the Government. GSA will verify that individuals and companies are not debarred by checking their information against the bidders debarred list which identifies those parties excluded throughout the U.S. Government (unless otherwise noted) from receiving Federal contracts or certain subcontracts and from certain types of Federal financial and non financial assistance and benefits.

Immediately below this paragraph is one entitled "U.S. Citizenship." This paragraph stated, "Bidding is not limited to U.S. citizens exclusively. However due to National Security and Export restrictions, some items shall only be sold to U.S. Citizen [sic]."

The General Sale Terms and Conditions (Standard Form 114C, April 2001) also included a paragraph entitled "Eligibility of Bidders." This paragraph stated:

The bidder warrants that he/she is not: (a) under 18 years of age; (b) an employee of an agency of the Federal Government (either as a civilian or as a member of the Armed Forces of the United States, including the United States Coast Guard, on active duty) prohibited by the regulations of that agency from purchasing property sold hereunder; (c) an agent or immediate member of the

household of the employee in (b) above. For breach of this warranty, the Government shall have the right to annul this contract without liability.

The auction terms and conditions also include a paragraph entitled “Export Restriction Notice” which provides, “The use, disposition, export and reexport of any property is subject to all applicable U.S. laws and regulations. These regulations include International Traffic in Arms Regulations (22 CFR [Code of Federal Regulations] Part 120 et seq.)”

For each of the two vessels at issue, the auction catalog stated, “The successful bidder of this property will be required to complete an ‘End Use Certificate’ prior to removing the vessel.” The End-Use Certificate, DLA Form 1822, Jan 2013, contained the following provisions:

SECTION III. UNDERSTANDING AND NOTIFICATIONS

1. The use, disposition, export and re-export of this property is subject to all applicable U.S. Laws and Regulations, including but not limited to the Arms Export Control Act (22 USC [United States Code] 2751 et seq.); Export Administration Act of 1979 (50 USC App [Appendix] 2401 et seq.) as continued under Executive Order 12924; International Traffic in Arms Regulations (22 CFR 120 et seq.); Export Administration Regulations (15 CFR 730 et seq.); Foreign Assets Control Regulations (31 CFR 500 et seq.) and the Espionage Act (18 USC 793 et seq.) which, among other things, prohibit: . . . [any] use, disposition, export or re-export of the property not permitted by applicable statute and regulation.

. . . .

SECTION IV. CERTIFICATION STATEMENT TO BE SIGNED BIDDER AT TIME OF RESPONSE TO IFB [Invitation for Bids]

. . . .

I acknowledge having been advised that the USML/CCLI [United States Munitions List/Commerce Control List Items] property I purchased is controlled by the U.S. Government and in many cases cannot be transferred (exported, sold or given) to a foreign country, a non-U.S. Citizen/National or a non-Permanent US Resident without a valid State/Commerce Department export authorization.

Three bidders participated in the auction for each vessel. Bidder 1 submitted a bid for each vessel which did not meet the reserve price of \$75,000 and dropped out of the bidding. Bidder 2 submitted a bid for each vessel which did meet the reserve price. Sea Shepherd

then submitted a bid of \$100,000 for each vessel. Bidder 2 and SSCS continued to bid against each other for each vessel. Ultimately, SSCS placed a bid of \$275,800 for the Pea Island and was determined to be the high bidder for that vessel. Bidder 2 submitted a higher bid than SSCS's last bid of \$155,100 for the Block Island and was determined to be the high bidder for that vessel.

With regard to the Pea Island, on December 4, 2014, GSA informed SSCS that it was the winning bidder and SSCS wired payment to GSA. A representative of SSCS completed the End-Use Certificate and on December 5 sent it to GSA by facsimile transmission. The GSA contracting officer issued a bill of sale to SSCS on December 10.

