Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTION FOR RECONSIDERATION DENIED: April 3, 2003

GSBCA 15217-R

ROWE, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

O. Kevin Vincent of Baker Botts L.L.P., Washington, DC, counsel for Appellant.

Robert T. Hoff, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **WILLIAMS**.

WILLIAMS, Board Judge.

This matter comes before the Board on appellant's motion for reconsideration of the Board's January 30, 2003, decision denying Rowe's appeal. Rowe, Inc. v. General Services Administration, GSBCA 15217 (Jan. 30, 2003). In the underlying appeal, Rowe claimed that the General Services Administration (GSA) breached a requirements contract awarded to it as a subcontractor of the Small Business Administration (SBA) under SBA's 8(a) subcontracting program. 15 U.S.C. § 637(a) (1994). Specifically, Rowe alleged that GSA contracted to procure all requirements for specified vans during the contract term from Rowe, but diverted those requirements by awarding contracts for the Immigration and Naturalization Service's (INS') needs for the same type vans to Chrysler Corporation (Chrysler) and Carter Chevrolet (Carter). Rowe elected to present its case on the record without an evidentiary hearing and sought lost profits in the amount of $1,775,514.

As a defense to this claim, respondent argued that the INS requirements were not within the scope of Rowe's contract and that the scope of Rowe's contract was limited to the requirements of GSA, not other federal agencies. Respondent also contended that there was no diversion because the vans which were purchased outside of Rowe's contract were substantially different from the vans encompassed by Rowe's contract.

We denied the appeal, concluding that GSA and SBA affirmatively determined from the outset not to include the INS requirements in Rowe's sole source, 8(a) contract. Both before and after the award of its contract, Rowe petitioned GSA to include the INS requirements in its contract, but GSA unequivocally and definitively said no. Rowe then attempted to "modify" its contract to include the INS requirements via an informational brochure, which purported to offer some of the features required by INS as options. However, GSA never approved such a modification or assented to increase substantially the scope of Rowe's contract. In short, we held that the INS requirements were never included in Rowe's contract either at its formation or via a modification. As such, there was no diversion of work from Rowe when the INS requirements were ultimately awarded to Chrysler and Carter.

As grounds for this motion for reconsideration, Rowe argues that the Board misconstrued the evidence. First, Rowe contends that the Board's conclusion that Rowe's own actions evidenced that it understood the INS requirements to be outside the scope of its contract is not supported by the record.

Secondly, appellant argues that the Board erred in failing to give any meaning to line item 1.1 of the Rowe contract, which appellant claims was intended to cover the INS vans. Rowe argues that, contrary to the Board's conclusion, the evidence showed that there was a meeting of the minds between Rowe and a warranted contracting officer of GSA that the Government's requirements for vehicles described by line item 1.1 would be ordered from Rowe.

Finally, appellant complains that the Board's decision "finesses the issue that GSA had used for the basis for denying Rowe's claim, i.e., that specifications for the vans awarded to Chrysler and Carter were essentially different from those under Rowe's contract." Rowe contends that "the rationale for the Board's decision [was] based upon an issue that was not briefed by either party and should have been left for the quantum phase of this case." Letter from O. Kevin Vincent to the Board (Vincent Letter) (Feb. 3, 2003).

Discussion

The boards of contract appeals have entertained motions for reconsideration in which a party has argued that the tribunal has misconstrued evidence. In Nathan Dal Santo, PSBCA 1214, et al., 84-1 BCA ¶ 17,194, the Postal Service Board of Contract Appeals reviewed the record and fully considered the arguments in support of the motion for reconsideration even though appellant submitted no new evidence. We follow that procedure here, keeping in mind that "the standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the [tribunal] overlooked--matters, in other words, that might reasonably be expected to alter the conclusions reach[ed] by the court." Tho Dinh Tran v. Din Truong Tran, 166 F. Supp. 2d 793 (S.D.N.Y. 2001) (citing Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)), aff'd in part, rev'd in part, 281 F.3d 23 (2002).

