

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

DENIED: January 30, 2003

GSBCA 15217

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.

In this appeal, Rowe, Inc. (Rowe) contends that the General Services Administration (GSA) breached a requirements contract awarded to Rowe 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 alleges 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 seeks lost profits in the amount of \$1,775,514.

Respondent, GSA, has raised several defenses to this claim. First, respondent contends 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. Second, respondent contends 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. Third, respondent contends that a number of vans were procured subsequent to the expiration of the Rowe contract and were not, therefore, a diversion.

We deny 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) subcontract. Both before and after the award of its contract, Rowe petitioned GSA to include the INS requirements in its contract. 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.¹ In short, 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.

Findings of Fact

On October 27, 1993, GSA submitted a recommendation to the SBA for the award of an 8(a) contract to Rowe, Inc. for two types of vans -- patient transports, estimated quantity fifty, and police conversion vans, estimated quantity twenty -- that GSA had previously procured from Rowe through SBA's 8(a) program. Appeal File, Exhibit 32. The Standard Industrial Classification (SIC) code GSA proposed for this procurement was 3713. Id. at 1.

On December 20, 1993, GSA received SBA's letter accepting its proposal to negotiate an 8(a) contract with Rowe. Appeal File, Exhibit 50.

Also in December 1993, GSA received from the INS motor vehicle requisition forms for the acquisition of "paddy wagons," describing a fifteen-passenger van to be used to "transport illegal aliens in an environment conducive to their health and safety." Appeal File, Exhibit 34 at 1; see id., Exhibit 33.

The Rowe Solicitation, Negotiations, and Contract

On February 1, 1994, GSA issued solicitation number FCAS-R3-93862-N (Rowe solicitation) to Rowe on a sole-source basis under SBA's 8(a) program. The solicitation contained specifications for three line items -- line items 1, 1.1, and 2, with an estimated quantity of ten units for each line item.² Appeal File, Exhibit 16A at 7-25. Line item 1 required cargo vans configured for the transportation of confined passengers, and line item 2 specified patient transport vans. Id. at 11, 21.

¹To the extent that Rowe may be arguing that the brochure was not a modification of its contract, but rather simply a confirmation that vehicles which met the INS requirements were within its contract, its argument fails. GSA and SBA affirmatively excluded those requirements from Rowe's contract from the outset, and there was no legal obligation on the part of these agencies to reserve those requirements for Rowe.

²The estimated quantity for line items 1 and 1.1, the police conversion vans, is the same as that estimated in the GSA's recommendation to SBA, i.e., ten, but the quantity for line item 2, not in issue here, was decreased from fifty to ten. Appeal File, Exhibits 16A, 32.

Line item 1.1, at issue here, described a fifteen-passenger police conversion van. Appeal File, Exhibit 16A at 11. In the Prenegotiation Memorandum dated May 21, 1994, the GSA contracting officer and contract specialist responsible for preparing the Rowe solicitation stated that "Line Item 1.1 is . . . based on a new purchase description which is for a larger police conversion van" similar to the other two line items. Id., Exhibit 39 at 2.

On July 22, 1994, prior to the award of a contract under the Rowe solicitation, GSA issued solicitation number FCAP-G5-99125-SN seeking offers for transport vans for aliens for the INS on a competitive basis. Appeal File, Exhibit 16H at 1. The SIC code for this acquisition was 3711. Id. at 7.

By letter dated that same day, July 22, 1994, to GSA's Automotive Center, Rowe asked that GSA set aside this INS requirement for it:

Please allow this correspondence to serve as a request that the Agency reconsider its rejection of SBA's set-a-side [sic] recommendation for the Boarder [sic] Patrol and Immigration and Naturalization Service (INS) vehicle procurement request. The foundation for our follow-up request is that this item be set-aside is [sic] based on that fact that it is a similar configuration to the item in our contract, however, it is designed to a lesser standard.^[3] The agencies which purchase our vehicle have agreed that they can live with the lesser standard. Therefore, orders anticipated under our contract will not be forthcoming. This may force us into a situation where we are unable to perform and are forced to discontinue as a vehicle manufacturer due to the significant change in anticipated volume under the current contract.^[4]

Appeal File, Exhibit 2 (emphasis added).

By letter dated August 8, 1994, Rowe's president requested that SBA approve a standard industrial classification (SIC) code for Rowe's reserved items, 3711, which was contained in the solicitation for INS alien vans. Appeal File, Exhibit 44. He stated:

In addition to the Secondary Standard Industrial Classification (SIC) Codes previously approved in the referenced letter, request you approve the following SIC Code which is very representative of our current line of business activity:

³The record does not clearly explain what appellant's president meant by his statement that "it" was designed to a lesser standard.

⁴There is no evidence in the record suggesting that Rowe's president should reasonably have anticipated a volume under the Rowe contract of more than the quantity estimated in the solicitation. As of this time, GSA had not yet awarded the sole source contract at issue to Rowe. However, the estimated quantity under Rowe's solicitation for line item 1.1 was ten vehicles. Appeal File, Exhibit 16A at 8. The estimated quantity for line items 1 and 2 was also ten vehicles each. In contrast, the INS solicitation sought eighty-eight vans on a firm-fixed-price basis. Id., Exhibit 16H at 1.

3711 - Motor Vehicles and Passenger Car Bodies

The SBA awarded Rowe Incorporated, a GSA motor vehicle modification contract on 26 July 1994 under SIC Code 3713.⁵ The GSA has released a new solicitation under the improper SIC Code 3711 for motor vehicle modification work, identical to our present contract (see enclosure 1). The proper SIC Code for this requirement is 3713. In order to submit a proposal under the new solicitation which can be supported by SBA for this and further set-aside requirements we need your approval of our qualification under SIC Code 3711.

Id. As appellant recognized, "Rowe started complaining about a diversion before its own contract was awarded." Transcript at 12; see id. at 165-66.⁶

By letter dated August 16, 1994, GSA responded to Rowe's letters as follows:

This letter responds to your letters dated July 22 and August 8, 1994, regarding your desire that this office's procurement of vehicles for the Immigration and Naturalization Service (INS) be conducted on a sole source basis with the Small Business Administration (SBA) under their 8(a) program with your company as the subcontractor.

I have reviewed the acquisition referenced in your letters and have concluded that your firm does not offer a small business product which fully meets our minimum technical requirements. Therefore, the procurement cannot be offered to the SBA under the 8(a) program for your exclusive participation.

The vehicles being procured for the INS are not the same vehicles as the patient transport vehicles you modified under your previous 8(a) program contract. On December 17, 1993, the SBA sent a letter to the contracting officer for the patient transport vehicles. The letter approved the participation of your company in the 8(a) program to provide those vehicles with SIC Code 3713. The letter went on to state that ". . . if the Statement of Work is changed, SBA will have to redetermine the appropriateness of the SIC Code, and the acceptability of this offer for the named 8(a) Participant."

Your August 8 letter implied that the decision to procure the vehicles through other than the SBA 8(a) program was made as a result of personality conflicts, temper tantrums and a destructive breakdown in the working relationship. I have talked with all parties involved and have not found any evidence that any

⁵The Rowe contract at issue was not awarded until later -- August 12, 1994.

⁶The parties elected to present their cases on the record without an evidentiary hearing. The transcript reflects an oral argument presented by counsel on their record submissions.

decisions were based on anything other than applicable Federal Acquisition Regulations and the highest degree of professionalism.

I regret that my response cannot be more favorable, and I do fully realize the importance of all business to you and your company. You are not precluded, as you have previously, from submitting an offer on a competitive solicitation.

In the future, discussions with regard to the 8(a) program should be directed to the Small Business Administration as that office is responsible for the management of the program.

As a separate matter, in your July 22 letter you indicated that you may not receive the anticipated volume of orders under the SBA/Automotive Center contract which was recently awarded and may be forced into a situation where you are unable to perform. I urge you to discuss any anticipated performance problems with the contracting officer.

Appeal File, Exhibit 45. This letter was signed by Bonnie Larrabee, Director, GSA's Motor Vehicle Procurement Division, with a copy to SBA. Id.

Both Rowe's president and a part-time consultant employed by Rowe testified in affidavits that certain GSA employees had intended to order the INS requirements from Rowe. Appeal File, Exhibit 82 (Affidavit of Stanley V. Campbell (First Campbell Affidavit) (Feb. 20, 2001) ¶¶ 7-10); id., Exhibit 83 (Affidavit of H. Stewart Cobb, Jr. (Cobb Affidavit) (Feb. 20, 2001) ¶¶ 7-9). Rowe's president further testified:

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.

