Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: September 28, 2001

GSBCA 14211

ROWE INCORPORATED,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stanley V. Campbell, Jr., President of Rowe Incorporated, Fairfax Station, VA, appearing for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, D.C., counsel for Respondent.

Before Board Judges **DANIELS** (Chairman)**, BORWICK**, and **HYATT**.

HYATT, Board Judge.

On February 29, 1996, the General Services Administration (GSA) awarded a contract to Rowe Incorporated. Under the terms of the contract, Rowe was to deliver four light trucks with special equipment (line items two, three, and four) within 180 calendar days of the receipt of orders from GSA. On March 13, 1996, GSA issued an order for the delivery of two vehicles under contract line item four. After Rowe failed to meet the first due date for delivery, GSA granted Rowe two extensions of time in which to deliver the vehicles. Rowe failed to deliver the vehicles by either of the extended dates. On May 15, 1997, GSA terminated for default Rowe's right to proceed with contract line item four. Rowe timely appealed the termination decision. For the reasons stated below, we deny the appeal.

Findings of Fact

The Contract

1. Contract number GS-30F-96106 was awarded to Rowe on February 29, 1996. The firm, fixed-price contract was for the modification and delivery of specially equipped two-wheel and four-wheel drive light trucks. Appeal File, Exhibit 1.

2. The solicitation leading to the award of the contract contained four line items. Line item number one provided for the manufacture and delivery of a modified four-wheel drive rescue squad vehicle. Line item number two required the contractor to manufacture and deliver a modified handicap conversion van. Line item number three similarly called for the manufacture and delivery of a modified handicap conversion van. Under line item number four, the contractor was to manufacture and deliver two modified type IX vans with cut-off cabs. Appeal File, Exhibit 1. The type IX van is a cutaway cab chassis. It looks like a typical passenger van except that there is no body from the area of the driver's seat back, just frame rails to which the contractor integrates a finished cargo body. Transcript at 314.

3. The solicitation provided that award could be made on an item-by-item basis and emphasized that there was no guarantee that offerors would be awarded all four of the line items. Appeal File, Exhibit 1. In Section F, the solicitation and contract also included clause 552.212-70 -- Time of Shipment. Under this provision shipment of the vehicles was required within 180 calendar days after receipt of order. Id., Exhibit 1; Transcript at 172-73.

4. Ultimately, a contract was awarded to Rowe for line items two, three, and four. The vehicles were ordered at the time of award, with a reservation of an option to order more vehicles under the contract. Appeal File, Exhibits 1, 7; Transcript at 172-74. On March 13, 1996, a written notice confirming the order of two vehicles under line item number four was issued, listing the contract award date as February 29, 1996, and specifying that shipment of the vehicles was to occur by August 27, 1996. The order informed the contractor that the vehicles were to be shipped to the Federal Communications Commission in Powder Springs, Georgia. Appeal File, Exhibit 3.

5. With respect to the vehicles ordered under line item number four, the contract stated that, except as modified therein, the vehicle "shall comply with Federal Specification 307X" and shall comply, among others, with the following minimum requirements:

> The vehicle was to be a delivery van, with cut-off cab, type IX, Class G, Item 94A, 11,500 pounds.
>
> The body was to be all aluminum.[1]
>
> The requirement for a roof ventilator was deleted.
>
> The height of the completed vehicle was not to exceed 107 inches; vehicle width was not to exceed 96 inches.

[1]This modified the requirement under Federal Specification 307X, which permitted the body to be either aluminum or fiberglass. Appeal File, Exhibit 2 at 65.

> A deluxe insulation package with extra insulation and sound proofing in the cab area was to be included.
>
> The cargo body was to have a minimum finished interior height of 72 inches and a minimum inside width of 90 inches
>
> The cargo body's interior was to be delivered unfinished (no headliner or interior panels) except for finished interior doors.
>
> The cargo body of the van was to have both side and rear insulated doors with finished interior sides.
>
> The cargo body's floor was to consist of three layers: a metallic subfloor, a layer of foam insulation, and a plywood top floor.
>
> The metallic subfloor was to be a continuous layer of aluminum sheet metal, at least 1/16th inch thick, bonded mechanically and electrically to the box sides and to the vehicle frame to provide for continuous electrical shielding to the cargo area.
>
> The driver/cargo separation bulkhead was to be of exterior grade plywood, approximately 1 and ½ inches thick, secured at the top, bottom, and sides and "capable of withstanding a thirty mile per hour impact from a 150 pound round object without penetration or tearing of the bulkhead from its mountings."

Appeal File, Exhibit 1, at 43-45.

6. Federal Specification 307X was modified by the contract in several respects. The standard specification's maximum height limitation, including roof vents, was 104 inches, while the contract permitted a maximum height of 107 inches. The contract also eliminated the specification's requirement for roof ventilators, which effectively eliminated three to eight inches of roof height. Appeal File, Exhibits 1, 2; Transcript at 315-17.

7. The specification identified two representative vehicles or chassis that would meet the requirements for a delivery van with cut-off cab, item 94A. One was a Chevrolet; the other was a Ford E350. Appeal File, Exhibit 2 at 38. The Ford model was proposed and intended to be supplied by Rowe. Id., Exhibit 1. The specification identifying representative vehicles depicts a cutaway van with an added cargo body that has wheel wells. Id., Exhibit 2 at 38.

8. The solicitation and contract incorporated GSA Form 3507, Supply Contract Clauses, by reference. Form 3507 included the Federal Acquisition Regulation's (FAR's) default clause for supply contracts, 48 CFR 52-249-8 (1995). Under this provision, by written notice to the contractor, the Government was permitted to terminate the contract in whole or in part if the contractor failed to

(a) deliver supplies within the time frame specified in the contract or any extension authorized;

(b) make progress so as to endanger performance of the contract; or

(c) perform any other provision of the contract.

A default termination based on failure to make progress or failure to perform any other provision of the contract required the issuance of a written ten-day cure notice and a failure on the part of the contractor to effect a cure. Appeal File, Exhibits 1, 31.

Preaward Events

9. The solicitation for this contract was issued on July 31, 1995. Appeal File, Exhibit 35. On August 9, 1995, Rowe sent a letter to the GSA contract specialist seeking clarification of certain of the solicitation's specifications. None of the requested clarifications pertained to line item number four, however. Id., Exhibit 45. The contract specialist consulted with personnel from GSA's engineering branch and responded to the inquiry. Transcript at 220-21, 251-52.