Rowe asserts that the Board made a critical factual assumption which is unsupported by the record, i.e., that Rowe's own actions evidence that it understood the INS requirements to be outside the scope of the contract. Appellant argues:

> There is a critical factual assumption in the Board's decision that merits reconsideration. The Decision is predicated on the assumption that Rowe's efforts to prevent [the General Services Administration] from awarding a contract for the INS vans to Chrysler constituted evidence that Rowe understood the INS requirements to be outside the scope of its contract. To the contrary, Rowe's efforts to stop award of the Chrysler Contract are entirely consistent with Rowe's belief that the INS vans were covered by Line Item 1.1 of Rowe's Contract. If GSA ignored Rowe's objections and awarded the contract to Chrysler, Rowe knew that GSA was faced with the choice of breaching either the Chrysler Contract or Rowe's Contract. Rowe tried to stop award of the Chrysler Contract because Rowe knew that when presented with that choice, GSA would do exactly what happened, breach Rowe's contract and honor the Chrysler Contract. GSA's promise that it would eventually order some of the INS requirements from Rowe served to mollify Rowe for a while, but that promise turned out to be hollow as well,[1] and Rowe brought this action for breach. The Board's conclusion that "Rowe's own actions evidence that it understood the INS requirements to be outside the scope of its contract" is not supported by the Record, and I ask that it be reconsidered.

Vincent Letter at 1.

First, the Board's decision was not "predicated" on Rowe's understanding that the INS requirements were outside the scope of Rowe's contract. Rowe's actual or claimed understanding of the scope of its contract is immaterial; what is relevant is the reasonableness of its expectations. Travel Centre v. Barram, 236 F.3d 1316, 1319 (Fed. Cir. 2001).

Even assuming that Rowe did believe that the INS vans were covered by line item 1.1 of Rowe's contract (although its actions are inconsistent with such a conclusion), that belief, as the Board expressly found, was unreasonable. Rowe, slip op. at 22 ("Rowe had no reasonable expectation that the INS requirements were within its contract."). In any event, the fundamental underpinning of the Board's decision was that Rowe's contract was a sole-source, noncompetitive, small business reservation which was negotiated between GSA and SBA and awarded to Rowe, a subcontractor of SBA, without the INS requirements.

Even aside from Rowe's president's efforts to have GSA include the INS requirements in its 8(a) contract, there is substantial evidence of record that GSA and SBA did not intend the INS requirements to be included in Rowe's contract:

. By letter dated August 14, 1994, GSA expressly advised Rowe that it "did not offer a small business product which fully meets our minimum

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[1]The weight of the evidence does not support a conclusion that GSA made any such "promise."

> technical requirements. Therefore, the [INS] procurement cannot be offered to SBA under the 8(a) program for Rowe's exclusive participation." Rowe, slip op. at 3 (quoting Appeal File, Exhibit 45).
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> . An agency decision not to reserve a particular procurement requirement award can be appealed by SBA to the head of the agency, 15 U.S.C. § 637(a)(1)(A), but SBA did not appeal GSA's decision to exclude the INS requirements to the GSA Administrator. Rowe, slip op. at 14, 22 (citing Appeal File, Exhibit 58).

There is no documentary evidence controverting these facts that GSA and SBA intentionally declined to reserve the INS requirements for Rowe. Rowe's allegation that the INS requirements were intended to be included in its contract is based solely upon the self-serving, untested affidavit testimony of its president and consultant. Appeal File, Exhibits 82 (Affidavit of Stanley V. Campbell (First Campbell Affidavit) (Feb. 20, 2001) ¶¶ 7-10); 83 (Affidavit of H. Stewart Cobb, Jr. (Cobb Affidavit) (Feb. 20, 2001) ¶¶ 7-9). Rowe's president's affidavit testimony constituted hearsay:

> On several occasions in 1994 and 1995, I was told by Mr. Compton [the GSA contracting officer for the solicitation] and Ms. Adams [the contract specialist] that they intended for Rowe to satisfy INS requirements under line item 1.1 of Contract No. GS-30F-10134 ("the Contract"). They told me that their office, the Special Programs Division (FCAS) of GSA's Automotive Commodity Center, considered the inclusion of the INS requirements under the 8(a) Contract to be an important indicator of GSA's commitment to small disadvantaged business contractors. They also told me, however, that certain other employees within GSA, most specifically Bonnie Larrabee, who headed another division in the Automotive Center (the Motor Vehicle Procurement Division (FCAP)), did not want FCAS to gain control of the INS requirements.
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> Prior to award of the Contract to Rowe and under the encouragement of Ms. Adams and Mr. Compton, I attempted to intervene in GSA's internal debate to persuade GSA to order the INS vehicles from Rowe under the Contract. Shortly after award of the Contract to Rowe, I learned that Ms. Larrabee had won the internal debate within GSA, and that GSA had decided that the INS requirements that were solicited by FCAP would remain in Ms. Larrabee's organization. Ms. Adams told me that Ms. Larrabee had come to her office and yelled at her for her actions in directing the INS vehicles to the Rowe Contract. Ms. Adams further indicated that Ms. Larrabee was directly responsible for her being the only employee in the division to not receive a payment bonus. Mr. Compton and Ms. Adams assured me, however, that although they had lost the internal debate regarding the vans awarded to Chrysler, additional vans required by the INS during the term of the Contract could still be ordered from Rowe.

First Campbell Affidavit ¶¶ 8, 9. Rowe's consultant testified in an affidavit that the contract specialist told him that she and the contracting officer "were attempting to have some orders for vans for the INS issued to Rowe under the Contract." Cobb Affidavit ¶ 8. He further

stated that, as a result of three or four telephone conversations with this contract specialist, he understood that GSA was going to issue orders to Rowe for ten vans for the INS in Miami and additional vans for the INS' Southwest Border Patrol. Id. ¶¶ 8, 9.

This affidavit testimony, which was not subject to cross examination due to Rowe's election not to have a hearing, was not corroborated by other evidence of record. Appellant elicited no testimony whatsoever from either the contracting officer or contract specialist, and the contract documents themselves as well as the correspondence belie a conclusion that the INS requirements were within Rowe's contract.

Although the Board admits hearsay evidence, it is free to accord that evidence the weight it deems appropriate in the context. GSBCA Rule 122(a); Sysorex Information Systems, Inc., GSBCA 10642-P, 90-3 BCA ¶ 23,181, at 116,369 n.10, aff'd, SMS Data Products Group, Inc. v. Austin, 940 F.2d 1514 (Fed. Cir. 1991) (hearsay statement of local witness whose testimony was illogical was given no weight where party offering hearsay made no attempt to show that calling this witness would have been difficult); see generally J. D. Hedin Construction Co. v. United States, 408 F.2d 424 (Ct. Cl. 1969) ("[T]he character of the hearing, and especially the nature of the conclusory written statements and remote hearsay on which the Board relied to a very large degree deprived the administrative findings of the weight to which they would be entitled if there had been a true adversary process and the findings had been grounded in oral testimony subject to cross examination (or on true documentary evidence subject to close scrutiny)." (citations omitted)). Here, the evidence of the parties' preaward and contemporaneous correspondence, which established that GSA and SBA had definitively concluded that the INS requirements were not to be in Rowe's contract and clearly communicated that to Rowe, and Rowe's letter entreating GSA to award the INS requirements to it, are more probative than the affidavit testimony of two employees of appellant relating hearsay.[2]

This testimony also constitutes the second ground Rowe raises in support of reconsideration. Rowe contends that it presented evidence that line item 1.1 of the Rowe contract "was intended to cover INS vans." Vincent Letter at 1. However, Rowe cites no specific evidence it claims the Board overlooked, and the weight of the evidence of record does not support such a conclusion.