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.

The Rowe Contract

On August 12, 1994, GSA awarded contract number GS-30F-10134 to the SBA, with Rowe as its subcontractor, for the procurement of Patient Transports and Police Conversion Vans. Appeal File, Exhibits 16D at 2, 50 at 4. This contract was a sole-source award under SBA's 8(a) program, approved for SIC Code 3713, with a size standard of 500 employees. The contract contained the following clauses which provided, in pertinent part:

52-219-11 (FEB 1990)

SPECIAL 8(a) CONTRACT CONDITIONS:

The Small Business Administration (SBA) agrees to the following:

- (a) To furnish the supplies or services set forth in this contract according to the specifications and terms and conditions hereof by subcontracting with an eligible concern pursuant to the provisions of section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

.....

52-219-12 (FEB 1990)

SPECIAL 8(a) SUBCONTRACT CONDITIONS:

- (a) The Small Business Administration (SBA) has entered into Contract No. * _____ * with the General Services Administration to furnish the supplies or services as described herein. . . .
- (b) The [sic] Rowe Incorporated, hereafter referred to as the subcontractor, agrees and acknowledges as follows:
 - (1) That it will, for and on behalf of the SBA, fulfill and perform all of the requirements of Contract No. * _____ * for the consideration stated therein and that it has read and is familiar with each and every part of the contract.
 - (2) That the SBA has delegated responsibility, except for novation agreements and advance payments, for the administration of this subcontract to the General Services Administration with

complete authority to take any action on behalf of the Government under the terms and conditions of this subcontract.

Id., Exhibit 16A at 40-41. Rowe's unit price for line item 1.1 was \$29,171.52⁷ and the estimated quantity was ten. Id. The estimated quantities for items 1 and 2 were also ten each. Id. at 8.

The contract solicitation contained a "Type of Contract" clause stating, "[T]he Government contemplates award of a Firm Fixed Price, Indefinite Quantity contract resulting from the solicitation." Appeal File, Exhibit 16A at 2. The Price Negotiation Memorandum signed by the contract specialist and contracting officer reiterated: "the resulting Contract will be a [sic] indefinite quantity, firm fixed price with Economic Price Adjustment." Id., Exhibit 16B at 1.

The contract also included the following clause:

A-FSS-2-A (OCT 1988)

REQUIREMENTS CONTRACT FOR:

FSC CLASS: 2320

COMMODITY: PATIENT TRANSPORTS AND POLICE CONVERSION VANS

PERIOD: MARCH 31, 1994 OR DATE OF AWARD, WHICHEVER IS LATER, THROUGH APRIL 1, 199[5].

52.216.1 (APR 1984)

Appeal File, Exhibit 16A at 2.

The Scope of Contract Clause stated:

This contract provides for the General Services Administration normal supply requirements . . . during the period specified elsewhere in this solicitation. The General Services Administration is obligated, except in cases of urgent requirements or as may be otherwise provided herein, to purchase such quantities as may be needed from time to time to fill any requirements determined in accordance with applicable procurement regulations and supply procedures. Except as otherwise provided herein, the Contractor is obligated to deliver hereunder all such quantities as may be so ordered from time to time. As to estimates, note the following. The quantities shown herein are estimated requirements based upon information made available to the General

⁷By modification 5, the price was increased to \$30,114, as the result of an extension in the contract term until June 30, 1996. Appeal File, Exhibit 16E at 3.

Services Administration. Since, however, such estimates are being furnished to the offeror solely for general information purposes, no guarantee is given that any quantities will be purchased, but assurance is accorded that such bona fide needs as may arise will be obtained subject to any provisions elsewhere set forth in this contract. If during the contract period significant changes in the estimated quantities occur, the government will, where feasible, notify the Contractor of such changes. However, such notification is furnished exclusively for the Contractor's information and has no bearing on the contractual obligations of either party.

Appeal File, Exhibit 16A at 52. The contract did not contain a clause specifying a minimum quantity required to be purchased under any line item. Id. Nor did the contract incorporate Federal Acquisition Regulation (FAR) clause 52.216-21, Requirements. Id.⁸

The Rowe Contract Line Item 1.1 Specifications

Contract specifications for line item 1.1, "Van, Passenger, Law Enforcement Conversion 4X2 Commercial Item," identified the scope and configuration of the requirements based upon a modified item 24PA, Federal Standard Number 307W.⁹ The specifications stated, in pertinent part:

LINE ITEM 1.1, GROUP I

VAN, PASSENGER, LAW ENFORCEMENT CONVERSION, 4X2 COMMERCIAL ITEM

Van, Passenger, Law Enforcement Conversion, 4X2 Commercial Item No. 24 in accordance with Federal Standard 307W, dated October 1, 1993, and the following minimum requirements to allow conversion to a law enforcement patrol van with a secured rear compartment for transport of up to thirteen confined occupants.

1.1 Scope. This purchase description covers a 15 passenger window van which shall be used by law enforcement agencies to transport up to thirteen detainees or prisoners in a secured passenger compartment.

1.1.2. Configuration. This vehicle is a van-wagon with windows, extended length fifteen (15) passenger van in accordance with Item 24, Federal Standard 307W. It is configured with the passenger compartment separated by a partition and secured by mesh screen over all the windows and the rear doors sealed.

⁸During oral argument, appellant's counsel characterized the scope of contract clause as "the requirements clause at issue in this case." Transcript at 9.

⁹Standard 307W, effective October 1, 1993, superceded Federal Standard 307V. Appeal File, Exhibit 1.

It is a more comfortable version of the Police Conversion Van (Item 32P), which is a windowless Cargo van with sidefacing fiberglass seats for up to fourteen detainees. This new version has windows and forward facing vinyl seats for up to thirteen detainees.

3.1.4. Type II Van-Wagon. The basic vehicle shall be an Item 24 Van-passenger, with a minimum GVWR [gross vehicle weight rating] of 3,860 KG [kilograms] (8,510 lbs) and a minimum payload of 1,350 KG (3,000 lb) with gas engine, and as otherwise specified in accordance with Federal Standard 307W, dated October 1, 1993, to include options. The vehicle resulting from this specification shall be classified as Item 24P.

3.1.4.1. Seating. The vehicle shall be configured with manufacturer's standard vinyl upholstered seats for fifteen (15) personnel: a driver, front attendant, and four (4) forward facing bench seats for thirteen (13) passengers in accordance with paragraph 3.1.4. All seat positions shall have seatbelts and restraints in accordance with 3.1.4.5.

....

3.1.4.3. Rear Doors. Double rear doors, hinged at the sides, shall be provided. The rear doors shall be permanently secured in the locked position, and door operating handles, both inside and outside, shall be removed and openings sealed with metal blanks or other suitable means. The door windows shall be completely covered on the inside with steel screen as specified in 3.1.4.6.

3.1.4.4. Side Doors. The manufacturer's standard hinged double door shall be provided. The doors shall have latches on the outside only, capable of being opened from the outside only. The doors shall be modified such as to prevent opening from the inside. Door checks shall be provided to hold doors in the full open position. The windows shall be completely covered on the inside with steel screen as specified in 3.1.4.8.

....

3.2.7. Diesel Engine. Required when code YD is specified. Diesel engine shall include chassis manufacturer's complete diesel package of upgraded components and cold weather operation equipment. Diesel must be eight cylinders with a minimum displacement of 6.2 liters.

....

3.7.1 Options. The following options codes are required per specification for an Item 24P: OT [oil cooler], . . . RF [rubber floor covering] . . . YD [diesel engine] is recommended. Other options listed in Federal Standard 307 for item 24 may be included at the discretion of the purchaser. [Federal Standard 307W listed "Standard Option Codes for class 24 vehicles: which included

side door sliding type, code SE, and Special Traction, rear not applicable w/fwd, code D3." Appeal File, Exhibit 6 at 13.]

3.7.14. Air Conditioning. Required per specification, and shall be Original Equipment Manufacturer's Ship Through or otherwise OEM approved AC unit and installation. Dealer installed AC is not acceptable.

....

Spotlight. A single handheld spotlight, with a minimum 100,000 candlepower lamp, corrosion-proof housing with momentary switch, and minimum 2.4 meter (8 ft) heavy duty coiled cord, shall be provided. The spotlight shall be hard-wired to the vehicle's 12 volt dc [direct current] system (for anti-theft purposes) and stowed in an applicable storage holder in a compartment/area accessible to the driver and passenger.

....

