GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

ANA TOWING AND STORAGE, INC.	)	
	)	CAB No. D-1176
Under Contract No. 98-0015-AA-OMS-KH	)	

For the Appellant: Laurence Schor, Esq., McManus, Schor, Asmar & Darden, LLP and David S. Greene, Esq. For the Government: Andrew J. Saindon, Esq. and Charles Barksdale, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash, concurring.

OPINION

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On April 15, 1998, AnA Towing and Storage, Inc. and the District entered into Contract No. 98-0015-AA-OMS-KH which obligated AnA, at the direction of the District, to pick up abandoned vehicles within the District and to deliver the vehicles to the Blue Plains storage lot to be offered for sale at public auction by the District and, if not sold, disposed of as scrap. The District paid no monetary compensation to AnA for the pick-up services. As consideration, AnA was granted the exclusive right and obligation[1] to purchase all vehicles not sold at public auction for a bargain rate of $12.50 per vehicle.

By order dated June 25, 2003, the Board granted AnA partial summary judgment as to entitlement. The Board ruled that AnA was entitled to damages for each vehicle which was not sold at the *first* auction at which it was offered. As represented by the District, the Board believed that every vehicle for which the auctioneer failed to receive a bid at or above a set minimum price was passed at the auction and either sold to AnA at the below market contract price or transferred to a later auction. (See Respondent's Responses to Appellant's First Set of Interrogatories, Interrogatory No. 7). The Board's ruling granted AnA entitlement to damages for each vehicle transferred to a subsequent auction. It now appears that, of the vehicles which failed to receive a minimum price at the public auction, only a small number were transferred to later auctions. A much larger number of vehicles for which the auctioneer did not receive a minimum bid during the formal auction were sold by District staff at the auction site, but outside

[1] The District's pleadings refer to AnA having an "option" to purchase unsold vehicles. (*See, e.g.* Memorandum of Points and Authorities in Opposition to Appellant's Second Request for Summary Judgment, at 2). This misconstrues the contract. The contract was a "requirements" contract. AnA was obligated to purchase any vehicle designated by the District as unsaleable and to remove such vehicles from the auction lot within 24 hours, subject to a storage charge of $20 per day or fraction of a day for any vehicle not removed within 24 hours. (Contract, 7). If the designated vehicle was not removed by AnA, AnA was subject to a further $75 removal fee, in addition to the storage fee.

the presence of the auctioneer.[2] Although such sales took place on negotiated terms after the auctioneer had completed calling for bids (Chisley Dep. 33), they were listed in the auction records as though the sales had been made by the auctioneer. (*Id.* 34). Such negotiated transactions were made below the minimum auction price and were sometimes made for groups of unsold vehicles. (*Id.* 118).

The District argues, in essence, that because neither the contract, nor any written agency policy, establishes a minimum bid price for the vehicles, the District was free to arbitrarily determine the salability of each vehicle. As a consequence, the District argues, AnA cannot demonstrate how many vehicles it should have received and is therefore not entitled to compensation. (Opposition, 8). The District further argues that the vehicles were sold at auction meeting the terms of the contract, even though sold outside the presence of the auctioneer because bidders in attendance at the auction were advised of the possible sales. (Respondent's Opposition to Appellant's Statement of Material Facts ¶¶ 14 and 16).

The District's arguments are incorrect as to both positions. The absence of an objectively determinable basis for quantifying AnA's entitlement to vehicles, as the District alleges, would render the contract invalid for lack of consideration. The Board presumes that contracts are valid. The Board concludes, based on the District's undisputed normal business practice, that the contract may reasonably be read to establish a $50 minimum price. AnA is entitled to compensation for every vehicle sold by the District for less than $50.

