D. Weickopf
Proc I

LG/138

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

8970

FILE: B-192462 DATE: January 26, 1979

MATTER OF: Charlie Driesbock Machine Tools DLG00748

DIGEST:

1. Where Government administrative error in sale of surplus property results in notice of award to second highest bidder, award is unauthorized.

2. Under solicitation which provides that title will not pass until removal of property from Government control, 40 U.S.C. § 484(d), does not raise conclusive presumption of compliance with surplus sale procedures required by law, since property was not removed.

3. Government is not bound by its agents acting beyond their authority and contrary to law, and the United States is not estopped to deny the authority of its agents.

Charlie Driesbock Machine Tools (Driesbock) protests the cancellation of surplus sale contract No. 60-8050-032 for item 165 awarded to Driesbock under sale invitation No. 60-8050 issued by the Defense Property Disposal Region (DPDR) Pacific Sales Office in Hawaii. Protest DLG00689

On June 20, 1978, bids were opened. Ten bids were received for item 165, a horizontal boring machine located on the island of Guam. On the abstract of bids, the bid of Driesbock in the amount of $3,333.33 was circled to denote it as the high bid. The bid of Greer Machinery Company, Inc. (Greer), in the amount of $6,756 on the abstract was misread as $675.60. As a result of that misreading, item 165 was awarded to Driesbock, the second high bidder, on June 23 1978. DPDR states that the erroneous award was discovered on July 3, 1978, and by letter of July 6, 1978, Driesbock was advised that DLG00749

[Protest of Surplus Sale Contract Cancellation]
Decision

003338 QC

the contract was being canceled and that payment for the item would be returned. The item has not been removed from Government control.

Driesbock protests cancellation of the contract stating that it sold item 165 for $27,500 on the basis of the award and that it has committed air fare to Guam to conclude the sale which represents an additional expense of over $1,300. Driesbock states that it will be sued for breach of contract if it fails to deliver the item to its customer.

The Defense Logistics Agency (DLA) has indicated that over the years it has followed 36 Comp. Gen. 94 (1956) which held that where the highest bid for the purchase of Government surplus sold under competitive bidding procedures is solicited, but through an administrative error award has been made to the second highest bidder, the interest of the United States, as well as the duty of the contracting officer to award such contracts to the highest bidder, requires that such unauthorized award be set aside and award made to the highest bidder. (Our Office recently has sustained that holding in William D. Garrett, B-192592, November 16, 1978, 78-2 CPD 350.) Now, in light of Fink Sanitary Service, Inc., 53 Comp. Gen. 502 (1974), 74-1 CPD 36, applying estoppel against the Government in an erroneously awarded procurement contract, DLA proposes that the estoppel principle be applied in a situation where a sale contract is awarded to the second high bidder by mistake. In that connection, DLA notes that estoppel was considered in a sale situation in Leonard Joseph Company, B-182303, April 18, 1975, 75-1 CPD 235, and was denied there because one of the essential elements for estoppel was missing. See also, Metalsco, Incorporated, B-187882, March 9, 1977, 77-1 CPD 175, another sale situation where estoppel was considered and denied. Thus, our Office has considered estoppel against the Government in sales as well as procurement situations. DLA also focuses attention on 40 U.S.C. § 484(d) (1976) which states:

"Validity of deed, bill of sale, lease, etc.

"A deed, bill of sale, lease or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance."

We do not believe that 40 U.S.C. § 484(d) is applicable. That subsection raises a conclusive presumption of the validity of the sale "insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance." The terms "grantee" and "transferee" refer to holders of a property interest as opposed to a contractual interest. See Black's Law Dictionary (4th ed. 1968). In Turney v. United States, the Court of Claims ruled that section 25 of the War Surplus Act of 1944, 58 Stat. 780, 50 U.S.C. App. § 1634 (1946), a precursor to 40 U.S.C. § 484(d), operated to give valid title to the purchasers of certain radar equipment despite the fact that Government agents had exceeded their authority in selling the radar as disposable surplus. 126 Ct. Cl. 202, 115 F. Supp. 457 (1953). The court specifically stated that if the surplus property sale did not pass ownership to the property, the purchaser never acquired title and could not recover. 126 Ct. Cl. at 213, 214, 115 F. Supp. at 463. It is evident from Turney that the event which gives a purchaser the rights of a grantee or transferee and triggers application of 40 U.S.C. § 484(d) is the passage to the purchaser of reputed title to the surplus property. See also United States v. Jones, 176 F.2d 278 (9th Cir. 1949); East Tennessee Iron & Metal Co. v. United States, 218 F. Supp. 377 (E.D. Tenn. 1963).

The notice of award in this case specifically conditions the passage of title upon payment by the buyer of the balance due ($422.23) and removal of the surplus property. Sale by reference pamphlet, Part 2, paragraph 7 (January 1978), incorporated into the IFB, provides in pertinent part:

"Unless otherwise provided in the Invitation, title to the property sold hereunder shall vest in the purchase as and when removal is effected * * *."