Rear Floodlight. Rear floodlight to be used as a rear loading light. It shall be a Weldon 3020 series or equal, in a polished aluminum housing that provides an angle of approximately 15 degrees down from the horizontal. It shall be wired such that the light is automatically activated when either rear door is opened. Also, there shall be two manual override switches, one dash-mounted, and the other co-located with the dome lights switch at right interior of rear door (protected). All switches shall be labeled as to function.

Appeal File, Exhibit 16A at 16-20 (emphasis added).

Also awarded were line item 1 based upon Standard Item 32P and line item 2 based upon Standard Item 24P. Appeal File, Exhibits 9 at 3, 16A at 16-20.

Federal Standard 307W

Federal Standard 307W, which listed options that "may be included at the discretion of the purchaser," was referenced in Rowe's specifications for line item 1.1. It was published under the authority of GSA, and approved by the Commissioner of GSA's Federal Supply Service "for the use of all federal agencies." Appeal File, Exhibit 1 at 1. The standard provided:

The purpose of this document is to achieve a practical degree of standardization in the Federal automotive fleet, yet be responsive to the wide range of vehicles required to meet the needs of the various agencies. The standard does not include all varieties which are available, but is intended to cover only those generally used by the Federal Government.

This standard establishes classifications for various types and sizes of vehicles, general requirements, and the equipment authorized for Government use. It

is intended to facilitate the ordering of vehicles and their subsequent competitive, consolidated procurement.

Id.

Paragraph 1.1, Scope, stated:

This document covers new, commercially produced, four wheeled two and four wheel driven (4X2 & 4X4) light truck vehicles, having 225 to 3600 kg (500 to 8,000 pound) cargo/passenger payload capacity. A selection of coded optional additional systems and equipment is included for agencies' divergent geographic and operational related needs. These vehicles are warranted by the supplier, upon delivery, as specified under 2.8.

Appeal File, Exhibit 1 at 1.

Paragraph 1.3, Intended Standardization Coverage, provided:

This Federal Standard does not include all varieties of the commodity indicated by the title but is intended to cover only those vehicles generally acquired by the Government. Additional requirements and deviations for special purpose vehicles may be submitted in accordance with 6.3 and 6.6. Approved modifications will be included in the invitations for bid, contract, or amendments.

Appeal File, Exhibit 1 at 1.

The Rowe Contract Provisions Addressing Contemplated Users

The clause "Decals, Stickers, and Data Plates" provides, in part:

Unless otherwise specified, caution plates/decals shall be conspicuously installed for all equipment requiring such notices. Vehicles for civil agencies shall be provided with the manufacturer's current warranty legend imprinted on decalomania, and applied in a visible area of the engine compartment.

Appeal File, Exhibit 16A at 26 (emphasis added). The contract also indicated that examples of "receiving agencies" of the vans were "State, USIA, Forest Service," as well as GSA. Id.

Clause 3.1.1.1, Special Paint and Markings (SPM), provided:

Treatment, painting, marking and data plates shall be in accordance with MIL-STD-1223. Identification markings shall be in accordance with the requirements of MIL-STD-1223 for the military service identified by the procuring activity.

Appeal File, Exhibit 16A at 24.

The clause describing license plate requirements stated: "The license plate will be used on Navy vehicles at facilities worldwide. These facilities experience salt air and extreme climatic environments." Appeal File, Exhibit 16A at 24.

The contract provided:

The Contractor will be required to provide toll-free (800 telephone number) access, during the contractor's normal business hours, to a designated person for the purpose of providing information to agencies concerning any matters related to the specific items and options available under contract.

Appeal File, Exhibit 16A at 35.

The Rowe Contract's Provision on the Police and Ambulatory Transport (PAT) Brochure

The Rowe contract contained the following clause which addressed the PAT brochure:

CONTRACTOR BROCHURES TO SUPPLEMENT AWARD

In order to provide additional Contractor and service information to our Government users and to create a user friendly document, the Contractor will provide brochures to be mailed to addresses included in the Government's mailing list. Under this arrangement, the Contractor agrees to furnish, (at the Contractor's expense), 500 copies of the brochures (color is required). The Government requires a copy of the sample brochure for review within 15 working days from notice of award. When the Government returns the approved sample copy submitted by the contractor, the 500 final printed copies, and a camera ready copy (which becomes Government property after the initial 500 copies) are due within 10 working days of approval of sample brochure. The Contractor will be furnished with a reproducible Government mailing frank on the back page. The General Services Administration will make distribution of the brochures. The balance of the 500 final copies shall be sent to the Contracting Officer.

The brochures shall be approximately equal to 11 inches in length by 8.5 inches in width. The cover of the brochure will have the "Patient Transport and Police Conversions Vans Available Now" title, accompanied by picture(s) of vehicles in the program. The cover shall also include the GSA logo, GSA contract number(s) of contract(s) included in the brochure, and the date (month and year) of publication of the brochure. On the inside of [the] cover, a short summary of the program and its advantages to the consumer should be noted. In the following pages, the Government requires that there be pictures of each type of vehicle awarded on this solicitation, the appropriate item number, and a brief description of each. In addition to the above requirements, there shall be a section which includes the options available for each vehicle type.

NOTE: Except for vehicle photographs, Contractor literature and "brand name" advertisements will not be accepted in this brochure. The general

requirements for this brochure are guidelines. The Government encourages creative efforts in the publication of the brochure.

Appeal File, Exhibit 16A at 10 (second emphasis added).

The contract provided:

I-FSS-965 (APR 1984)

INTERPRETATION OF CONTRACT REQUIREMENTS:

No interpretation of any provision of this contract, including applicable specifications, shall be binding on the Government unless furnished or agreed to in writing by the Contracting Officer or his designated representative.

Appeal File, Exhibit 16A at 53.

Appellant submitted drafts of its brochure on or about December 30, 1994. Appeal File, Exhibits 50-56. The record indicates that the brochure went through several iterations before it was finalized. Id. However, it is unclear who edited which portions of the brochure. Id. On December 20, 1994, the GSA contract specialist talked with Rowe's president about the brochure; they "agreed that [Rowe's president] would fax a corrected copy of the brochure over before GSA gave its final approval." Id., Exhibit 50. There is no document indicating that GSA ever formally gave its final approval to the brochure, but the brochure was nonetheless distributed to potential customers. Id., Exhibit 27. Nor did any GSA witness testify about approval of the PAT brochure. Although the final version of the brochure stated "Effective Date August 12, 1994," it was not published or disseminated until after December 1994. Id.

Appellant's president testified about the PAT brochure in an affidavit:

I was involved in the preparation of the "PAT" Brochure that Rowe provided to GSA in accordance with the terms and conditions of the Contract.

Rowe provided drafts of the PAT Brochure to GSA on several occasions between September 1994 and January 1995. On each occasion GSA employees provided comments and required changes to the draft brochure. I recall discussing the brochure with the following GSA personnel: Jim Compton, Hattie Adams, Harry Butler, Mel Globberman, Tom Mould, Bryce Frey, and Steve Dellinger.

.....

The draft of the PAT Brochure that is included at Tab 55 in the Appeal File was reviewed by GSA officials during a meeting with me in January 1995. I do not recall who was present in the meeting but I believe that Jim Compton or Hattie Adams, or both, were in attendance. I made some of the handwritten notations on Tab 55 during the meeting but I recall that a GSA employee

(although I do not remember who) made some of the other revisions marked on the document.

On several occasions I discussed with Jim Compton, Hattie Adams and other GSA officials specific features that the INS wanted on the vehicles to be ordered under line item 1.1 of the Contract. Among other features I was told by Mr. Compton or Ms. Adams that the INS needed: (a) 13 forward-facing fiberglass seats; and (b) metal ceiling and compartment liners with insulation. I was also told by Mr. Compton or Ms. Adams that the INS did not want lights on the roof of its vehicles.

Rowe revised the PAT Brochure at the suggestion, and with the approval of, the contracting officer, in order to show that Rowe could satisfy the INS's requirements under line item 1.1 of the Contract.

The final draft of the PAT Brochure was submitted to GSA and approved by Jim Compton and Hattie Adams in January 1995. Rowe did not make any changes to the PAT Brochure after the final review by Mr. Compton and Ms. Adams. Mr. Compton and Ms. Adams were given a completed copy prior to the printer performing the production run of 7000 copies and it too was approved.