Alternatively, even if the District was correct that no minimum sales price is established, the vehicles sold for less than $50 were not sold in the presence of the auctioneer. The contract requires the District to sell unclaimed vehicles "at public auction." Vehicles sold outside the presence of the auctioneer, even if their availability is publicly announced in the presence of the auctioneer, are not sold "at public auction." AnA is entitled to compensation for every vehicle sold outside a public auction. It is undisputed that the vast majority of vehicles sold for under $50 were sold outside the presence of the auctioneer and, to the extent that vehicles were sold for under $50 in the presence of the auctioneer, the District, due to its own record keeping system cannot identify such vehicles. For this reason AnA is alternatively entitled to damages for every

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[2] The District has been less than forthright in responses to discovery. No mention is made in the District's answer of any vehicles which were "passed over" being sold for less than $50 after the close of the auction. In fact, the number of vehicles sold for less than $50 dwarfs the number of vehicles auctioned at a later date by a factor of over 17 to 1. The District provided a spreadsheet prepared by Stephen Chisley purporting to list all vehicles sold for under $50 and all vehicles transferred to future auctions. Of the 3,213 vehicles listed, only 180 were shown as transferred to later auctions (Chisley Dep. 50); the bulk of the remainder appear to have been sold outside of the presence of the auctioneer. The District mischaracterizes the Chisely testimony when it claims that "Hundreds of vehicles were sold for less than $50 *by the auctioneer during the auction.*" (Opposition ¶ 13). Ms. Jones testified that auctioneers never accepted below-minimum bids, but rather passed vehicles which did not receive the minimum opening bid and did not go back to those vehicles. (Jones Dep. 39). Ms. Holmes-Smith testified that she never "actually saw" an auctioneer accepting a bid below the minimum opening bid, but had "heard" that it had happened. (Holmes-Smith Dep. 18). Based even on this hearsay, Ms. Holmes-Smith stated that such sales happened "very seldom." (*Id.* 19). In fact, Mr. Chisely specifically testified that there is no way to tell whether a vehicle was sold by the auctioneer or after the auctioneer passed the vehicle. (Chisley Dep. 34).

vehicle sold for less than $50 as being sold in breach of the contract requirement that all vehicles be offered for sale at public auction.

The District concedes that 3,213 vehicles were either sold for less than $50 or transferred to future auctions. The District has not disputed AnA's valuation of $75 per vehicle, it has merely objected to the nature of AnA's proof. The Board therefore grants partial summary judgment to Appellant and awards damages of $62.50 ($75, less the $12.50 contract purchase price) for each of 3,213 vehicles sold for less than $50 or transferred to future auctions, totaling $200,812.50.

DISCUSSION

Evidentiary Standard

Summary judgment should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Prince Construction Co., Inc.*, CAB No. D-1011, July, 15, 2003, 50 D.C. Reg. 7518, citing, *RDP Development Corp. v. District of Columbia*, 645 A.2d 1078, 1081 (D.C. 1994); *see also, Moorehead v. District of Columbia,* 747 A.2d 138, 143 n.7 (D.C. 2000), citing, *Beegle v. Restaurant Management, Inc.*, 679 A.2d 480, 483 (D.C. 1996).

A party opposing summary judgment may not rely on "mere allegations or denials" in its opposition to a movant's motion for summary judgment. See Super. Ct. R. 56(e). Rather, the non-movant must demonstrate specific facts showing a "genuine issue for trial." (*Id.*) "Mere conclusory allegations on the part of the non-moving party are insufficient to create a genuine issue of material fact." *W.M. Schlosser Co., Inc.*, CAB No. D-0903, Sept. 13, 1994, 42 D.C. Reg. 4824. With regard to facts which are peculiarly within the knowledge of a party, that party may not create a dispute of fact by conflicting testimony of its own witnesses.