Rowe also complains that the Board "finessed" its argument that the critical issue in the case was whether or not the Rowe vehicles and the INS vehicles were essentially identical. The Board's decision resolved a threshold argument raised by respondent -- whether or not the INS requirements were included within the scope of Rowe's contract. In addressing that argument, the Board considered the statutory and regulatory bases governing what requirements could be reserved for a sole-source 8(a) award. Although neither party

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[2]In addition to this correspondence, the estimated number of vehicles to be procured also supports the conclusion that the INS vehicles were not included in Rowe's sole-source contract -- eighty-eight INS vehicles were procured from Chrysler in a competitive acquisition on a firm fixed price basis, and the Carter contract a had a guaranteed minimum quantity of 216 vehicles, while an estimated ten vehicles were to be ordered under line item 1.1 of Rowe's contract.

had briefed this, the correspondence which prompted this analysis was evidence of record and had been cited by appellant for other purposes. Both parties had every opportunity to raise the SBA legal framework underlying this procurement. Our consideration of the Small Business Act and its implementing regulations was far from novel and simply points out the requirements for reserving agency requirements for a sole-source subcontract -- which Rowe should have known since this was not its first 8(a) award. Indeed, the SBA rules governing 8(a) awards are critical to understanding what legally was included within Rowe's contract and are thus part and parcel of the fundamental issue underlying the diversion claim -- whether the business which was allegedly diverted was within the scope of the claimant's contract. E.g., Golden West Environmental Services, DOTCAB 2895, 00-2 BCA ¶ 30,990 (the evidence necessary to determine whether a diversion occurred would include a determination of whether the waste removed by other contractors was within the scope of appellant's contract).

Appellant does not argue that, had it been given an opportunity to brief this issue, it would have brought to the Board's attention any precedent or argument which would have altered the result. Nor did appellant seek to submit any new evidence on reconsideration.

As the Board concluded in its decision, it matters not whether these vehicles eventually procured from Chrysler and Carter under competitive acquisitions were similar to those under the Rowe contract because the evidence demonstrated that the understanding of SBA and GSA was that these INS requirements were not to be part of Rowe's sole-source 8(a) contract. Importantly, the Scope of Contract clause in Rowe's contract did not purport to encompass all the Government's requirements for passenger vans. Rather, that clause obligated GSA to purchase quantities of vehicles "to fill any requirements determined in accordance with applicable procurement regulations and supply procedures." Here, GSA necessarily determined its requirements for Rowe in accordance with the procurement regulations applicable to SBA 8(a) reservations. 13 CFR 124 (1994). These regulations confer on SBA and the procuring agency the discretion for determining the suitability of offering a requirement to an 8(a) contractor and expressly provide that "SBA is not required to accept any particular requirement for the 8(a) program." 13 CFR 124.308(b), (d). The weight of the evidence does not support a conclusion that Rowe reasonably expected the INS requirements to be within the scope of its 8(a) sole-source set-aside, when GSA expressly advised that they were not, and SBA never appealed this determination.[3]

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[3]For the first time on reconsideration, Rowe argues that it had a reasonable expectation that GSA would order only some INS vans from Rowe if they were essentially identical to the vans described in line item 1.1 of its contract -- not all the vans encompassed by the Chrysler or Carter contracts. Rowe states:

> The Board understandably may be reluctant to rule for Rowe out of concern that the award of lost profits to Rowe for the hundreds of vehicles from Rowe's Contract will represent an unjustified windfall to Rowe. If the Board reconsiders its Decision to allow the case to proceed to a determination on quantum, the Board could find that Rowe had no reasonable expectation that GSA would order all of the diverted vehicles under Rowe's requirements contract to the extent that Rowe lacked the ability to perform a contract for the

Decision

The motion for reconsideration is **DENIED**.

MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

EDWIN B. NEILL
Board Judge

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entire quantity of vehicles diverted to other contractors. In that event, Rowe's recovery of lost profits could be limited to the number of vehicles that Rowe could have reasonably expected that GSA would order under Rowe's Contract.

Vincent Letter at n.4.

This argument ignores the nature of a requirements contract under which a vendor has the exclusive right to provide all requirements within its scope -- not just those the contractor can handle. A requirements contract is a contract in which the purchaser agrees to buy all of its needs of a specified material from a particular supplier, and the supplier agrees, in turn, to fill all of the purchaser's needs during the period of the contract. E.g., Rumsfeld v. Applied Cos., Inc., 318 F.3d 1317, 1322 (Fed. Cir. 2002).