The boring machine in this case was never removed from Government possession by Driesbock. Therefore, title did not pass, and 40 U.S.C. § 484(d) is not applicable to raise a conclusive presumption of compliance with the requirements stated elsewhere in 40 U.S.C. § 484.

We also believe that estoppel is inappropriate. In the present case we are concerned with a sales contract. Our Office has frequently held that where the highest bid for the purchase of Government surplus sold under competitive bidding procedures has been solicited, but through administrative error award was made to the second highest bidder, the interests of the United States, as well as the duty of the contracting officer to award such contracts to the highest bidder, require that such unauthorized award be set aside and award made to the highest bidder. E.g., 36 Comp. Gen. 94, supra; William D. Garrett, supra; Metalsco, Inc., supra; Leonard Joseph Co., supra. The rationale of these decisions is that a contracting officer has no authority to award a surplus sale contract to other than the highest responsive, responsible bidder and that an award to another party is illegal and a nullity, conferring no rights on the contractor against the Government. Cf., 53 Comp. Gen., supra, at 507.

We recognized the contract in Fink, supra, as creating rights in the contractor, because that case involved a procurement contract award which was improper as opposed to "plainly or palpably illegal" under the standards prescribed in 52 Comp. Gen. 215 (1972). This Office has not applied the standard of plain or palpable illegality for procurement contracts to the area of sale contracts, and we are unaware of any court having done so. The standards for procurement contracts were reached to remove the contractor from what the Court of Claims termed "an unfortunate dilemma:"

> "If he questions the award and refuses to accept it because of his own doubts as to possible illegality, the contracting officer could forfeit his bid bond for refusing to enter into the contract. The full risk of an adverse decision on validity would then rest on the bidder. If he accedes to the contracting officer and commences performance of the contract, a subsequent holding of non-enforceability would lead to denial of all recovery under the agreement even though the issue of legality is very close; and under the doctrine of quantum meruit there would be no reimbursement for expenses incurred in good faith but only for any tangible benefits actually received by the defendant. United States v. Mississippi Valley Generating Co., 364 U.S. 520, 566 n. 22 (1961); Clark v. United States, 95 U.S. 539, 542 (1877). It is therefore just to the contractor, as well as to the Government to give him the benefit of reasonable doubts and to uphold the award unless its invalidity is clear." John Reiner & Co. v. United States, 163 Ct. Cl. 381, 386, 325 F.2d 438, 440 (1963).

The party to a sale contract does not suffer such a dilemma. The purchaser does not have to incur expenses to begin performance, with the possible exception of arranging removal. In this regard we note that Driesbock alleges to have committed $1,300 air fare to Guam to conclude the sale. It is not clear from the record, however, whether the $1,300 was incurred by Driesbock in reliance upon the notice of award or was incurred in the course of Driesbock's participation as a bidder. In any event, we are not persuaded that the "plain and palpable illegal" test should be applied to the sales contracts so as to protect purchases such as Driesbock from incurring removal costs. Of course, once the property is removed, 40 U.S.C. § 484(d) operates to pass valid title.

Based on the above, the contract in this case is unauthorized and illegal. It is well settled that

one who purports to contract with the United States assumes the risk that the official with whom he deals is clothed with actual authority to enter the alleged contract, and that the United States is not bound by its agents acting beyond their authority and contrary to law. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947); Jackson v. United States, 213 Ct. Cl. 354, 359, 551 F.2d 282, 285 (1977). Moreover, the United States is not estopped to deny the authority of its agents. 213 Ct. Cl. at 359, 551 F.2d at 285. We believe that until title vests in the purchaser pursuant to 40 U.S.C. § 484(d), the purchaser must bear the risk that the official has actual authority to enter the sale contract, and that the United States is not estopped to deny an unauthorized award by its agent. Although we did discuss estoppel in conjunction with sales contracts awarded to other than the high bidder, we have never held the Government estopped to deny the illegality of such contracts. We simply stated that the requirements for estoppel are not present, never reaching the issue whether the Government can be estopped to deny the illegality of the contract.

In light of our decision that the contract is illegal and the Government can not be estopped to deny its illegality, we do not find it necessary to discuss potential Government liability for damages to Driesbock under the contract. See Peck Iron & Metal Co. v. United States 204 Ct. Cl. 381, 496 F. 2d 543 (1974); Freedman v. United States, 162 Ct. Cl. 390, 320 F.2d 359 (1963). The unauthorized contract creates no rights in Driesbock against the Government.

Accordingly, the interests of the United States as well as the duty of the contracting officer to award contracts for which bids were solicited to the highest bidder require that the unauthorized award to Driesbock be set aside and award made to the highest bidder, Greer.

Deputy Comptroller General
of the United States