The Superior Court Rules of Civil Procedure recognize that a corporate party can only speak through individuals and provides that a corporate party may be required to designate an individual who speaks on its behalf. Rule 30(b)(6). "The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose." Super. Ct. R. 32(2). The District's representation that its employee, Stephen Chisley, is "[t]he most knowledgeable person about the process and the records" (Opposition 9) is the equivalent of a Rule 30(b)(6) designation and the Board therefore accepts as conceded by the District the facts as stated in Mr. Chisley's sworn deposition and the "definitive spreadsheet of all vehicles sold for less than $50 or transferred to subsequent auctions," which Mr. Chisley prepared after having "personally reviewed each and every statistic sheet for the period in question, and compared that information to what was in the Blue Plains computer system." (*Id.*)

Minimum Price

It is an elementary principle of contract law that there can be no valid contract unless there is mutual consideration. (Restatement, Second, Contracts § 17). In performance of the contract, AnA gave valuable consideration by removing vehicles from the streets and delivering the vehicles to Blue Plains. The District's position is, essentially, that the contract lacks an objective method of determining the vehicles to which AnA is entitled as compensation. The final decision of the contracting officer stated:

> The agreement between AnA and the District is for the purpose of disposing of junk and/or unsaleable vehicles. The term unsaleable is defined in section 2, Definitions as "a vehicle which is not sold at Department of Public Works public auction."
>
> The contract does not mention a minimum price at which the District is required to sell the vehicle before the vehicle is determined to be unsaleable, nor does the contract mention that vehicles not sold at one auction are to be automatically designated as "unsaleable." The District as the owner of the abandoned and junk vehicles has the exclusive right to determine the final price for which it will sell a vehicle and to determine when a vehicle is classified as "unsaleable."

While this statement is absolutely correct in the abstract, entering into a bilateral contract for the disposal of vehicles may contractually limit the District's right to determine unsalability. The Board presumes good faith on the part of the District and the contractor in entering into the contract. AnA obligated itself to provide, and the District received and accepted, a valuable service, that is, pick up of vehicles from the streets of the District and delivery of those vehicles to the auction lot at Blue Plains. The assertion by the District that it has the exclusive right to determine which vehicles will be sold to AnA cannot be accepted since it would negate any obligation of the District in consideration of AnA's promise and void the contract.

As formulated in the final decision, the contracting officer appears to have reserved to himself the right to arbitrarily determine AnA's compensation. The contracting officer appears to have arbitrarily determined the number of vehicles for which AnA was entitled to damages. Although the final decision stated AnA's right to compensation for 245 vehicles, neither the final decision, nor the District's pleadings, shed any light on the derivation of the number.

The Board concludes as a matter of law that the subject contract would be invalid for lack of consideration unless a minimum sales price to determine unsalability was intended by the parties. As a general rule of construction, the law presumes the validity of contracts, 6A A. Corbin, *Contracts* §§ 1499, 1533 (1962). Ambiguously worded contracts should not be interpreted to render them invalid where the wording lends itself to a logically acceptable construction that renders them valid. *Walsh v. Schlecht*, 429 U.S. 401, 408 (U.S., 1977); *see also*, Restatement, Second, Contracts, § 203. It is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be valid and the other invalid, the former must be adopted. *Hobbs v. McLean*, 117 U.S. 567, 576 (U.S. 1886).

Although a minimum price is not stated expressly in the contract or in law or regulations, there is no genuine issue of fact that the understood minimum price established at the beginning of performance of the contract was $50. The District now attempts to distinguish the $50 price as an "opening" price for bidding, rather than a "minimum" price for sale. It is clear that at the time of contracting the District understood the so-called "opening" price to be a minimum price. Interrogatory No. 7 of Appellant's first set of interrogatories asked the District to "[i]dentify and/or describe in detail the practices and procedures pursuant to which DPW conducted the Auctions. ..." The District responded, in part:

> The auctioneer begins the sale by announcing the sale number of the vehicle to be auctioned and typically asks for an opening bid of $50. Customers place bids on the vehicle by lifting up their bidder's card as the auctioneer "cries" escalating prices for the vehicle, and this process continues up to the highest bidder. *If no one acknowledges the opening bid, the vehicle is passed over and either auctioned at a latter date or sold to the scrap contractor.* [emphasis supplied]

Contrary to the District's statement in its Opposition that there was "no minimum opening bid," (at 6), the evidence is unambiguous that there clearly was an *understood* minimum bid. Judy Holmes-Smith. Lead Property Control Specialist in charge of the storage and auction Branch (Holmes-Smith Dep. 5) testified as follows:

Q. Are you familiar with what a minimum bid is?

A. Yes.

Q Did you use it at the DPW, at auctions in 1998, 1999?