First Campbell Affidavit ¶¶ 11-12, 14-17. He further testified:

As it relates to the brochure . . . I always understood the brochure to be a required deliverable under the contract which would be used to articulate the items available under the contract and that I would have to be available to provide anything referenced under the brochure along with any reasonable or standard options. My thoughts are amplified in a review of the last page of the inside cover. There you can see that this is an actual "GSA FORM 1781" which was modified to fit this contract. The intent was for the agencies to complete this form and to return it to the address on page 1 of the brochure in accordance with the "1. Simple Order Procedure." Though much of this case appears to reside around the \$200 vent a review of the option list on the order form would indicate items much more significant, like \$3,300 stretchers which are not covered under the contract but were ordered and delivered under the contract. The last sentence in the first paragraph in the first page of the PAT Brochure confirms that Rowe would provide such modifications: "P.A.T. vans come totally equipped and modified to the end user's specifications and may be ordered without the cumbersome process of generating a new contract for a specific application."

Appeal File, Exhibit 112 (Affidavit of Stanley V. Campbell (Second Campbell Affidavit) (May 11, 2001) ¶ 14).

A part-time consultant to Rowe testified in an affidavit as follows regarding the PAT brochure:

I was involved in the preparation of the "PAT" Brochure that Rowe provided to GSA under the Contract.

Rowe provided drafts of the PAT Brochure to GSA on several occasions between September 1994 and January 1995. On each occasion GSA employees provided comments and required changes to the draft brochure.

.....

I do not recall the specific items, but I recall GSA requested that Rowe list in the PAT Brochure certain modifications to the law enforcement vans available under the Contract in order to show that Rowe could satisfy INS requirements.

The final draft of the PAT Brochure was submitted to GSA and approved by Jim Compton and Hattie Adams in January 1995. Rowe did not make any changes to the PAT Brochure after the final review by Mr. Compton and Ms. Adams.

Cobb Affidavit ¶¶ 10-11, 13-14.

The PAT Brochure

The PAT brochure provided, in pertinent part:

Today, product diversity is not an option[,] it is essential to your success and ours. The ever-changing nature of your operational demands and the constant constraints caused by budget considerations have fostered the requirement for commercially available vehicles which can be manufactured for multiple configurations. The **P.A.T. Program** was created to achieve multiple vehicle applications through advanced vehicle flexibility; thereby allowing the end-user the maximum utilization of the asset. P.A.T. vans come totally equipped and modified to the end user's specifications and may be ordered without the cumbersome process of generating a new contract for a specific application.

Three types of transport vehicles are available:

- **Item No. 24T - Gasoline Engine Driven, Patient Transport Van** versatile configuration for either thirteen (13) ambulatory patients; or three (3) ambulatory and two (2) medically stable stretcher/cot occupants by removing seats and installing cots.
- **Item No. 24P - Law Enforcement Conversion Van** with a secured rear compartment for transport of up to thirteen (13) confined occupants.

- **Item No. 32P - Law Enforcement Conversion Van** with a secured rear compartment for transport of up to fourteen (14) confined occupants.

Appeal File, Exhibit 27 at 3.

The "modifications" to vehicles offered under line item 1.1 were:

- Partition with door, and surveillance window with cover.
- Install 13 forward facing fiberglass seats with seatbelts.
- Install interior & exterior lights.
- Install metal ceiling and compartment liners with insulation.
- Cover rear windows and interior lights with expanded metal.

Appeal File, Exhibit 27 at 5. These "modifications" were listed after the vehicle "specifications, standards and dimension." The brochure indicated that vans would be shipped within 150 days of the date on which they were ordered. Id. at 3.

The Contract Period

The initial Rowe contract period was from August 12, 1994, through June 30, 1995, and contract modification no. 5 extended the contract period through June 30, 1996. Appeal File, Exhibit 16E.

On April 5, 1996, GSA issued a final order, RPN-N-50221, under the contract, for line item 2, with delivery due date of September 2, 1996. Appeal File, Exhibit 18 at 2. As reflected in contract modification no. 9, on January 3, 1997, the date for final delivery of this order was extended to January 21, 1997. Id., Exhibits 16G, 31.

GSA ordered a total of fifty-one vehicles under contract line items 1 and 2. Appeal File, Exhibit 23 at 5. This exceeded the contract's total estimated quantity of thirty vans for all three line items. Id., Exhibit 16A at 7-9. GSA did not place any orders for vehicles under line item 1.1 under Rowe's contract, however. Id., Exhibit 23 at 5.

The Chrysler Contract

On October 21, 1994, pursuant to a competitive solicitation which had been issued on July 22, 1994, GSA awarded a definite quantity firm fixed-price contract, number GS-30F-95007, to Chrysler Corporation for vans for use by the INS, including an INS component entity, the United States Border Patrol. Appeal File, Exhibit 16H. Rowe submitted a proposal under this solicitation and filed a protest. Id., Exhibit 58.

Under this contract Chrysler was to provide twenty-four vans under line item 1.1 at a price of \$22,414 each and sixty-four vans under line item 1.2 at a price of \$22,568 each.

Appeal File, Exhibits 5 at 10-15, 16H at 3, 10-15. These vehicles were to be delivered to various locations of the INS Deportation Section and the Border Patrol. Id., Exhibit 16H at 10. The SIC Code for this acquisition was 3711, with a small business size standard of 1000 employees for manufacturers and 500 employees for nonmanufacturers. Id. at 7. The contracting parties were GSA and Chrysler, and the contract specified that all orders would be placed by GSA. Id. at 28.

The specifications for the Chrysler contract for line item 1.1, Detention and Deportation vans, and line item 1.2, Border Patrol vans, also incorporated Federal Standard Number 307W and provided that these vehicles would be used to transport illegal aliens in an environment conducive to their health and safety. The specifications for line items 1 and 2 required:

- . Fifteen (15) passenger seating, with fiberglass seats
- . Two (2) power exhaust type roof ventilators with protective covers and enclosed wiring, operated by an on/off switch in the reach of the driver,
- . Interior dome light in the rear compartment, covered with a metal cage and controlled by a switch within reach of the driver,
- . No floor covering for the rear compartment,
- . Rear doors and side windows, inoperable and covered with a heavy steel mesh screen,
- . Foam insulation on the rear compartment ceiling and walls, with tamper resistant aluminum interior roof and side wall lining,
- . Rear compartment doors, inoperable from the interior, and sliding side doors with a limiting device (double hinged doors not acceptable),
- . A transparent shield of clear, one-fourth (1/4) inch Lexan (Polycarbonate), installed from ceiling to floor and side to side on the forward side of the partition screen, and
- . The spare tire assembly under the rearmost seat.

Appeal File, Exhibit 16H at 13-16.

Paragraph 18 of 1.1 required an adjustable halogen floodlight over the side door, but that same paragraph in line item 1.2 provided that "[n]o light shall be mounted above the sliding side door to provide lighting in the loading/unloading area of the vehicle." Appeal File, Exhibit 16H at 16.

Rowe's Protest Against the Chrysler Solicitation

On October 22, 1994, Rowe filed a protest before award challenging solicitation number FCAP-G5-99125-SN, which had been issued on July 22, 1994, and had given rise to the contract to the Chrysler Corporation. Appeal File, Exhibit 48 at 1-2 (protesting that "the exact product requested (Converted Law Enforcement Vans) are currently available under GSA contract number GS-30F-10134 awarded July 1994"¹⁰). GSA dismissed this protest as untimely because the protest was filed one day after GSA awarded the contract for the INS requirements to Chrysler. See also id., Exhibit 58.

GSA's Orders Under the Chrysler Contract

During the term of the Rowe contract, GSA ordered a total of 138 vans from Chrysler under the Chrysler contract, thirty-two under line item 1.1 and 106 under line item 1.2. Appeal File, Exhibit 19.

Rowe's President's Understanding

Rowe's president testified that if GSA had ordered any vans under line item 1.1 of the Rowe contract, Rowe would have used the same insulation material, Celotex, that it used under line items 1 and 2 of the contract -- a material GSA had approved under every other contract awarded to Rowe by GSA. First Campbell Affidavit ¶¶ 19, 20. Similarly, Rowe was prepared to install under line item 1.1 aluminum liners of approximately .032" thickness. Id. ¶ 20.

The Carter Chevrolet Contract

On December 20, 1996, nearly six months after the Rowe contract's expiration date of June 30, 1996, GSA awarded contract number GS-30F-97067 to Carter for modified Standard Items 24 and 34 vehicles. Appeal File, Exhibit 12. The Carter contract was stated to be a "firm fixed price, indefinite quantity requirements contract" with a guaranteed minimum quantity of 216 vehicles and an estimated dollar value of \$17,000,000. Id. at 18.