10. The closing date for submission of proposals in response to the solicitation was September 13, 1995. The offers received were then evaluated to determine compliance with the solicitation requirements and the referenced specification standards. After issuing an amendment designed to clarify the requirement for line item one, GSA issued a request for best and final offers. Rowe was the low offeror on line items two, three, and four. Appeal File, Exhibits 35-36.

11. GSA's quality assurance specialist, Thomas Mould, visited the Rowe facility in Powhatan, Virginia, on November 1, 1995, and the facility in Springfield, Virginia, on November 2, 1995, to conduct a preaward survey of Rowe's ability to perform the contract requirements. In performing this assessment, Mr. Mould met with Rowe's president, Stanley Campbell, and its new quality control manager, James Muncie. Mr. Mould discussed the solicitation requirements for each of the four line items, the product specification requirements, and letters of commitment from subcontractors and suppliers. Mr. Mould concluded that Rowe could not properly perform with respect to line item one, but was capable of performing the other three line items. Mr. Mould also believed that Rowe's principals fully understood and could comply with the specifications and contract requirements. Appeal File, Exhibit 36; Transcript at 29-34.

12. Although Rowe was deemed technically capable of performing line items two through four, GSA's finance division recommended against award based on its review of Rowe's financial capability, which the finance division considered to be marginal. As a result, GSA's contracting officer deemed Rowe to be a nonresponsible bidder and referred the matter to the Small Business Administration (SBA). Appeal File, Exhibit 36. Rowe requested and received a certificate of competency (COC) from SBA. Id., Exhibits 37-40. By letter dated February 13, 1996, SBA informed GSA that it had issued a COC to Rowe and that GSA was consequently required to award Rowe a contract for the three line items for

which Rowe was the low bidder. Id., Exhibit 40. Upon receipt of confirmation that SBA had issued a COC to Rowe, GSA awarded contract number GS-30F-96106 for line item numbers two through four. A letter notifying Rowe that it had been awarded the contract for these line items was sent on March 4, 1996. Appeal File, Exhibits 1, 47.

Performance Issues Arising Under the Contract

13. On March 4, 1996, Rowe was mistakenly informed that the contract administration branch in GSA's Region 4 would be responsible for this contract. Appeal File, Exhibit 48. On April 16, 1996, Rowe was notified that administration of the contract would remain in the Automotive Commodity Center's procurement division. This letter identified Millisa Gary as the contracting officer, Gina Jordan as the contract specialist, and Thomas Mould as the quality assurance specialist. Id., Exhibit 68; Transcript at 170. The role of the quality assurance specialist was two-fold: to perform quality assurance inspections and to keep the contracting officer up to date on the status of contract progress and projected vehicle deliveries. Transcript at 42.

14. In late March 1996, Mr. Mould conducted a post-award meeting with Rowe at the Powhatan facility. The purpose of this meeting was to review the contract requirements and specifications and to identify any areas in performance that might require clarification. No issues requiring clarification were noted and Mr. Mould formed the impression that there were no open issues. Mr. Mould authored a contemporaneous written report, dated March 28, 1996, reflecting the discussions held during the meeting. According to Mr. Mould's memorandum, during the meeting, Mr. Campbell advised Mr. Mould that orders for the vehicle chassis had been placed on March 1, 1996. Mr. Campbell further noted that he had not received a confirmation of production date from Rowe's supplier, Richmond Ford. Mr. Campbell discussed his tentative plans for completion of the work and stated that the requisite confirmation that the cargo body bulkhead could withstand a thirty mile per hour impact from a 150 pound round object would be obtained from the cargo body manufacturer. Appeal File, Exhibit 4; Transcript at 39-41.

15. Mr. Mould visited the Powhatan facility again on July 10, 1996, to discuss the status of open orders. At that time Rowe had not yet received the two chassis for line item four and did not have an anticipated production date from Richmond Ford. Mr. Mould's report noted that "it is anticipated that [the line item four order] may not meet the required delivery schedules." Appeal File, Exhibit 49.

16. On August 20, 1996, Mr. Mould visited Rowe to inspect the line item two vehicle, which was ready to be furnished under the contract. While at the facility, Mr. Mould noted that the chassis for line item four had still not been received. Additionally, Rowe had no documentation confirming when these items would be produced and delivered. When Mr. Mould inquired about these items, Mr. Campbell told him he had had difficulty obtaining documentation but averred that the orders had been placed. Based on this circumstance, Mr. Mould informed the contracting officer and the contract specialist that he anticipated that the line item four vehicles would be delivered late. Appeal File, Exhibit 5; Transcript at 42-43.

17. On September 4, 1996, Mr. Mould returned to Rowe's plant to reinspect the line item two vehicle. While he was there, Rowe advised that it still did not have the line

item four chassis and that it had not received documentation that orders had been placed. Mr. Campbell notified Mr. Mould that Rowe was experiencing problems with Richmond Ford and might have to reorder the chassis from a different dealer. Appeal File, Exhibit 6; Transcript at 44-45.

18. Mr. Mould in turn informed the contracting officer of this conversation and pointed out that Rowe's performance under line items three and four was now untimely. He recommended issuance of a show cause letter to Rowe, based on the fact that deliveries were untimely, and further recommended that the contract personnel explore finding new contractors to provide these line items. Appeal File, Exhibit 6; Transcript at 44-45.

19. By letter dated September 17, 1996, the contracting officer formally notified Rowe that its performance under line items three and four was untimely and asked Rowe to provide a "detailed explanation for the overdue shipment, a new shipment date, and an offer of consideration for the delinquent orders." Rowe's response was due by September 24, 1996, and Rowe was cautioned that failure to meet the deadline for a response could result in a partial termination of the contract for default with respect to these items. The contracting officer, Ms. Gary, testified that she considered this to be a cure letter. Appeal File, Exhibit 8; Transcript at 174-75.