A. Yes, we did.

Q Based upon your best recollection today, what was that minimum bid that was normally used in 1998, 1999.

A. Fifty dollars.

(*Id.* 15-16)

Cynthia L. Jones, supervisory property control specialist at the Blue Plains impoundment lot at the time of contract performance (Jones Dep. 8) and subsequently a "certified public auctioneer" (*Id.* 31) described the auction process:

Q. You come to a car, you don't get the opening bid, what do you do with that car?

A. We say pass.

Q. Pass the car?

A. We go to the next vehicle.

Q. And then you continue on until you come to the last vehicle?

A. Exactly.

Q. And you never go back to the last car?

A. No we do not.

(*Id.* 39).

The possibility that an auctioneer would only "very seldom," (Smith Dep. 19), or "occasionally," but "not frequently," (Chisley Dep. 118), accept a bid below the stated opening bid confirms, rather than negates, the conclusion that $50 was understood as the minimum acceptable bid price. The Board concludes that, based on the District's normal business practice, a minimum auction sales price of $50 was intended by the parties to the contract.

Sale at Public Auction

Apart from the minimum sales price implicit in the contract, AnA is entitled by the express terms of the contract to purchase at a bargain rate every vehicle delivered by it and "not sold [by the District] at public auction." (Scope of Work ¶ 2.4). The term "public auction" used in the contract has a clear meaning both in common usage and in law. A sale at public auction must be in the presence of the auctioneer. Indeed, in nongovernment transactions, a sale alleged to be at public auction outside of the presence of a licensed auctioneer might subject the seller and the auctioneer to criminal prosecution. The very first section of the District's commercial practice regulations dealing with "public auctions" provides:

> No person or corporation shall offer for sale, sell, or cause to be offered for sale or sold, any real or personal property at public action in the District of Columbia, unless that sale is cried by a duly licensed auctioneer.

16 DCMR § 1100.1. The regulations further provide:

> No licensed auctioneer shall permit any other person or corporation to hold or conduct any auction sale in his or her name.

Id. § 1101.2. Criminal penalties are provided for violation of these regulations. *Id.*, § 1106. The District's interpretation of the "public auction" requirement in the contract as including sales made outside the presence of the auctioneer after the "crying" of the auction was complete (Respondent's Opposition to Appellant's Statement of Material Facts ¶¶ 14 and 16).would permit improper sales not cried by the auctioneer and further permit the government to make sales in the name of the auctioneer, both of which would violate the public auction regulations. Although consumer regulations may not be directly applicable to government action, without some persuasive showing of authority, the Board cannot interpret a contract to allow the government to act in a manner which would be clearly improper if undertaken by a private party. The Board also notes that the District, in apparent recognition of the requirements of a public auction, utilized only "certified auctioneers" to conduct the auctions and followed commercial auction procedures. (Jones Dep. 35-36).

As noted above, vehicles which did not receive the minimum bid were "passed" by the auctioneer. Such vehicles were sold after the auctioneer finished public bidding, (Chisley Dep. 32), in the "customer service office." (Jones Dep. 44). By definition, any vehicle sold outside of the presence of the certified auctioneer was "not sold at public auction."[3] Failure to sell such vehicles to AnA was thus a breach of contract for which AnA is entitled to damages.

[3] The District's record keeping system does not distinguish between sales properly made by the auctioneer and sales made outside the auctioneer's presence. (Chisley Dep. 34-37; Jones Dep. 44).

