



COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

Overruled: 52 C.B.
(B-177445, Apr. 13, 1973)

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JAN 3 1973

Dear General Robinson:

Reference is made to letter DSAH-G dated August 15, 1972, from the Assistant Counsel, Headquarters, Cameron Station, furnishing a report on the protest of Surplus Tire Sales with respect to sales contract No. 44-2174-136 which it was awarded.

The invitation for bids (IFB) under which the auction sale was consummated incorporated by reference the "General Sale Terms and Conditions" of the Defense Logistics Services Center pamphlet "Sale by Reference, February 1971," including paragraph 2, "Condition and Location of Property," and paragraph 30, "Guaranteed Descriptions." The former provision specifies that property listed in the IFB is offered "as is" and "where is"; that the description of the property is based on the best information available to the sales office; and that the Government makes no warranty of the quantity, kind, character, quality, weight, size, description, or fitness for any purpose of any of the property. The latter provision warrants that property sold will be "as described" in the IFB, but specifically denies warranty of estimates as to the weight of property sold by the unit or by the lot. The contract awarded to Surplus Tire under the IFB was for 22 items, including items 200 and 201. Each of the latter two items was described in the IFB as containing one lot of irregular shaped corrosion resistant steel plates. The estimated total weight included in the description was 5,420 pounds for item 200 and 1,800 pounds for item 201.

After the award of the contract, Mr. Fred Schwartz of Surplus Tire examined items 200 and 201. He concluded that the lots contained substantially less material than estimated in the IFB and he requested that the property be weighed. The request was denied on the basis that there was no obligation to weigh the property since it was offered for sale by lot. Mr. Schwartz then offered to pay for and remove all items, except 200 and 201, pending resolution of the dispute over the estimated weight of the latter two items. He was advised that none of the property would be released to him unless he paid for all the items he desired to remove and provided a 20-percent deposit for items 200 and 201. Mr. Schwartz did not believe that he should have to provide a deposit on items 200 and 201 as a condition to receiving the other property and he refused to perform on that

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basis. When the conditions set by the sales office were not met, a notice of default was issued on all items in the contract except items 200 and 201. Surplus Tire thereafter protested to our Office the default and the refusal of the sales office to weigh the property.

The termination for default is a matter for resolution under contract dispute procedures and is not for consideration by our Office.

In the matter of the weights of items 200 and 201, it has been reported to our Office that as a result of the protest the property was weighed and found to be 3,600 and 2,000 pounds, respectively. Mr. Schwartz disputes the accuracy of those weights and has requested that the material be weighed in his presence. However, since the property was sold on a lot basis without any guaranty as to the weight, there is no obligation on the part of the Government to weigh the material and our Office will not require the material to be reweighed in the presence of the contractor.

It appears from the record that the IFB descriptions for items 200 and 201 were based upon information in turn-in documents from which it was determined that the estimated weights for the items were 5,420 and 1,800 pounds, respectively. There is nothing in the turn-in document on item 201 which indicates that the estimated weight may be anything other than 1,800 pounds. Since the material was sold on a lot basis without any guaranty as to the weight, there is no basis for any relief for the contractor on that item.

A question is presented in the administrative report as to whether the contractor may be relieved from performing on item 200. In that connection, the three separate turn-in documents from which the total estimated weight on that item was computed listed weights of 1,500, 910 and 1,011 pounds. These individual weights were rewritten in column form as 910, 1,011 and 1,500 on one of the turn-in documents. The sum of the weights was written below the column in such a manner that the first digit blends with the line separating the sum from the individual weights with the result that the first digit could be read as a 5 instead of a 3. The individual who prepared the item description which was ultimately submitted to the sales office for inclusion in the IFB apparently read the sum of the three weights as 5,420 instead of 3,420 pounds.

Notwithstanding the foregoing erroneous total used to describe item 200, Counsel for the Defense Logistics Services Center recommends that no relief be accorded Surplus Tire on that item on the basis that the error did not result from a lack of good faith on the part of the Government since the sum of the weights appearing on the turn-in document can reasonably be read as 5,420 pounds.

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In our view, the good faith in reading the sum as 5,420 instead of 3,420 is not in issue. That sum did not appear by itself. The individual weights upon which the sum was based were included in the individual turn-in documents and were rewritten on the document upon which the sum is contained. Anyone looking at the individual weights should realize readily that the sum of 5,420 is grossly inconsistent with the individual weights. In the circumstances, we conclude that the description writer could not have reasonably relied upon the sum as being 5,420. In that regard, in 50 Comp. Gen. 28,30 (1970), our Office stated that where the information the holding activity has is contradictory or inconsistent it has a duty to select the descriptive information to be used on some reasonable basis.

Accordingly, Surplus Tire should be relieved from performance on item 200.

The turn-in documents are returned as requested.

Sincerely yours,

R.F. KELLER

/ Deputy Comptroller General
of the United States

Enclosures

Lieutenant General Wallace H. Robinson, Jr.
Director, Defense Supply Agency