20. The contracting officer's supervisor, Steven Mial, reviewed the letter. He made the following notations on the letter, in the form of questions posed to the contracting officer: 1) Should the cure/show cause provisions of the contract's default clause be noted? 2) Should Rowe be required to proffer an explanation for its failure to perform timely? and 3) Should GSA's legal staff have been consulted about the letter? Appeal File, Exhibit 50; Transcript at 176. Mr. Mial explained that this was not an attempt to second guess the contracting officer, but rather to provide a training exercise to remind her of the various options available in the circumstances. Transcript at 603-04.

21. By letter dated September 23, 1996, Rowe responded to Ms. Gary's letter of September 17. Rowe stated that its relationship with its supplier had been terminated on September 19, 1996, and that it would have to reorder the vehicles as a result. Rowe was awaiting a response from a new supplier on the availability of 1996 model year vehicles. If Rowe was unable to locate 1996 model year vehicles it would offer 1997 vehicles at no additional cost to the Government. The letter concluded with the statement that further correspondence concerning this matter would be forthcoming from Rowe by October 1. Appeal File, Exhibit 8.

22. In a letter dated October 4, 1996, Rowe informed GSA that it had been working with a new supplier but had not been successful in locating any 1996 vehicles for purchase. In this letter Rowe offered 1997 vehicles at no additional cost. Rowe stated in the letter that an order had been placed as of September 25, 1996, and that a copy of the vehicle order confirmation sheet was provided for GSA's review. The letter further stated that it would "take 14 days from the time of order to get a firm vehicle ship date from Ford" and that Rowe would continue to try to locate 1996 vehicles. Appeal File, Exhibit 9.

23. In a follow-up letter, dated November 8, 1996, Rowe informed GSA that it had received confirmation on vehicle delivery. The vehicles were to be received on December

7, 1996, and Rowe would "have them ready for inspection within two weeks from this date." Appeal File, Exhibit 10.

24. On November 20, 1996, the contracting officer contacted Mr. Mould to inform him that she had established December 26, 1996, as the new shipment date. She inquired whether he would be available to conduct an inspection that week. Mr. Mould responded, expressing doubt, based on his dealings with Rowe, that Rowe could meet that shipment date. The contracting officer replied that she needed to establish a new shipment date and this one appeared reasonable based on the input she had received from Rowe and the customer. Mr. Mould then suggested that the contracting officer try to obtain written documentation showing that the vehicles were actually on order. Ms. Gary responded that she had the necessary documentation to reestablish a shipment date and concluded that Mr. Mould would presumably be available to perform an inspection. Appeal File, Exhibit 11. Following this exchange, on November 22, 1996, the contracting officer issued a unilateral modification to the contract establishing a new shipment date of December 26, 1996, for line items three and four, and providing that the offer of 1997 vehicles would serve as consideration for the extension of shipment time. Id., Exhibit 12.

25. Shortly after issuing the contract modification, Ms. Gary transferred to another office in GSA and ceased to be the contracting officer for this contract. Transcript at 182-84. The contract specialist assigned to the contract remained. Id. at 421. Mr. Ron Quinn, a supervisor in the office who also held a contracting officer's warrant, temporarily took over the role of contracting officer pending the permanent assignment of another contracting officer to this contract. Id. at 421.

26. On January 2, 1997, Mr. Mould sent a memorandum to the contract specialist, noting that he had visited the Powhatan plant on that date and inquired about the status of the delivery of vehicles under the subject contract. The vehicles had not been received. He recommended that the contracting officer contact Rowe to determine when delivery and conversion of the vehicles could be accomplished. Appeal File, Exhibit 13.

27. In a letter dated January 3, 1997, Rowe informed GSA that one of the vehicles had been delivered to a local Ford dealership and that it would be delivered to Rowe on January 8. The other vehicles were expected to arrive at the dealership on January 8. Allowing three days for processing at the local dealership, Rowe estimated that the remaining vehicles would be delivered to the Rowe facility on January 13. Appeal File, Exhibit 14.

28. Mr. Mould visited Rowe's Powhatan plant on January 13, 1997, to inspect vehicles produced under a different contract. While there, he discussed the status of the line item four vehicles with Mr. Campbell and Mr. Muncie. He was told the chassis had still not been received. Mr. Campbell represented to Mr. Mould that Rowe expected to use a subcontractor for the first line item four vehicle conversion. Rowe then intended to convert the second vehicle in-house, using the first vehicle conversion as a guide. Rowe did not identify the prospective subcontractor that would perform the initial conversion. In light of Rowe's intention to build and attach the second cargo body in-house, Mr. Mould reminded Rowe that the bulkhead strength would have to be certified or crash tested to insure that it could withstand a thirty mile per hour impact from a 150 pound object. Appeal File, Exhibit 22; Transcript at 56-59.

29. On January 17, 1997, Mr. Mould contacted Rowe regarding the status of the line item four vehicle conversions. He was told by Mr. Muncie that the chassis had still not been received and that Rowe had no firm arrangement for producing or installing the cargo body. Thereafter, Mr. Mould recommended to the contract specialist that a show cause letter be issued to Rowe with respect to the failure to timely deliver the line item four vehicles. Appeal File, Exhibit 15; Transcript at 52-53.

30. On January 22, 1997, Rowe notified GSA that it had received the line item four chassis units and had initiated the manufacturing process. Appeal File, Exhibits 17, 128. In fact, Rowe had received only one of the units at the Powhatan facility. Id., Exhibit 19; Transcript at 781.

31. In the letter dated January 22, 1997, Rowe stated that "Mr. Mould has questioned the strength and/or durability certification of the completed unit. We are unaware and unsure of what he is referring [to]. Please provide clarification as to the standard that he is referencing." Appeal File, Exhibit 17.

32. Mr. Mould testified that there was no "strength/durability" certification requirement for the line item four cargo bodies and further stated that he had not represented to Rowe that there was such a requirement. Transcript at 61-62, 71. Although Mr. Mould did remind Rowe about the requirement to establish that the body bulkhead was capable of withstanding a thirty pound impact from a 150 pound object, this does not amount to a requirement that Rowe certify to the structural integrity of the entire vehicle. Appeal File, Exhibit 22; Transcript at 55-62.

33. Upon receiving Rowe's letter requesting clarification of the "strength/durability" "certification requirement" the contract specialist attempted to confer with Mr. Mould, but was unable to contact him. Accordingly, she contacted Mr. Campbell and simply told him to comply with the contract requirements and any amendments thereto. Appeal File, Exhibit 18; Transcript at 233-34, 272.