Number of vehicles wrongly withheld from AnA

The contracting officer determined that AnA was entitled to damages for 245 vehicles. Consideration of this matter is hindered because the District is unable to offer any cogent explanation of the contracting officer's decision. Since the decision appealed from gave no indication as to how the contracting officer decided that AnA was entitled to damages for failure to deliver 245 vehicles to it, AnA sought through interrogatories and depositions to ascertain the reasoning. Interrogatory 10 provided:

> State the basis for the Contracting Officer's ("CO") contention, in his Final Decision, that AnA is entitled to compensation for only 245 of the vehicles that were not sold at the original Auction at which they were offered but were transferred to a subsequent Auction.

In response the District stated:

> . . . Although the Contracting Officer's Final Decision ("COFD") dated April 14, 2002 states that AnA is entitled to some compensation for 245 vehicles, the decision was not intended to imply that these vehicles were once sold at an auction and subsequently transferred to another auction. The District's position is that AnA was entitled to 245 vehicles that were disposed of by the District outside of its agreement with AnA. AnA is entitled to compensation for the 245 vehicles only because these vehicles were sold to entities outside of the bidding process and therefore they fell outside of the District's agreement with AnA.

At best, the answer is disingenuous. Thousands of vehicles were sold to others outside the bidding process. Although District personnel could identify the transactions for which the contracting officer determined that AnA was entitled to damages, the individual who provided information to the contracting officer for his final decision had no recollection of why the determination was limited to those transactions. (Chisley Dep. 92-93 and 103). The District's pleadings similarly fail to give any rationale supporting the contracting officer's decision.[4]

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[4] The District merely asserts in its opposition to AnA's claim that "because Appellant has failed to show a 'minimum price' below which the District should not have sold vehicles to anyone other than Appellant, Appellant cannot therefore demonstrate how many vehicles it should have received." The District's analysis is not a sufficient defense to a motion for summary judgment. In essence, it is that District's position that the contract which the District drafted was deficient and that the District is therefore entitled to deny any compensation to the contractor. Further, the District will not reveal how the actual determination was reached. In its Opposition to Appellant's Statement of Undisputed Material Facts, the District itself expresses uncertainty by stating its answer in hypothetical form, Paragraph 23 states:

> The District objects of paragraph 23 of the ASUMF, in part because of improper characterization and argument. Mr. Chisley, in fact, did explain how the figure of 245 vehicles *might* have been calculated. . . . (245 figure *could* be achieved by adding 86 vehicles to 159 vehicles, two group sales to bidders on the two dates referenced in [Mr. Chisley's] e-mail) . . . (The only data I *could* have reviewed was those dates [November 16 and December 7, 1999] that are listed [in the [Chisley] e-mail] for those particular bidders.")

(continued on next page)

Mr. Chisley was, in fact, the source of the 245 vehicle figure, which he admitted upon being shown documents he prepared in response to a request from Tara Sigamoni on behalf of the contracting officer. In order to respond to AnA's initial claim, Ms. Sigamoni asked by email, in part, for the following information:

> 1. How many vehicles were sold to entities other than AnA towing from 4/15/98 to 4/14/00 (upon conclusion of the auction). . . .[5]

Mr. Chisley responded by email:

> 1. There were two-hundred and forty five (245) vehicles that were sold to entities other than AnA towing from 4/15/98 through 4/14/00. November 16, 1999, 86 vehicles were sold for $15 each, totaling $1,290 to J & T Auto Wreckers. On December 7, 1999, 159 vehicles were sold for $20 each, totaling $3,180, to Friendly Motors & Parts.

Although Mr. Chisley advised the contracting officer that 245 vehicles were improperly sold "from 4/15/98 through 4/14/00," in his deposition he admitted, without explanation, that the only sales data which he "reviewed was those dates that are listed [November 16 and December 7, 1999]. . . for those particular bidders [J&T and Friendly]." (Dep. 96). Mr. Chisley was unable to

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(Footnote 4 continued)

Mr. Chisley was not forthcoming in his deposition. Initially he gave the following answers:

> Q. Did you have any role in gathering any information about 245 vehicles which ANA should have received that it did not get?
> A. No.
> Q. You had none whatsoever?
> A. No.
> Q. Do you know where the 245 number came from?
> A. Not particularly, no.
>
> * * *
>
> Q. Do you know how the number 245 was arrived at?
> A. No I do not.