As of June 30, 1996, the end of the Rowe contract, GSA had received from the INS requests for a total of 316 Standard Item 24 vans, which it later ordered from Carter.¹¹ Appeal File, Exhibit 20. Rowe contends that GSA should have ordered these vehicles from

¹⁰As stated in our findings regarding the Rowe contract, the contract number cited is that of the Rowe contract, but the award date is not. The Rowe contract was awarded on August 12, 1994.

¹¹Approximately 190 of these vans were ordered from Carter following Rowe's termination for default on another contract for vans. This contract was awarded to Rowe on April 19, 1996; GSA ordered 219 vans, but Rowe did not deliver the vans by the due date, and GSA terminated the contract for default. Rowe challenged the termination on numerous grounds, but the Board upheld it and denied Rowe's motion for reconsideration. The United States Court of Appeals for the Federal Circuit later affirmed our decision. See Rowe, Inc. v. General Services Administration, GSBCA 14136, 00-1 BCA ¶ 30,668, motion for reconsideration denied, 00-1 BCA ¶ 30,797, aff'd, 6 Fed. Appx. 863 (Fed. Cir. 2001).

it because Rowe's contract provided that it "cover[ed] all requirements that may be ordered, as distinguished from delivered during the contract term." Appeal File, Exhibit 16A at 33.

GSA's specifications for the Carter contract were derived from the Chrysler contract specifications, and there are only minor differences in the language used in the specifications for the two contracts. Compare Appeal File, Exhibit 16H at 11-16 with id., Exhibit 16K at 6-16.

The Carter contract specifications required an engine with "a minimum 6.8 liter, 230 HP with 385 ft. lbs torque." Appeal File, Exhibit 12 at 6, 12. The specifications also referenced option code "E4" for an "Extra Power Engine." Federal Standard 307Y¹² applicable to the Carter contract explained that code E4 specified an eight-cylinder engine. Id., Exhibit 9 at 13.

Rowe's President's Complaint to Congress

By letter dated January 3, 1995, Rowe's president complained to his Congressman:

Re: Your 27 Dec 94 correspondence to Rowe Incorporated which included 16 Dec 94 correspondence from SBA^[13]

Dear Mr. Sisisky:

Please find enclosed a copy of the chronological correspondence which has been communicated by and between Rowe Incorporated and Ms. Bonnie Larrabee of GSA. It is evident that Ms. Larrabee is the individual which [sic] is responsible for removing the work slated for our Powhatan Facility under our current contract and placing it into the competitive market. It was also obvious well in advance of this solicitation that the work was earmarked by her for Chrysler Corporation. Therefore we can expect no equatable [sic] relief from Ms. Larrabee.

Secondly, the correspondence enclosed indicates that SBA was notified well in advance of the award of this contract and as the prime contractor to the 8(a) contract, had every responsibility to protest the resolicitation. To date, they have been inactive regarding this matter, however a formal protest on their part could stop the Chrysler award immediately.

We have recently been made aware of the fact that the Minority Automobile Dealer Associations from Ford, Chrysler and General Motors representing over 500 Automobile Dealers have also protested the GSA award to Chrysler Corporation on behalf of their membership. The actions of Ms. Larrabee to

¹²Federal Standard 307Y, effective October 1995, superceded 307X, effective October 1994, which in turn had superceded Federal Standard 307W. Appeal File, Exhibits 9, 6, 1.

¹³These documents are not in the record.

direct the contract has cost the United States Government an additional \$350,000. These actions alone should generate more than a superficial recommendation by the SBA.

This matter has already been advanced to the office of the commissioner of the Federal Supply Service at GSA We would therefore advise that SBA review the correspondence which has been submitted to them by Rowe Incorporated and further, that they receive a debriefing from Mr. David Wiggs of SBA who was the individual responsible for this action with GSA prior to his transfer.

Appeal File, Exhibit 58.

Rowe's Claim and the Contracting Officer's Final Decision

On June 25, 1999, appellant presented a claim to the contracting officer for breach of contract alleging a diversion of its contract requirements to other vendors. Appeal File, Exhibit 16.

In her final decision, dated October 18, 1999, the contracting officer denied Rowe's claim, stating, in pertinent part:

The claim states that the Government's requirement for vehicles to transport illegal aliens as reflected in the Chrysler contract, and then the Carter contract, were within the scope of the Rowe contract. However, the requirements for transport of illegal aliens included specifications for a type of vehicle that was essentially different from the vehicle proposed under line item 1.1 of the Rowe contract, the line item at issue in your claim. Moreover, the vehicles were essentially different as a result of the distinct functions that were to be performed by the different Government agencies that were intended to use these vehicles.

Specifically, the specifications in the Chrysler and Carter contracts stated that "these vehicles will be used to transport illegal aliens in an environment conducive to their health and safety." The solicitation for these contracts was issued to fulfill a requirement of the Immigration and Naturalization Service (INS) for vehicles used for transport by the Detention and Deportation function and the U.S. Border Patrol. The special nature of the work performed by INS's U.S. Border Patrol and Detention and Deportation required a distinct type of vehicle. For example, the U.S. Border Patrol required a vehicle capable of transporting illegal aliens on mountainous terrain and off-road locations in the desert of the southwestern United States. Also, the physical condition of the illegal aliens being transported resulted in health concerns and special sanitation requirements in connection with cleaning the vehicle. These special requirements were reflected in the solicitation specifications for the Chrysler and Carter contracts and are discussed in further detail below.

In contrast, the solicitation that was issued for the Rowe contract did not require specifications which addressed the distinct application for vehicles used in the transportation of illegal aliens in an environment conducive to their health and safety. The specifications for the Rowe contract for line item 1 (van, cargo, law enforcement vehicle) were developed to satisfy Government requirements primarily for the U.S. Navy to transport confined occupants such as prisoners and detainees. The specifications for line item 1.1 of the Rowe contract (van, passenger, law enforcement conversion vehicle) as stated in the purchase description in paragraph 1.1.2 represented a "more comfortable version" of line item 1. This more comfortable version had "windows and forward facing vinyl seats..." and was developed to satisfy Government requirements which may have been received from an agency where in addition to providing maximum security, comfort of the detainees was also a consideration, e.g., U.S. Marshall's [sic] Service. The specifications for line item 2 under the Rowe contract, patient transport vehicles, were developed to satisfy Government requirements, primarily for the U.S. Army's need for transporting medically stable ambulatory patients. The vehicles offered under the Rowe contract did not include the essential features and/or components required for the work to be performed by INS's U.S. Border Patrol and Detention and Deportation functions. I will explain some of the distinct differences in the vehicles offered under the Rowe and the Chrysler and Carter contracts as follows.

The Chrysler Contract

The Chrysler contract was awarded on October 21, 1994, two months after award of the Rowe contract. The vehicles offered and awarded under the Chrysler contract were not identical to those awarded under the Rowe contract Several essential differences existed as follows:

(a) Seating specifications: The Government's requirement for vehicles used to transport illegal aliens by the INS's Detention and Deportation function, and by the U.S. Border Patrol included a specification requirement for a fiberglass, non-upholstered seating surface. This requirement was derived from health and safety needs associated with the transport of illegal aliens. Specifically, the pathogens contained in blood, other bodily fluids, vomitus, and fecal matter could be entrained in vehicles with traditional upholstery, headliner, and side-wall materials. Therefore, these vehicles require seats and other materials that are intrinsically non-absorbent, and can be easily cleaned and disinfected. In contrast, the vehicles under the Rowe contract contained the chassis manufacturer's standard vinyl upholstered seating. As stated above, the law enforcement passenger van (item 1.1 under the Rowe contract) required that the vehicle be a more comfortable version of Line Item 1 of the Rowe contract and did not mandate the same concerns with regard to sanitation as reflected in the specifications designed for vehicles to be used in the transport of illegal aliens.

(b) Insulation Requirements: As stated in the specifications for the illegal alien transport vehicles, non water holding, fire resistant (per FMVSS [Federal Motor Vehicle Safety Standard] 302) foam insulation shall be installed in the rear compartment's ceiling and walls, which fully fill all exterior body panels. The foam insulation is to limit heat transfer and the resultant temperature rise inside the vehicle's passenger compartment. This is particularly important since these vehicles are extensively used in the desert climate of the southwestern United States.