34. On February 4, 1997, Mr. Mould visited Rowe's facility in Powhatan to inspect the vehicle to be furnished under line item number three. This vehicle was inspected and accepted. Mr. Mould also met with Mr. Muncie. He determined that one line item four vehicle had been received. Mr. Muncie could not say when the second one would be delivered, nor was he able to advise when the conversion process would begin on the vehicle presently at the facility. So far as Mr. Mould could ascertain, Rowe did not have the necessary component parts on hand to start the conversion process or begin construction of the cargo bodies. Rowe appeared to be considering using a subcontractor, Crenshaw Corporation, to manufacture and install one or both cargo bodies. In discussing the conversion process, Mr. Muncie and Mr. Mould talked about specifications. In particular, Mr. Muncie asked whether the contract requirement for continuous electrical shielding could be met by welding the floor to the walls. Mr. Mould agreed that this method of attachment would fulfill the specification requirement. No other questions concerning specifications were raised in this meeting. Appeal File, Exhibits 19, 22; Transcript at 59-61.

35. Following his February 4 visit to Rowe, Mr. Mould again recommended to the contract specialist that a show cause letter be issued to Rowe based on its failure to make

progress and failure to make timely deliveries with respect to line item number four. Appeal File, Exhibit 19. On February 6, 1997, a show cause letter was issued to Rowe. Id., Exhibit 20. The letter was drafted by Ms. Jordan, the contract specialist, and signed by Mr. Quinn, who was acting as Rowe's contracting officer following the departure of Ms. Gary. Ms. Jordan drafted the letter relying on the information in the contract file, as supplemented by information conveyed by the quality assurance inspector. Transcript at 235, 417, 421.

36. The show cause letter details the chronology of events leading up to the issuance of the modification to the contract, extending the time for shipment to December 26, 1996, and described Mr. Mould's two visits to the Rowe facility in January and February. The letter concludes with the statement that, because Rowe had failed to perform the contract according to its terms, GSA was considering terminating the contract for default. Rowe was afforded the opportunity to respond and to present any information bearing on whether the failure to perform arose from causes beyond the contractor's control and without fault or negligence on Rowe's part. Appeal File, Exhibit 20.

37. On February 18, 1997, Mr. Campbell sent a four page letter to GSA detailing his position with regard to the untimely deliveries of the two vehicles under line item four. The letter states that as of that date Rowe was in receipt of both chassis. Rowe then, for the first time, took the position that its current inability to deliver the converted vans was attributable to confusion concerning the proper interpretation of specification provisions. In particular, Rowe stated that there was doubt concerning the Government's intent to require it to perform some type of crash test in order to certify the cargo body strength of the vehicles and whether its proposed electrical shielding would suffice. Rowe also claimed that the quality assurance specialist (QAS) had instructed Rowe to delay manufacture of the cargo body until he had reviewed the line item four specifications. Rowe contended that the QAS's actions, and the contract specialist's failure to provide a written response to Rowe's letter of January 22, constituted a constructive suspension of the work and a change in the scope of the work. Appeal File, Exhibit 21.

38. Rowe added in this letter that these technical issues had caused it to decide to have the manufacture and installation of the cargo bodies performed by a subcontractor, but noted that until the technical issues allegedly introduced by Mr. Mould were resolved, the subcontractor could not complete performance. Finally, Rowe asserted that there are "5 to 10 minor items under the contract which required clarification, definition, acceptance, or a full change based on their conflict with each other. They range from a simple approval of the Celotex and Reflextex insulation to the government[']s definition of electrical shielding." Rowe then stated that these items would be addressed under separate cover and that a fifteen minute meeting with GSA's engineer should "clear all issues." Rowe further stated that once it received answers to its questions, the line item four vehicles would be ready for inspection within fifteen days. Appeal File, Exhibit 21.

39. Rowe's response to the show cause letter was reviewed by the contracting officer, Mr. Quinn, the contract specialist, Ms. Jordan, and the quality assurance specialist, Mr. Mould. All three were of the view that Rowe's response did not address the matters raised by GSA in the show cause letter. Their principal concerns were that the response did not adequately explain the failure to make timely deliveries or offer a firm assurance that Rowe would meet a specified completion date. The matters raised by Rowe, and particularly

the statement that the specifications needed clarification, were regarded as implausible and untimely. Appeal File, Exhibits 21-22; Transcript at 65, 236-37, 423-25.

40. Mr. Quinn then met with Mr. Mial, his supervisor, to confer on GSA's next step with respect to this contract. They recognized that termination for default was one option. Another avenue would be to allow Rowe to continue with performance after establishing a new firm delivery date with sufficient consideration. Mr. Mial suggested, however, that in light of Rowe's status as a small business, the SBA should be notified that GSA was considering default termination of the contract for failure to perform. Appeal File, Exhibit 22; Transcript at 426-28, 604-06. A letter to this effect was sent by GSA to SBA on March 3, 1997. This letter was signed by the newly appointed Director of the Automotive Commodity Center's Light Vehicles Division, and the replacement contracting officer for Rowe's contract, Doris Marsh. Appeal File, Exhibits 52, 134.

41. On March 6, 1997, Mr. Mould conducted a telephone conference with Mr. Campbell to discuss the production status of the line item four vehicles. Mr. Campbell advised that no production work had been done on either vehicle and stated that he could not propose a firm delivery schedule until GSA responded to his request for clarifications on some eight or nine issues. Mr. Campbell represented that he had sent a letter setting forth these issues on February 19 or 20, 1997. He said the clarification requests were generated by Rowe's intended subcontractors, Crenshaw Corporation and Morgan Corporation, which would be manufacturing and installing the cargo bodies. Appeal File, Exhibit 23; Transcript at 67-68.

42. Rowe received a quote from Crenshaw for the conversion of the line item four vehicles on March 3, 1997. Crenshaw proposed to deliver an aluminum van body having an inside height of 78 and 3/4 inches, with a subframe and rear frame made from steel. Although Rowe signed the quote on March 25, 1997, no approval signatures from Crenshaw are on the quote document. Appeal File, Exhibit 65.