With regard to the Block Island, on December 5, GSA informed SSCS that Bidder 2 was not a United States citizen and was therefore ineligible to purchase this vessel. The GSA contracting officer offered to sell this vessel to SSCS at the price of its last and highest bid of \$155,100. The SSCS representative asked the contracting officer by email, "[C]onsidering that we were only bidding against someone not permitted to purchase and the bidding ran high, would GSA be willing to sell the Block Island to us for \$100,000?" The contracting officer promptly responded, "We cannot do this. You have the option to not accept the offer." SSCS equally promptly replied, "We accept." On December 7, the SSCS representative signed a document saying that he "wish[ed] to have my bid of **\$155,100** . . . revived on [the sale of the Block Island]. . . . By reviving my bid, this will constitute a Legal, Binding Contract." In its complaint, SSCS says that it agreed to pay \$155,100 "under protest" because it was "[c]oncerned that, if it did not immediately accept the GSA's non-negotiable terms, SSCS would lose the opportunity to purchase the vessel." GSA determined that SSCS was the winning bidder on December 8 and, after receiving SSCS's payment and End-Use Certificate, issued a bill of sale to SSCS on December 10.

By letter dated October 5, 2015, SSCS made a certified claim in the amount of \$175,800 plus interest with regard to the purchase of the Pea Island. SSCS "contend[ed] that [the] price that it paid, under protest, was unjustifiably inflated as a result of the GSA's failure to prevent an ineligible bidder from participating – and precipitating a bidding war – in the auction." By letter dated December 29, 2015, the contracting officer denied this claim. She maintained that the other bidder for the vessel was an eligible bidder and that SSCS "willing[ly] increased [its] bid." SSCS appealed this decision, and the Board docketed the appeal as CBCA 5254.

By another letter dated October 5, 2015, SSCS made a certified claim in the amount of \$55,100 plus interest with regard to the purchase of the Block Island. SSCS made the same contention it made in its claim with regard to the Pea Island. By letter dated December 29, 2015, the contracting officer denied this claim, noting that SSCS had revived

its bid and that it had done so despite knowing that the other bidder was not a United States citizen and despite having “the option to decline the offer and have the item be re-listed on another sale.” SSCS appealed this decision, and the Board docketed the appeal as CBCA 5255.

Discussion

Motion to Dismiss for Lack of Jurisdiction

GSA cites *DekaTron Corp. v. Department of Labor*, CBCA 4428, 16-1 BCA ¶ 36,259, for the proposition that “the Board ‘lack[s] jurisdiction over allegations of irregularities in the selection process.’” *Id.* at 176,892 (quoting *IMS Engineers-Architects, P.C.*, ASBCA 53471, 06-1 BCA ¶ 33,231, at 164,672). GSA maintains that because “[t]he entire basis for SSCS’s claim relies on GSA’s actions prior to the award of the contract,” redress of SSCS’s grievances would have been possible only through the filing of a protest with the Government Accountability Office, per 31 U.S.C. §§ 3551-3557.

We agree with SSCS that this theory is not valid. The Board’s jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012), is “to decide any appeal from a decision of a contracting officer of any executive agency (other than [those specifically named, none of which includes GSA]) relative to a contract made by that agency.” *Id.* § 7105(e)(1)(B). A contractor’s claim that reformation of a contract is appropriate, due to alleged illegal government conduct in the award of the contract, relates to the contract. The Board consequently has jurisdiction over appeals from contracting officer decisions regarding such claims – even if those claims are brought after contract performance is complete. *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1550-52 (Fed. Cir. 1995). We have jurisdiction over these appeals, and therefore deny GSA’s motion to dismiss the cases for lack of jurisdiction.

Motions for Summary Relief

Each party has moved for summary relief in these cases. Resolving a dispute on such a motion is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When both parties move for summary relief, the Board must “evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration.” *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1338-39

(Fed. Cir. 2001) (citing *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999)). There are no disputed facts here, so the appeals may be resolved on the cross-motions.

SSCS contends that but for the intervening bids of an ineligible bidder, SSCS would have been the winning bidder for each vessel at the price of its original bid, \$100,000. GSA violated regulations, the organization maintains, by refusing to accept those bids and instead permitting an ineligible bidder – a nonresponsive entity – to drive up the prices.

SSCS notes that pursuant to 40 U.S.C. § 545(a)(4), GSA may dispose of surplus government property by making an award “to the responsible bidder whose bid, conforming to the invitation for bids, is most advantageous to the Federal Government, price and other factors considered.” A “bid,” in the context of sales of such property, is “a response to an offer to sell that, if accepted, would bind the bidder to the terms and conditions of the contract (including the bid price).” 41 CFR 102-38.35 (2014). A “responsive bid” is “a bid that complies with the terms and conditions of the sales offering Only responsive bids may be considered for award.” *Id.* 102-38.190. An agency “must award the sales contract to the bidder with the highest responsive bid, unless a determination is made to reject the bid.” *Id.* 102-38.275. An agency “may reject any or all bids when such action is advantageous to the Government, or when it is in the public interest to do so.” *Id.* 102-38.205.