(c) Interior Finish: The specifications required that the rear compartment interior roof lining and side-walls are to be fabricated from 0.032" sheet aluminum (one piece used for headliner/ceiling panel sections) with tamper resistant hardware. This was required to prevent the removal or destruction of the interior walls and headliner by the secured individuals in the back of the vehicle. The walls and headliner normally furnished by the chassis manufacturer are typically fabricated from fiber board covered with vinyl, fabric or carpeting type materials. Additionally as mentioned in paragraph (a) the need for materials that can be cleaned and disinfected are [sic] necessary for health and safety concerns and resulted in the specification of the aluminum headliner and side-walls.

(d) Special traction rear axle: This was required by the specifications for mountainous roads covered with ice and snow and for operation in sand and mud conditions in off-road locations. This requirement was mandated because of the need to mitigate the possibility of getting stuck when operating in the above conditions and the potential compromise of safety and security.

(e) Sliding Door: The specifications for the illegal alien transport vehicles contained a requirement for a sliding side door with an opening limit device. The specification stated that double side-hinged doors were not acceptable. The need for a sliding side door with the opening limit device was necessitated for security and safety reasons. Specifically, unlike a hinged type door, a sliding door can have a limit device installed on the track which the door travels. This device is required to limit the door opening to a predetermined amount, that will only permit a single individual to exit the vehicle at a time. This prevents a larger number of detainees from simultaneously forcing their way out of the vehicle, thus presenting a serious safety problem for both the officers and the detainees. Conversely, the side doors provided under the Rowe contract were vertically hinged sedan type doors.

(f) Roof Ventilators: The specification required two (2) driver controlled, power exhaust roof ventilators to be installed in the rear load space (passenger compartment). The ventilators are necessary in order to expel airborne pathogens and to minimize heat rise in the passenger compartment.

The aforementioned differences demonstrate that the vehicles under the Rowe contract were substantially different than the vehicles required and offered under the Chrysler contract. The vehicles that Chrysler delivered under its

contract met the Government requirements for vehicles used to transport illegal aliens in an environment that would not compromise their health and safety, while still providing the necessary security. The vehicles offered under the Rowe contract did not meet these specifications.

The Carter Contract

On July 12, 1996, GSA issued a solicitation to fulfill the Government's requirement for passenger secured vans to be used by the INS's Detention and Deportation function, and by the U.S Border Patrol. The contract for these requirements was awarded to Carter Chevrolet on December 20, 1996, which was subsequent to the expiration of Rowe's contract on June 30, 1996. Not only did the vehicles which were offered under the Rowe contract not meet the Government's requirements for passenger secured vans to transport illegal aliens, but the Rowe contract was not even in effect on the date that the solicitation for these requirements was issued.

In your claim, you incorrectly state that the final delivery order (RPN-N-50221) under the Rowe contract was issued on January 10, 1997. In fact, our records show that the above delivery order number was issued on April 5, 1996 -- almost two months prior to the expiration of the contract on June 30, 1996. The shipment date for the vehicle covered by this order was September 2, 1996. However, the GSA inspector advised that Rowe had not shipped the patient transport van under order number RPN-N-50221. As a result GSA agreed to extend the delivery date for this order until January 21, 1997. The date of January 10, 1997, shown on the copy of the subject delivery order furnished with your claim merely reflects the reprint date of the delivery order.

The vehicles specified in the Carter contract were different from the Rowe contract vehicles for many of the same reasons which were discussed earlier with respect to the Chrysler contract, including fiberglass seating, sliding door with an opening limit device, foam insulation, sheet aluminum interiors, and special traction rear axle. In addition, the engines in the Carter vehicles were 6.8L, V-10, 230hp with 385 ft-lbs. of torque, which is significantly larger than the 5.8L, V-8 engines provided in the Rowe contract. This larger engine was necessitated by the need for additional performance, because the vehicles are used at full load in the mountainous terrain of the southwestern United States.

Also, the issue has been raised concerning whether, on the contracts in question, the Government was buying Federal Standard item 24 (passenger vans) or Standard Item 34 (cargo vans). As reflected in the specifications for these procurements, the Government's intention was to buy Law Enforcement patrol vans (the Rowe contract), and illegal alien transport vehicles for the INS (Detention and Deportation and U.S. Border Patrol) in the Chrysler and Carter contracts. These completed vehicles were based on the Federal Standards (items 24 and/or 34). However, as has been shown, each contract contained additional specifications to the standard item 24 and/or 34. The resulting

completed vehicles under the Chrysler and Carter contracts were technically, functionally, and essentially different from the vehicles required under the Rowe contract.

In addition, the allegation contained in footnote number 12 (on page 18 of your letter) is false. The contracting officer did use reasonable care in computing estimated quantities. These estimates were established in accordance with the provisions of FAR 16.503(a)(1) and were based on the most current information available and from Rowe's previous contract (GS-30F-20044) for the same and/or similar items. Although there was no line item 1.1 on the previous contract, the total of the vehicles ordered on that contract was apportioned among the three line items on the solicitation, resulting in estimates of ten (10) units per line item. The total quantity of vehicles ordered under the Rowe contract was 51 (37 in the first year and 14 in the second year). The contracting officer had no knowledge of additional requirements. Moreover, at no time prior to or subsequent to award of the Rowe contract (GS-30F-10134) was it ever contemplated that the INS requirements for (Detention and Deportation, and U.S. Border Patrol) vans would be placed under the Rowe contract because the performance requirements and resultant specifications were essentially different.

The INS's Detention and Deportation, and U.S. Border Patrol vehicles which were procured under the Chrysler and Carter contracts simply did not fall within the scope of the Rowe contract. Therefore, there was no breach of the Rowe contract, and the claim is denied.

Appeal File, Exhibit 23.

Discussion

Rowe claims that GSA breached its requirements contract for the supply of police conversion vans when the agency procured vans for the transportation of aliens for the INS under separate solicitations.

Was Rowe's Contract a Requirements Contract?

At the outset, we examine whether Rowe's contract was a requirements contract.¹⁴ On the one hand, the solicitation and Price Negotiation Memorandum stated that the "resulting contract will be an indefinite quantity, firm fixed price with Economic Price Adjustment."

¹⁴The parties stipulated that the Rowe contract was a requirements contract, but that stipulation, because it concerns a matter of law, is not binding on the Board. Ace- Federal Reporters v. General Services Administration, GSBCA 13298, et al., 99-1 BCA ¶ 30,139, at 149,107, rev'd on other grounds, 226 F.3d 1329 (Fed. Cir. 2000); Respondent's Response to Appellant's Request for Admission, No. 1; Transcript at 159. During oral argument, respondent's counsel argued that the Rowe contract was not a requirements contract, notwithstanding the stipulation. Transcript at 49-51.

On the other hand, the contract included a clause which stated, "A-FSS-2-A (OCT. 1988) Requirements Contract for: FSC Class 2320 Commodity: Patient Transports and Police Conversion Vans." In addition, the Scope of Contract clause stated that GSA was "obligated to purchase such quantities as may be needed from time to time to fill any requirements determined in accordance with applicable procurement regulations and supply procedures." The standard FAR Requirements clause was not included.

Although designated as an indefinite quantity contract, we conclude that Rowe's contract was a requirements contract. As the Armed Services Board of Contract Appeals (ASBCA) recently recognized: "To make an indefinite quantity contract enforceable, the Government must agree to purchase from the contractor at least a guaranteed minimum quantity of goods or services." Centurion Electronics Service, ASBCA 51956, slip op. at 10 (Dec. 5, 2002) (citing Mason v. United States, 615 F.2d 1343, 1346 n. 5 (Ct. Cl. 1980), cert. denied, 449 U.S. 830 (1980); Travel Centre v. Barram, 236 F.3d 1316, 1319 (Fed. Cir. 2001); FAR 16.504(a)(1)). Here, the Rowe contract would not be enforceable as an indefinite-quantity contract because it did not guarantee a minimum number of vehicles GSA was obligated to order. A contract lacking a minimum quantity term cannot be interpreted as an indefinite-quantity contract. Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302, 1306 (Fed. Cir. 1998). A requirements contract differs from an indefinite-quantity contract in that the Government need not guarantee a minimum purchase amount but must buy all of its specified requirements from the contractor. Travel Centre, 236 F.3d at 1318-19; Mason, 615 F.2d at 1349; Centurion. "[A] requirements contract necessarily obligates the Government to purchase exclusively from a single source." Coyle's Pest Control, 154 F.3d at 1305.

As the United States Court of Appeals for the Federal Circuit recently recognized:

A requirements contract calls for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price. This arrangement offers the government a measure of both flexibility and cost certainty, by ensuring an adequate supply of the required item at an agreed price before it determines the exact quantity of items it ultimately will purchase. In exchange for providing the government cost certainty and flexibility with respect to the quantity of items ordered, a contractor, at least in theory, may exact a higher per unit price.