43. On March 10, 1997, Rowe sent a letter to the contract specialist concerning the March 6, 1997, telephone conference with Mr. Mould. In this letter Rowe referred to another letter, dated February 19, 1997, describing the outstanding "issues" that Rowe had with the contract specifications. Since GSA had not received the February 19 submission, Ms. Jordan requested that Rowe fax a copy of this document. The letter, which sets forth a request for clarification of some eleven items, was received by GSA on March 11, 1997. The letter seeks clarification of the following items:

1. Does the vehicle require any specialized "electrical shielding" which is not currently part of the existing materials listing?

2. If the aluminum body acts as the shielding, do the doors and interior bulkheads require the same shielding?

3. The aluminum subfloor is not one piece. It is not possible to purchase this as one piece. Is this acceptable?

4. Is there a minimum required thickness of the finished sidewall? This is required to determine the size of the window frame.

5. Confirm that "rear door hardware" is the hinge and locking mechanism.

6. Is the Celotex insulation material acceptable?

7. Is aluminum, wood or some other material expected as the interior lining?

8. Will the government require the front wall to be relined with the same insulation and lining materials as the remaining walls?

9. Will the government request the front wall in the drivers compartment to be finished off with FRP, some other material, or just left plain?

10. The company is unaware of an aluminum body whose subframe and rear frame are not made of steel. Please document this clarification to ensure an acceptable inspection.

11. Do any of the requirements for temporary electrical mounting require additional wire lengths with the Rowe installation?

Appeal File, Exhibit 24.

44. Although the contracting officer viewed these requests for clarification as untimely, she forwarded Rowe's inquiries concerning the specifications to the engineering branch, which had been responsible for developing the line item four contract specifications. Transcript at 165-66, 310, 484-85, 618-19, 633. The letter was reviewed by Steven Dellinger in the engineering branch. His response to the contracting officer formed the basis for GSA's letter of April 4, 1997, addressing Rowe's request for clarifications. Id. at 340-41, 485-86; Appeal File, Exhibit 25.

45. Also on March 11, the contracting officer sent an electronic mail message to the contract specialist asking for the file on this Rowe contract and commenting that "we need to send [Rowe] a very strong letter stating our position." She further noted that she wanted to obtain answers to the clarification requests from the engineering staff as quickly as possible and that "at this point we do not want engineering to call the contractor to discuss these issues" because she wanted only "simple uncomplicated answers" that could be included in a letter to Rowe. Appeal File, Exhibit 138.

46. In a letter dated April 4, 1997, GSA requested that, by April 14, 1997, Rowe provide a "detailed time line for each step of the truck body production process and a firm completion date for these vehicles." In addition, Rowe was asked to furnish the complete address where the vehicles would be produced and inspected. Finally, Rowe was provided the following information in response to its eleven questions:

1. The specification does not require specialized "electrical shielding" that is not currently a part of the existing materials listing.

2. The specification does not require the same shielding for the doors and interior bulkheads.

3. The specification does not require the aluminum subfloor to be purchased as one piece.

4. The specification does not require a minimum thickness for the finished sidewall.

5. The rear door hardware is the hinge and locking mechanism.

6. The specification does not require Government approval of the insulation material.

7. The specification does not require interior lining except for the doors.

8. The specification does not require the walls to be lined.

9. The specification does not require a particular finish for the front wall in the drivers compartment.

10. The subframe and rear frame must be custom manufactured of aluminum.

11. The specification does not include a requirement for temporary electrical mounting.

Appeal File, Exhibit 25; Transcript at 486-87.

47. The contracting officer, Ms. Marsh, requested a new production schedule and shipping date because the previously established contractual delivery date of December 26, 1996, had passed and GSA had not yet taken action to terminate the contract. She was concerned that the lapse of time may have constituted a waiver of the timely delivery issue. Although she thought she could still terminate for failure to make progress, Ms. Marsh, having been newly assigned as the contracting officer on this contract, wanted to try to work with Rowe to get the contract completed. Transcript at 488-89.

48. On April 14, 1997, Rowe responded to GSA's April 4, 1997, letter by identifying its intended subcontractors and their locations, and proffering a schedule seeking some seventy days to complete the vehicle conversions. Rowe proposed that Morgan Corporation, in Morgantown, Pennsylvania, would manufacture the truck bodies "40 days after receipt of clarification." Crenshaw Corporation, in Richmond, Virginia, would complete installation of the bodies to the chassis "22 days after receipt of [t]ruck [b]ody."

Rowe would perform final production and have the vehicles ready for inspection "8 days after receipt of vehicle from Crenshaw Corporation." The letter then adds:

> We remain unclear as to what standards if any shall be imposed by the Government QAR as it relates to the company's certification of the structural integrity of the completed unit. In accordance with the QAR's statements, if there is a specific certification we will require it from our subcontractors, Morgan and Crenshaw Corporation. If there is none, please so state.

Appeal File, Exhibit 26.

49. Also on April 14, 1997, Morgan faxed to Crenshaw a letter stating that Morgan intended to furnish its standard commercial cargo body pursuant to its quote. The inside height of the body would be 78.75 inches, or 6.75 inches above the minimum requirement. The overall truck body height would be 120 inches, or thirteen inches higher than the maximum permitted by the applicable specification. The aluminum body would have steel frames, contrary to the specification's requirement that the subframe and rear frame be manufactured of aluminum. Morgan also asserted that it did not understand the specification requirement that the bulkhead be able to withstand a thirty mile per hour impact from a 150 pound round object and that Morgan would not comply with it.[2] Crenshaw forwarded Morgan's letter to Rowe. Appeal File, Exhibit 140.

50. On April 15, 1997, Rowe raised a new issue in another letter to the contracting officer. Rowe contended that the interior minimum body height of seventy-two inches was inconsistent with the maximum body height of 107 inches. According to Rowe, if the minimum interior height of seventy-two inches was met, the overall height of the completed vehicle would have to be at least 114 inches. Rowe asserted that the combined specifications were impossible to meet and requested that one of the requirements be relaxed. Appeal File, Exhibit 27.

51. Ms. Marsh referred Rowe's allegation of impossibility to Mel Globerman for his input. Transcript at 320, 492. Since 1987, Mr. Globerman has been Chief of the Engineering Commodity Management Branch within the Office of Vehicle Acquisition and Leasing Services for GSA's Federal Supply Service. He supervises a staff of about eight engineers and vehicle equipment specialists and analysts. His responsibilities include overseeing all engineering programs within the branch, including specifications, standards, and purchase descriptions for customized vehicles that may not be fully covered under an existing specification or standard. Id. at 306-07.