(Dep. 92-93).

[5] The formulation, "upon the conclusion of the auction," appears to confirm that vehicles were sold outside of the "public auction."

give any reason why the two specific dates or sales were chosen (Dep. 102-103) even when asked leading questions by his own counsel.[6]

Mr. Chisley was the sole source of the contracting officer's determination of the number of vehicles which AnA was entitled to purchase. (Dep. 103). The District has not named any other knowledgeable person. Mr. Chisley now admits that his original computation was incorrect and that if he were providing the information today he "would probably list almost the same spreadsheet" as was submitted as Exhibit 2. (Dep. 103). As the designated representative of the District, the Board accepts as conceded the total number of vehicles on the spreadsheet prepared and submitted by Mr., Chisley. (Dep. 57 and Dep. Ex. 2). AnA is entitled to compensation for 3,213 vehicles.

Damage for each vehicle wrongfully withheld,

AnA moved for judgment for damages of $75 for each vehicle improperly sold or transferred, representing the price which it received during the contract period for sale of junk vehicles, for each of the vehicles which it claimed it was entitled to purchase, but which were not offered to it. The District did not offer any evidence disputing the AnA sales price for junk vehicles as a measure of damages for failure to receive vehicles to which AnA was entitled. The District argues only that AnA did not submit bills of sale and that AnA's submission of the price through sworn depositions was insufficient. The District however does not allege, nor does it

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[6] Questioning by District counsel:

> Q. One final question, Exhibit 13 [Chisley email]. Directing your attention, again on page 2 down at the bottom, paragraph one, that was the question that Tara Sigamoni had directed to you regarding AnA's claims, is that correct?
> A. Yes
> Q. Let me read the first sentence, quote, "How many vehicles were sold to entities other than AnA Towing from 4/15/98 through 4/14/00" Now, Plaintiff's Exhibit 2 shows over 3200 vehicles, is that correct?
> A. Correct.
> Q. Could it be that the parenthetical after the first sentence of paragraph one upon conclusion of the auction could be how that number was reduced to 245?
> A. Yes. Mm-hmm.
> Q. Can you tell me how you got that number 245, if you recall, how you arrived at that number from the 3,000, whatever, that went for less than $50.
> A. The particular dates I noted in the e-mail, those are probably dates that when we just didn't give the vehicles to AnA for whatever reason. I'm not sure what the exact reason is, but it has to be something why November 16th, '99 and December 7th, those two particular dates are the only dates that are specified there. And I can't really recall at this time what the reasoning was.
> Q. Could it have been there were the large 86 vehicles to J&T and 159 to Friendly, could they have been sold as a group to each of those bidders at the conclusion of the auction?
> * * *
> A. It could be, yes.
> Q. Do you know whether or not that was the case?
> * * *
> A. I can't recall at this time.

(Dep. 129-130)

point to any evidence showing that the price claimed to have been received by AnA is unreasonable. It does not appear that the District even attempted to determine the scrap value of vehicles during the contract period. (*See* Chisley Dep. 104-108). In the absence of any contrary evidence, the Board accepts the Appellant's sworn statements (Ingraham Dep. 19-22), as undisputed. The Board takes notice, however, that the contract obligated AnA to pay $12.50 to the District for each vehicle received by AnA. Had the District delivered the improperly sold vehicles to AnA, AnA would have paid that amount per vehicle. The Board therefore grants summary judgment and awards damages to AnA of $62.50 for each of 3,213 vehicles sold for less than $50 or transferred to a future auction, totaling $200,812.50 plus interest at the rate of 4 percent per annum from January 30, 2002, the date of AnA's claim to the District. (D.C. Code §§ 2-308.06 and 2-3302(b)).

SO ORDERED.

May 27, 2005

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

/s/ *Warren J. Nash*
WARREN J. NASH
Administrative Judge