Rumsfeld v. Applied Companies, Inc., No. 01-1630, slip op. at 7 (Fed. Cir. Dec. 10, 2002), (quotations and citations omitted).

We do not deem the absence of the standard Requirements clause a death knell to a conclusion that the Rowe contract is a requirements contract. Centurion. More significant is the Scope of Contract clause, which expressly stated that GSA was obligated to purchase quantities of vehicles needed "to fill any requirements determined in accordance with applicable procurement regulations and supply procedures." Because the contract gave Rowe the exclusive right to supply the vehicles specified within its scope, it was a requirements contract.

Whose Requirements were Covered Under the Rowe Contract?

GSA contends that the Rowe contract was intended to bind only GSA to the mandatory contract requirements for GSA's own fleet management purposes. Transcript at 19. Although the Rowe contract neither contained the standard Requirements clause nor listed "designated Government activities" whose requirements were to be filled, the contract cannot reasonably be read to limit the requirements covered to those of GSA. GSA's argument is refuted by reference to several contract clauses and the contracting officer's final decision.

The Rowe contract's Packaging and Marking clauses clearly contemplated other agencies would be purchasing the vans. Specifically, the clause on decals, stickers, and data plates specified the warranty legend required on "vehicles for civil agencies." The clause describing the "GSA Purchased Vehicle" form listed the State Department, USIA (United States Information Agency), and Forest Service as examples of "receiving agencies." The Painting and Marking clause requires compliance with MIL-STD-1223 "for the military service identified by the procuring activity." The License Plate clause cautioned that the license plates would be used on "Navy vehicles worldwide in extreme climatic environments."

Even the Scope of Contract clause on which GSA bases its argument does not unequivocally support a conclusion that only GSA's requirements were subject to this contract. The clause provided:

This contract provides for the General Services Administration normal supply requirements (as identified herein, excluding those available from the Commercial Customer Supply Center (CCSC) program and the standardization and control of industrial quality tools program (during the period specified in this solicitation). The General Services Administration is obligated, except in cases of urgent requirements or as may otherwise be provided herein, to purchase such quantities as may be needed from time to time to fill any requirements determined in accordance with current applicable procurement regulations and supply procedures. . . . The quantities shown herein as estimated requirements are based upon information made available to the General Services Administration. . . .

The Scope of Contract clause referenced "any requirements determined in accordance with current applicable procurement regulations and supply procedures" and did not limit those requirements to those of a single agency. Importantly, the reference to estimated requirements being based upon information "made available" to GSA indicated that this information would be coming from other agencies.

Finally, Standard 307W stated that it was approved by the Commissioner of GSA's Federal Supply Service for "the use of all federal agencies." The standard's purpose was to "be responsive to the wide range of vehicles required to meet the needs of the various agencies" and to "cover only those vehicles generally used by the Federal Government." The standard further provided that options were included "for agencies' divergent geographic and operational related needs."

Thus the clauses and Standard 307W do not limit the applicability of this contract to one single agency, GSA. This conclusion is bolstered by the fact that none of the contemporaneous documentation in the record suggests that GSA itself believed the contract was limited to only GSA. Nor does the record indicate that vehicles which were ordered under Rowe's contract were solely to be used for GSA's own requirements. Rather, the contracting officer's final decision itself belies GSA's belated contention that the contract only covered its own agency requirements. There the contracting officer stated that the specifications for the Rowe contract for line item 1 "were developed to satisfy Government requirements primarily for the U.S. Navy to transport confined occupants such as prisoners and detainees." Line item 1.1 "was developed to satisfy Government requirements which may have been received from an agency where in addition to providing maximum security, comfort of the detainees was also a consideration, e.g., U.S. Marshall's [sic] Service." Similarly, the contracting officer's final decision stated that the specifications for line item 2 under the Rowe contract were developed primarily for the U.S. Army's needs for transporting medically stable ambulatory patients. We thus reject GSA's argument that the contract was limited to GSA's requirements.

Were the INS Requirements within the Scope of Rowe's Contract?

The Rowe contract's Scope of Contract clause 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 pt. 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. 13 CFR 124.308(b).

When contracting with the SBA under the 8(a) program, the procuring agency must conclude that the procurement being reserved for the small business is appropriate given the firm's capability. Here, GSA and SBA affirmatively determined that a reservation for Rowe which included the INS requirements was not warranted, and the record does not indicate that their determination in that regard -- a determination which, by regulation, is imbued with discretion -- was a subterfuge to divert business which somehow belonged to Rowe.

Rowe has gone to great lengths to persuade the Board that the vans which GSA solicited for INS on a competitive basis were within the scope of its requirements contract because they were essentially identical to those specified under its contract. However, the evidence of record convinces us that the INS requirements were never intended by GSA or SBA to be included in Rowe's contract -- despite Rowe's persistent efforts to obtain these requirements. Rowe's claim thus fails when the formation of its contract is scrutinized.

In October 1993, GSA recommended that SBA consider an 8(a) contract for Rowe which would call for police conversion vans and patient transport vans. In December 1993, SBA accepted GSA's proposal. That same month, GSA received a request from INS for the acquisition of alien transport vans. In February 1994, GSA issued Rowe's 8(a) solicitation on a sole source basis soliciting a requirement for an estimated quantity of twenty police conversion vans and ten patient transport vans. On July 22, 1994, GSA issued a competitive

solicitation for eighty-eight alien transport vans for INS. That same day, in apparent recognition that these INS requirements were not included in its sole source, 8(a) solicitation, Rowe wrote a letter asking GSA to "reconsider its rejection of SBA's set aside recommendation for the [INS] vehicle." GSA did not reconsider and instead awarded a contract to SBA which contained the items reserved for Rowe on August 12, 1994, without any increase in estimated quantities or mention of INS or alien vans. Rowe's contract covered, as its solicitation had indicated, patient transport vans and police conversion vans. Four days later, on August 16, GSA replied by letter to Rowe's request that the INS requirements be included in Rowe's contract. GSA said no. GSA expressly explained that Rowe "did not offer a small business product which fully meets our minimum technical requirements. Therefore, the [INS] procurement cannot be offered to SBA under the 8(a) Program for [Rowe's] exclusive participation."

GSA's determination to exclude the INS requirements from Rowe's contract did not constitute a pre-award breach or diversion, but rather was within its discretion under applicable statute and regulation. Under the Small Business Act's 8(a) program, Rowe is a subcontractor to the SBA, which in turn has contracted with GSA to perform the requirements in question. 15 U.S.C. § 637(a)(1)(A) (1994); Appeal File, Exhibit 16A at 40-41. Under that Act, an agency's decision "not to make available for award . . . a particular procurement requirement" is subject to appeal by the SBA to the agency head for reconsideration. 15 U.S.C. § 637(a)(1)(A). Further, under the governing regulations, it is SBA and the procuring agency who are charged with determining the suitability of a given requirement for the 8(a) program and designating the appropriate SIC code. 13 CFR 124.308(b), (d) (1994);¹⁵ Woerner v. Small Business Administration, 739 F.2d 641 (D.D.C. 1990), aff'd, 934 F.2d 1277 (D.C. Cir. 1991); Ebon Research Systems, B-240391 (Nov. 6, 1990) (the agency, subject only to an appeal to SBA, determines the proper SIC code; the General Accounting Office does not).

Importantly, the regulations expressly provide that "SBA is not required to accept any particular requirement for the 8(a) program." 13 CFR 124.308(d) (1994); see Young-Robinson Associates, Inc., B-242229 (Mar. 22, 1991) ("SBA and contracting agencies have broad discretion to determine whether to place a requirement under the 8(a) program"). As the Comptroller General recognized in The Writing Co., B-284622.2 (May 19, 2000):

No firm has a right to have the government satisfy a specific procurement need through the 8(a) program or award a contract to that firm, since the contracting officer is authorized "in his discretion" to let the contract to SBA upon terms and conditions to which the agency and SBA agree. Electronic Sys. and Assoc., Inc., B-244878, Nov. 13, 1991, 91-2 CPD ¶ 456 at 4.