52. Mr. Globerman testified that he initiated a telephone discussion with Mr. Campbell. In this conversation, Mr. Globerman observed that under other contracts, for example, contracts for ambulances, which use the same base chassis and had the same type

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[2]The quality assurance specialist and the GSA engineer testified that had Rowe delivered completed line items having the body characteristics described by Morgan in this letter, GSA would have had to reject them. Transcript at 77-80, 350-51.

of dimensions and height limitations, contractors had been able to meet the stated requirements without seeking a relaxation of the specifications. Mr. Globerman also told Mr. Campbell how Rowe could meet both the internal and external height requirements and recalled furnishing materials from the Ford body builder's manual for guidance in this regard. Mr. Globerman also testified that he knew from personal experience that it is possible to achieve the minimum internal height requirements as well as the maximum external height requirements in these vehicles. He commented that perhaps Rowe wanted to buy a standard body from a particular subcontractor and that the resulting height of the cargo box on the chassis would not meet the specification.[3] Transcript at 321-24; see Appeal File, Exhibit 66.

53. Mr. Globerman further explained, at the hearing, that these vehicles were being procured for the Federal Communications Commission and would be equipped with sensitive electronics equipment. The modifications to the specification were intended to produce the equivalent of a screening room, shielding the interior of the vehicle from extraneous electronic signals. Transcript at 334-35. The requirement that the bulkhead be capable of withstanding a thirty mile per hour impact from a 150 pound object was included for safety reasons. While the electronic equipment, some of which may be relatively heavy, is secured to racks and other mountings in the cargo body, should there be an accident, the mountings could potentially tear loose, allowing the equipment to hit the bulkhead and possibly injure or kill the driver and other occupants of the vehicle. There are various ways of demonstrating that this requirement has been met. For example, the contractor could provide a pure engineering analysis based on the materials used in the cargo body or, alternatively, the contractor could do a physical mock-up and perform actual testing. Id. at 336-37.

54. Mr. Globerman contacted the contracting officer and explained his disagreement with Mr. Campbell's assertion that it would be impossible simultaneously to comply with the internal and external height requirements. Ms. Marsh recalled that Mr. Globerman told her he had also explained to Mr. Campbell that one means of reconciling the two height requirements was through the use of wheel wells, which would allow the interior floor to be dropped so as to permit the external height to stay within the specified maximum. Transcript at 492, 569. This approach is consistent with Federal Standard 307X. In fact a picture of a modified Type IX cutaway vehicle having wheel wells is depicted in this standard. Finding 7; Appeal File, Exhibit 2; Transcript at 72-73, 315.

55. In essence, Mr. Globerman's calculations are based on the Ford body builder's manual. Mr. Globerman noted at the hearing that a Ford chassis has an unloaded height of 30.5 inches. This dimension included four inches to accommodate the mounting of the cargo body to the frame. Some manufacturers elect to substitute their own mounting mechanism for the one provided by Ford, potentially saving an inch on height, which would reduce the unloaded height to 29.5 inches. The cargo body's floor is required to be a layer of plywood that is .75 inches in thickness. The floor must also have a .5 inch layer of foam insulation and a layer of aluminum sheet metal approximately .06 inches thick. The floor is thus 1.3 inches thick, which, added to the unloaded height of 29.5 inches, increases the height to 30.8

[3]This observation is supported by correspondence indicating that Rowe's intended subcontractor, Morgan, proposed to use a standard cargo body to build up a vehicle with an overall height of 120 inches. Appeal File, Exhibit 66.

inches. Adding the seventy-two inch interior height for the cargo box brings the height to 102.8 inches. Assuming approximately one inch of space to accommodate the roof's thickness, the cargo body is well within the maximum external height of 107 inches.[4] Appeal File, Exhibits 1, 157; Transcript at 375, 380-85.

56. In a letter dated April 17, 1997, the contracting officer responded to Rowe's April 14, 1997, letter, proposing a production schedule based on the receipt of clarification of the contract terms. In her letter, the contracting officer informed Rowe that an extension of the contract delivery date by some seventy days was unacceptable in light of Rowe's prior representations to GSA that it could complete vehicle conversion within two weeks of receipt of the chassis. She also pointed out that Rowe had neglected to propose a firm completion date as GSA had requested. Accordingly, Ms. Marsh unilaterally established a new completion date of May 14, 1997, which accorded Rowe an additional twenty-seven days to achieve contract performance. She also responded to Rowe's April 15 letter, informing Rowe that the vehicles would be required to meet the existing specification requirements for internal and external height dimensions. Rowe would not, however be required to certify to the structural integrity of the vehicle as this was not a contract requirement. Appeal File, Exhibit 28; Transcript at 493-96.

57. At the hearing, respondent elicited testimony from Ms. Betty Borelli, who is employed by Carter Chevrolet, a company that frequently supplies vehicles similar to those in the subject litigation. Ms. Borelli has been employed by Carter for twenty-two years and has been the director of government contracting for about eighteen years. In this capacity, she oversees the bidding process, including the preparation of bids, and oversees all contracts that are awarded to the company, including the production process. Transcript at 728. When Ms. Borelli prepares a bid for one of these contracts she usually reviews the specifications herself and also sends them to a body subcontractor for a quote and a time frame for production. Id. at 734-35, 738.

58. Ms. Borelli also attested that she is generally familiar with contracts for cutaway vans similar to the one at issue, and had reviewed the specifications for this contract. She did not consider the specifications to be ambiguous. She further stated that in her experience it is possible to build a vehicle meeting the height restrictions set forth in the subject specification, because Carter had built many such vehicles for the Air Force over the years. In fact, the dimensions for the Air Force were stricter with respect to the maximum height requirement. She also confirmed with her supplier, Grumman Olsen, that these measurements had been met in the past. Transcript at 729-30.

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[4]Mr. Globerman contacted Wheeled Coach, another contractor that performs similar conversions of the Ford E350 chassis. He asked Wheeled Coach to verify his analysis that the two height restrictions could be met. On July 15, 1997, Wheeled Coach provided a response that addressed floor loading heights, which would be a major factor in determining the overall height of the vehicle. Wheeled Coach confirmed that its vehicles have a height of 30.5 inches from the ground to the finished floor. Transcript at 325-26; Appeal File, Exhibit 56.