SSCS notes further that pursuant to 41 CFR 102-38.45(a), an agency in selling personal property is to “[e]nsure the sale complies with the provisions of Title 40 of the U.S. Code, the regulations of this part [102-38], and any other applicable laws.” Those “other applicable laws” for the sale of these Coast Guard vessels, SSCS continues, include the various laws cited on the End-Use Certificate which the successful bidder had to complete. Those laws include the International Traffic in Arms Regulations, 22 CFR subch. M, which provide, at 22 CFR 121.15, that Coast Guard cutters with the designation “WPB” are included on the United States Munitions List. Such property may not be transferred to ineligible parties. Department of Defense Instruction 2030.08, ¶ 4.3 (May 23, 2006).

Neither GSA nor we take exception to these summaries of relevant statute and regulations. But how do they relate to SSCS’s claims? The contractor notes that pursuant to 41 CFR 102-38.75(a), an agency must “sell personal property upon such terms and conditions as the head of [the] agency or designee deems proper to promote the fairness, openness, and timeliness necessary for the sale to be conducted in a manner most advantageous to the Government.” And, says SSCS, allowing a nonresponsive bidder to participate in an auction does not promote fairness or openness. This regulation is said by SSCS to be principally for the benefit of the contractor – a factor which is necessary for

reformation to be appropriate due to violation of a regulation. *See Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1451-52 (Fed. Cir. 1997).

We do not agree with this analysis. As GSA points out, the auction terms and conditions did not limit bidding to United States citizens; the limitations excluded only individuals who were under the age of eighteen, employees of certain government agencies (or family members of such employees), and debarred individuals and companies. The terms and conditions warned that non-citizens would be precluded from buying certain items due to national security concerns. The requirement for buyers of the vessels at issue to complete an End-Use Certificate, along with the “WPB” designation of the vessels, amplified this warning. GSA faithfully followed all of these provisions by allowing a non-citizen to participate in the bidding and then, once it learned of the bidder’s citizenship, preventing that bidder from purchasing the vessels. The predicament in which SSCS found itself – having to pay more for the vessels than it would have if the other bidder had not participated – is unfortunate for the organization, but sanctioned by the rules of the auction in which it chose to join.

A government contract may be reformed to correct errors caused by an agency’s violation of regulations issued for the benefit of contractors. *Cessna Aircraft Co.; LaBarge Products; Promac, Inc.*, VABCA 5345, 98-2 BCA ¶ 30,068, at 148,782-83, *aff’d sub nom. Promac, Inc. v. West*, 203 F.3d 786 (Fed. Cir. 2000). Nevertheless, such “contracts are [not] readily subject to change after performance. The law and precedent of contract and procurement require some grave error or mutual mistake or changed circumstance, such as would render it unconscionable for the government to require performance of the original terms.” *American Telephone & Telegraph Co. v. United States*, 307 F.3d 1374, 1383 n.2 (Fed. Cir. 2002) (Newman, J., dissenting). Compliance with auction terms and conditions, even if detrimental to the interests of one of the bidders, is hardly the sort of “grave error or mutual mistake or changed circumstance” which might merit reformation.

Accordingly, we grant GSA’s motions for summary relief in these appeals and deny SSCS’s motions for summary relief. Because we have decided the appeals in this way, we need not consider an issue which GSA addresses fully, whether the regulations in question were principally for the benefit of the contractor or the Government. *See Promac, Inc.*, 203 F.3d at 789 (because the contractor had benefited from the agency’s violation of regulations, it had “unclean hands and [was] not entitled to the equitable remedy of contract reformation,” so determining the intended beneficiary of those regulations was unnecessary).

Decision

GSA's motion to dismiss for lack of jurisdiction is denied, and its motions for summary relief are granted. SSCS's motions for summary relief are denied. The appeals are **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

H. CHUCK KULLBERG
Board Judge