There is no indication in the record that SBA requested the GSA Administrator to reconsider and expand the requirements set aside for Rowe here. Rather, Rowe itself petitioned GSA's Automotive Center to set aside the INS requirement for it, and GSA denied

¹⁵The regulations provide: "So long as the SIC Code assigned to the requirement by the procuring agency contracting officer is reasonable, the SIC Code will be accepted by SBA." 13 CFR 124.308(b) (1994).

the request. Rowe also complained to its Congressman that SBA "had every responsibility" to protest the Chrysler award but failed to take any action. Our record does not indicate that any further judicial or administrative review was sought of GSA's determination not to expand Rowe's sole source contract to include the INS requirement.¹⁶

There was never a meeting of the minds that the INS requirements were to be part of Rowe's contract. GSA and SBA did not intend to include the INS requirements in the Rowe contract, and Rowe was well aware of GSA's and SBA's intentions, accepted the contract on those terms, and cannot be heard now to claim that its contract was much broader. Rowe had no reasonable expectation that the INS requirements were within its contract. Cf. Travel Centre, 236 F.3d at 1319 ("based on the solicitation for the IDIQ contract, Travel Centre could not have had a reasonable expectation that any of the Government's needs beyond the minimum contract price would necessarily be satisfied under this contract"). Rowe's post hoc attempt to argue that the INS requirements -- a quantity almost three times greater in the Chrysler contract than Rowe's estimated quantity and some ten times greater in the Carter contract than Rowe's estimated quantity -- were included in the Rowe contract must fail.

Rowe had also complained that the SIC Code for the 1994 INS solicitation, 3711, was erroneous and should be changed to the SIC Code in the Rowe contract, 3713. In addition, Rowe asked that SBA approve its qualification under SIC Code 3711 "in order to submit a proposal under the new [INS] solicitation which can be supported by SBA for this and further set aside requirements." However, SBA only approved the participation of Rowe in the 8(a) program to provide those vehicles under SIC Code 3713, and our record reflects that Rowe's SIC Code for participation in the 8(a) program for these requirements was never changed for purposes of this 8(a) reservation. Nor did GSA change the SIC Code in the INS solicitation. Thus, in the instant case, Rowe would not have been permitted to perform the INS requirements because they were classified under a different SIC code (3711) than that approved for and contained in its 8(a) contract (3713).

Nor were the INS vehicles added to Rowe's contract via the PAT brochure. Rowe has the burden of proving this contention. Rowe's contention that its contract was "modified" by the PAT brochure to include the very INS requirements SBA and GSA had previously declined to include fails for lack of proof. Specifically, Rowe appears to argue that vehicle features which were not in the specification, e.g., fiberglass seats, nonwaterholding, fire-resistant foam insulation, and aluminized steel or aluminum interior ceilings and walls, were included as options in its PAT brochure and therefore brought vehicles with these features within the scope of its sole source contract.

The record does not persuasively indicate that the "modifications" in the PAT brochure were agreed to by an authorized GSA representative. Indeed, the record on how the "modifications" were inserted into the PAT brochure is inadequate. The sole evidence that the PAT brochure was intended to encompass the INS requirements is contained in the affidavits of Rowe's president and consultant to this effect. GSA denies that the PAT brochure was ever approved by it at all, let alone with this radical deviation from its prior determination on the INS requirements.

¹⁶SBA did not seek to intervene in this appeal and neither party requested its joinder.

Further, Rowe's contentions with regard to the PAT brochure are not consistent. On the one hand, Rowe recognizes that its contract did not include the INS requirements, as is evidenced by its letters to SBA, GSA, and Rowe's Congressman urging that action be taken by SBA to incorporate those INS requirements into Rowe's contract. On the other hand, Rowe, at the very same time it was petitioning its Congressman, January 3, 1995, asking that SBA take such action, is also contending that GSA approved a "modification" of its contract via the PAT brochure to do exactly what it was asking its Congressman to have SBA do -- add the INS requirements to its contract. If Rowe truly believed that GSA had approved its PAT brochure and enlarged the scope of its contract, it would have had no need to write as it did to its Congressman.

Nor is there a sufficient showing of consideration or definiteness in the formation of the PAT brochure to conclude that the brochure operated as a contract modification imposing new obligations on the parties. As our appellate authority has recently recognized: "To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation . . . and sufficient definiteness so as to 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.'" Ridge Runner Forestry v. Veneman, 287 F.3d 1058, 1061 (Fed. Cir. 2002), (citing Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329, 1332 (Fed. Cir. 2000)). Based upon this record, the allegation that Rowe's contract contained or was "modified" to contain the INS requirements fails.¹⁷

In sum, we conclude that because the parties to Rowe's 8(a) contract never intended the INS requirements to be within the scope of Rowe's contract, and Rowe had no reasonable expectation of fulfilling these requirements, GSA did not breach Rowe's contract by procuring those INS requirements elsewhere under competitive solicitations. To the extent that Rowe's complaint here can properly be characterized as a claim that GSA and SBA should have agreed to include the INS requirements in Rowe's sole source, 8(a) contract, that belated complaint would not be subject to review in this forum.¹⁸

Is GSA's Determination Not to Include the INS Requirements in Rowe's Contract a Diversion of Those Requirements Which Would Subject GSA to Breach Damages?

We have concluded that this Board lacks jurisdiction over a claim that the INS requirements should have been included in Rowe's noncompetitive 8(a) reservation. Appellant has characterized its claim somewhat differently, however. Rowe contends that GSA, acting in bad faith, diverted the INS requirements from it before contract award was ever made to Rowe, because GSA never intended to procure any vans under line item 1.1 from Rowe.

¹⁷If Rowe is arguing that the PAT brochure confirmed that the INS requirements were within its contract, that argument also fails because those requirements were never included in its contract from the outset.

¹⁸Rowe did file a protest in another forum challenging the INS solicitation on the ground that the INS requirement was encompassed within its requirements contract, but that protest was dismissed as untimely, so its merits were not addressed.

In so arguing, Rowe is attempting to demonstrate that the vehicles procured under the INS solicitation did not differ from the vehicles specified in the Rowe solicitation -- and therefore a breach occurred when requirements for these same type vehicles were procured outside Rowe's contract. The problem with Rowe's argument is that the INS requirements were affirmatively excluded from its contract by both GSA and SBA, and that this exclusion was recognized by Rowe, as the parties' pre- and post-award course of dealing demonstrates. Thus, even a recognition that the vehicles procured for INS were similar to those Rowe offered cannot bring those vehicles within Rowe's contract.

Further, as our appellate authority recognized in Technical Assistance International, Inc. v. United States, 150 F.3d 1369, 1371-72 (Fed. Cir. 1998):

A requirements contract is primarily designed to provide a buyer with flexibility in operating its business. . . . The buyer is generally accorded significant freedom in determining its requirements under a requirements contract because it has specifically bargained for such flexibility, in exchange for which it has usually agreed to pay a premium price for the goods or services to be provided.

. . . .

The limitation on the buyer's freedom to vary its requirements is usually expressed as a duty to act in good faith. See Shader Contractors, 276 F.2d at 4 ("Ordinarily when a quantity ordered is considerably more or considerably less than that anticipated from a reading of the contract terms, the courts will protect the aggrieved party from unfair usage by applying a test of good faith to the other party's actions.")

See also Workrite Uniform Co. v. General Services Administration, GSBCA 14839, 99-2 BCA ¶ 30,455, aff'd, No. 99-1520 (Fed. Cir. Aug. 8, 2000).

Here, the fact that the Government purchased fifty-one vehicles from Rowe -- twenty-one more than the number estimated -- militates against a conclusion that a diversion occurred, entitling appellant to breach damages. There is no evidence to suggest that the estimate of requirements in Rowe's contract was flawed. In the instant case, the Government estimated a total of thirty vehicles would be purchased from Rowe, ten units under line item 1, ten units under line item 1.1, and ten units under line item 2. Fifty-one vans were purchased under line items 1 and 2, but no vans under line item 1.1. The fact that GSA ordered over twice the vehicles estimated under two line items, but none under the third, does not suggest bad faith.

Even characterized as a diversion claim, Rowe's claim cannot prevail because the record does not support a factual conclusion that GSA intended the INS requirements to be encompassed under line item 1.1 of the Rowe contract. A requirements contract only covers requirements specified to be within its scope, and Rowe's own actions evidence that it understood the INS requirements to be outside the scope of its contract.

The evidence as a whole indicates that GSA did not breach Rowe's contract, but rather reasonably exercised its discretion not to reserve for award to Rowe, through SBA, the INS requirements awarded to Chrysler and Carter.¹⁹

Decision

The appeal is **DENIED**.

MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

EDWIN B. NEILL
Board Judge

¹⁹Given our conclusion that the INS requirements were not within the scope of Rowe's contract, GSA's delay in ordering the 316 vehicles allegedly needed during the existence of the Rowe contract until the Carter contract was awarded was likewise not a diversion from the Rowe contract.