59. Ms. Borelli stated that, based on her many years of submitting bids in similar government procurements, the clarification requests submitted by Rowe should have been brought up prior to contract award. Transcript at 738.

60. Ms. Borelli further testified that once the chassis have arrived, it should take approximately two to three weeks to attach or build a cargo body and deliver a finished vehicle. Thus, in her opinion, the twenty-seven day period for delivery established by the contracting officer was reasonable and should have permitted adequate time to allow for completion of the contract. Transcript at 733-34.

Subsequent Events Leading to Default Termination

61. On May 13, 1997, the quality assurance specialists contacted Crenshaw Corporation to ascertain the production status of the vehicles. He was told that the manufacture and installation of the cargo body was not underway because Crenshaw had not received final clarification regarding the vehicle height requirements. The vehicle conversions were to be performed by Morgan and the chassis had been transferred to Morgan's facility in Morgantown, Pennsylvania. Appeal File, Exhibit 55; Transcript at 81.

62. On May 14, 1997, Mr. Mould recommended that Rowe's contract be terminated for default because of 1) its failure to deliver in a timely fashion, 2) its failure to make progress with contract performance, and 3) its failure to advise GSA of changes in actual production and inspection points. Appeal File, Exhibit 55; Transcript at 81-82.

63. Also on May 14, Rowe participated in a telephone conference with the contract specialist. In this conversation, Rowe asserted that it was still awaiting a contract modification increasing the allowable height of the vehicle and that if the modification was delayed, Rowe would miss the reestablished delivery date. Appeal File, Exhibit 29.

64. The contracting officer determined, based on Rowe's repeated failure to make timely delivery of the vehicles and its pattern of waiting until just before shipment due dates to raise new issues for clarification, all of which, in her view, had been fully addressed either before or in GSA's letter of April 17, 1997, that the contractor's failure to perform under the contract was not excusable. In accordance with this decision, the contractor's right to proceed under the contract with respect to line item four was terminated by letter dated May 14, 1997. Appeal File, Exhibit 29.

65. Prior to reaching the decision to terminate Rowe's contract with respect to line item four, Ms. Marsh reviewed the contract file. Ms. Marsh and Ms. Jordan reviewed the regulations and applicable law. Transcript at 501-03, 552-53. The contracting officer's review included all of the factors identified in Federal Acquisition Regulation 49.402-3(f). In particular, Ms. Marsh reviewed "the essentiality of the contractor" as a source of supplies for the Government and also considered the financial effect on the contractor but did not consider that these factors were particularly relevant to her decision. Transcript at 504-10, 553-60. Using her independent judgment, the contracting officer determined that, under the circumstances, a default termination would be in the best interest of the Government. Id. at 502-03.

66. This contract line item was not reprocured. Prior to terminating the contract, GSA contacted the Federal Communications Commission, the intended customer, to determine if it still needed the vans. The agency responded that it no longer needed the vehicles. Transcript at 503-04.

67. On May 29, 1997, Rowe appealed the termination decision to the Board. Rowe maintained in its notice of appeal that the delays in meeting delivery dates were beyond its control and without its fault or negligence. Specifically, Rowe claimed that the delays and disruptions experienced in contract performance were attributable to defective specifications, design changes, untimely clarifications from the Government, and inconsistent directions received from GSA personnel. Appeal File, Exhibit 30.

Discussion

Rowe contends that the delays that occurred in contract performance with respect to the line item four vans were attributable to factors that were outside of its control and, in particular, to Government action and inaction in responding to its requests for clarification and design modifications. Because of this, Rowe asserts, the default termination should be converted to one for the convenience of the Government.

It is well settled that the burden of proving the propriety of a default rests with the Government, while the contractor bears the burden of establishing the excusability of non-performance. See, e.g., DCX, Inc. v. Perry, 79 F.3d 132, 134 (Fed. Cir.), cert. denied, 519 U.S. 992 (1996); Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 764 (Fed. Cir. 1987); Switlik Parachute Co. v. United States, 573 F.2d 1228, 1232-33 (Ct. Cl. 1978); CardioMetrix v. Department of the Treasury, GSBCA 13462-TD, 97-1 BCA ¶ 28,775, at 143,602; Sierra Tahoe Manufacturing, Inc. v. General Services Administration, GSBCA 12679, 94-2 BCA ¶ 26,771, at 133,157; Arctic Refrigeration & Air Conditioning, Inc., GSBCA 8073, 87-3 BCA ¶ 20,078, at 101,655.

The Government's Prima Facie Case

GSA maintains that the termination for default of line item four of the contract was proper because appellant failed to deliver the line item four vans within the time specified by the contract or any of the revised delivery schedules. The evidence unequivocally establishes that this is the case -- appellant failed to deliver the vans within the time frames dictated by the contract and subsequent extensions granted by the contracting officer. The evidence further shows that the original delivery schedule and the revised delivery schedule implemented by the first contracting officer, Ms. Gary, were not promptly enforced by the Government. Because of this, the successor contracting officer, in April 1997, was concerned that GSA may have waived the previous delivery dates. She thus decided that she should establish a new delivery date that GSA could properly enforce. In a letter to Rowe, dated April 17, 1997, the contracting officer fixed May 14, 1997, as the new date for performance.

Ordinarily, time is considered to be of the essence in a contract for supplies and failure to deliver by the specified due date would justify a decision to terminate for default. See, e.g., General Cutlery v. General Services Administration, GSBCA 13194, 96-1 BCA

¶ 27,957. When the Government, by failing to exercise its right to terminate the contract within a reasonable time after the contractor misses the delivery date, however, waives or disregards the delivery schedule, the Government must reestablish a contractual delivery schedule making time again of the essence in order to regain its right to terminate the contractor for default on the ground of failure to deliver. To accomplish this, the Government is obliged either to (a) reach agreement with the contractor on a new delivery schedule or (b) give the contractor notice setting a specific new time for performance, which must be reasonable at the time the notice is given. International Telephone & Telegraph Corp. v. United States, 509 F.2d 541, 547-48 (Ct. Cl. 1975); DeVito v. United States, 413 F.2d 1147, 1154 (Ct. Cl. 1969); Bailey Specialized Buildings Inc. v. United States, 404 F.2d 355, 359-60 (Ct. Cl. 1968); Lanzen Fabricating, Inc., ASBCA 40328, 93-3 BCA ¶ 26,079, at 129,608-09. After establishing a new delivery date, the Government may then terminate the contract in the event the contractor fails to deliver in accordance with the new schedule. See W.S. Jenks & Son, GSBCA 10278, et al., 91-3 BCA ¶ 24,262; Papco Tool Corp., GSBCA 5679, 81-1 BCA ¶ 15,077.

