

TRANS

DECISION



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

12229

FILE: B-196156

DATE: December 10, 1979

MATTER OF: S. J. Heller Co. D 3465

DIGEST:

[Protest of Auction Sale]

1. Protest that auctioneer improperly "knocked down" sale to another bidder at \$39,000 after acknowledging protester's bid of \$40,000 is denied, since auctioneer contends that he in fact did not see protester's bid, and tape recording of auction shows that auctioneer kept calling for bid of \$40,000 before "knocking down" sale at \$39,000.
2. Since "knocking down" sale at auction constitutes award of item, item cannot subsequently be withdrawn from sale for further bidding.

2  
3  
S. J. Heller Co. (Heller) protests the auction sale of a brake press by the Defense Logistics Agency's Defense Property Disposal Service (DPDS) to Austin D. Lucas & Co., Inc. (Lucas) under Sale No. 27-9301. Heller contends that it in fact was the high bidder for the item at \$40,000 and was so recognized by the auctioneer, but that the auctioneer inexplicably "knocked down" the item for sale to Lucas for \$39,000. For the reason set forth below, the protest is denied. D 3058 D 3466

Heller states that when the bidding reached approximately \$30,000, only Heller and Lucas were participating. The bidding then went back and forth between the two until Lucas bid \$39,000, after which the auctioneer called for \$40,000. Heller asserts that it indicated a \$40,000 bid, and the auctioneer acknowledged the bid by saying "there's \$40,000," but that the auctioneer "knocked down" the sale to Lucas at \$39,000 a few seconds later. Heller suggests that we listen to a tape recording of the auction, and contact certain individuals who were present, to confirm its position.

607995 111034

Heller further suggests that, in any case, since the brake press is worth over \$60,000 "the bidding would have continued at least for another few thousand dollars," and the Government therefore should have withdrawn the item from the sale and solicited further bids from Heller and Lucas.

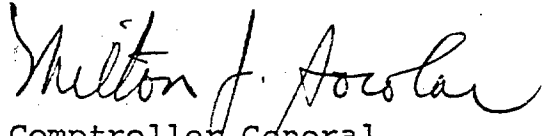
In a report on the protest, DPDS states that neither the auctioneer nor the four people assigned as observers recording bids were aware of Heller's alleged \$40,000 bid, and that after calling for \$40,000 the first time the auctioneer's words were "where's \$40,000," not "there's \$40,000" as Heller contends. The auctioneer states that after saying "where's \$40,000" he in fact pointed at Heller's representative and kept repeating the call for \$40,000.

The protester has the burden to affirmatively prove its case. Airwest Helicopters, Inc., B-193277, June 7, 1979, 79-1 CPD 402. In this connection, we generally will not conduct an investigation pursuant to our bid protest function such as that suggested by Heller for the purpose of establishing the validity of the protester's statements. Colonial Ford Truck Sales, Inc., B-194047, June 27, 1979, 79-1 CPD 458.

We have, as requested, reviewed the tape recording of the auction provided to us by DPDS. We do not find the recording conclusive on the issue of whether the auctioneer stated "there's \$40,000" or "where's \$40,000". Nevertheless, it is clear from the recording that for approximately 20 seconds immediately after the statement in dispute the auctioneer proceeded as if \$39,000 had been the highest bid up to that point. He stated that he had a \$39,000 bid; repeatedly asked for a bid of \$40,000; and, finally, stated "anyone 40?", waited a few seconds and "knocked down" the sale at \$39,000. In such case we believe that Heller reasonably should have assumed that the auctioneer had not realized that Heller had bid \$40,000, if in fact the firm did so. In view thereof, we do not believe that the protester has met the burden to affirmatively prove that the sale of the item to Lucas for \$39,000 was in disregard of Heller's higher bid.

Concerning the suggestion that the item should have been withdrawn from the sale and higher bids solicited from Heller and Lucas, according to the Sale's Instructions, Terms and Conditions the auctioneer's "knocking down" of the item constituted an award thereof to Lucas. Thus, the item could not properly have been withdrawn after that action. Leroy D. Marquardt, B-192984, December 5, 1978, 78-2 CPD 388.

The protest is denied.

  
For the Comptroller General  
of the United States