Here, although GSA overlooked Rowe's failure to meet two previously established delivery dates, thereafter, GSA established a new delivery date of May 14, 1997, and terminated line item four of the contract immediately when Rowe failed to make delivery of the vans on that date. The issue remaining, then, is whether the new delivery date of May 14, 1997, implemented unilaterally by the contracting officer in April 1997, was reasonable. The schedule set must be reasonable "from the standpoint of the performance capabilities of the contractor at the time the notice is given." International Telephone & Telegraph Corp., 509 F.2d at 549; Oklahoma Aerotronics, Inc., ASBCA 28006, et al., 87-2 BCA ¶ 19,917, aff'd, 852 F.2d 1293 (Fed. Cir. 1988) (table). This is, nonetheless, an objective determination to be made based on the facts and circumstances of each case:

> Invariably, "reasonableness" is a matter to be determined objectively by the trier of fact, in weighing various factors established by the evidence. Among the factors always to be considered when determining the reasonableness of a delivery schedule unilaterally set by the Government are the actual situation of the contractor and its performance capabilities at the time notice of new delivery dates is given. Nevertheless, these factors, albeit important, are not paramount and their consideration does not, as argued by appellant, turn the determination of reasonableness into a subjective test.
>
> To the contrary, giving conclusive weight to the contractor's subjective situation would, if carried to its logical conclusion, result in a reductio ad absurdum, foreclosing entirely the reestablishment of a delivery schedule once waived after breach whenever the contractor, through circumstances within its control, deliberately or through its fault or negligence, becomes totally incapable of rendering the originally promised performance. Therefore, the subjective condition of the contractor is not the overriding consideration in determining the reasonableness of a reestablished delivery schedule.

Computer Products International, Inc., ASBCA 26130, et al., 83-2 BCA ¶ 16,889, at 84,050 (citations omitted).

We turn, then, to an assessment of whether the delivery date established in the contracting officer's letter of April 17, 1997, was realistic given the information available to GSA. We find that it was. In an earlier letter GSA had asked Rowe for a detailed time line of the production process for adding the cargo body to the chassis and for a firm completion date. Rowe responded with a letter stating that it needed seventy days to deliver completed units, but tendered no explanation as to why this amount of time was necessary or why it could not complete this task in the approximate two-week period it had previously requested on two separate occasions. The contracting officer testified that she considered a variety of factors in establishing the May 14 delivery date, including the recent correspondence in which Rowe asserted that it had the chassis and would be in a position to make the units available for inspection and shipment within fifteen days after receiving GSA's response to certain clarification questions. The clarification questions were addressed by GSA in full with the issuance of the April 17 letter establishing May 14 as the firm completion date.[5] In addition to allowing the fifteen days Rowe had previously said it needed, the contracting officer added another twelve days, for a total of twenty-seven days, to ensure flexibility in the schedule. Rowe did not object to the new date after it received the contracting officer's letter.[6] The record supports the conclusion that other contractors could have accomplished delivery within the time accorded. See Finding 60. Considering all of this evidence, we conclude that GSA has met its burden to show that the date unilaterally reestablished by the contracting officer was reasonable.

Appellant nonetheless failed to comply with the May 14 delivery date, and at the time of the termination, GSA had no reason to believe that appellant would deliver vans within any reasonable time frame. There is no evidence that appellant was attempting to manufacture the vans at the time of termination; rather, appellant was continuing to assert objections to the specifications and had not even undertaken to provide its subcontractors with the clarifications received from GSA. We thus conclude that the Government has established a prima facie case that it properly terminated line item four of the contract for default.

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[5]With one exception, on April 4, 1997, GSA responded in writing to Rowe's requests for clarification. The exception concerned Rowe's confusion over the requirement that the cargo body bulkhead be capable of withstanding a thirty mile per hour impact from a 150 pound object. This issue was addressed by the contracting officer in the April 17, 1997, letter reestablishing a firm delivery date for the line item four vans. The contracting officer unequivocally informed Rowe that it was not required to certify to this.

[6]As noted by this Board in Aargus Poly Bag, GSBCA 4314, et al., 76-2 BCA ¶ 11,927, at 57,181, in resolving the merits of a disagreement over whether a new delivery date is reasonable, significance may be attached to the fact that the contractor did not complain that the date was unrealistic at the time it was established. Cf. L. W. Schneider, Inc., ASBCA 45181, et al., 95-2 BCA ¶ 27,774, aff'd, 98 F.3d 1359 (Fed. Cir. 1996) (board observed that appellant did not take exception to Government's unilaterally imposed schedule; board consequently did not question its reasonableness).

Appellant's Case for Excusable Delay

Having determined that GSA has met its initial burden to justify the termination action, we address Rowe's claimed justifications for the delays experienced in making deliveries. Rowe contends that the circumstances preventing timely delivery of the vans were beyond its control and without its fault or negligence. These include claimed ambiguities in the contract; defective specifications leading to impossibility of performance; and Government-caused delays. Rowe also contends that procedural defects, notably failure to comply strictly with procedures enumerated in the default provisions of the FAR, such as GSA's failure to notify the agency small business specialist, failure to notify the surety, and failure to provide a copy of the cure notice to the SBA's regional office, invalidate the action taken. Further, Rowe maintains that GSA neglected to consider the degree of essentiality of the contractor in the Government's acquisition programs and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

Although Rowe suggests that the specifications contained defects for all the line items awarded under this contract, it is particularly critical of the specifications for line item number four. Rowe bought the Ford chassis stated in the specifications to be a representative vehicle for this item, Finding 7, but, according to Rowe, it was not possible to build the end product using this chassis and still comply with the height specifications. Principally, Rowe contends that the internal and external height restrictions were incompatible and that the responses provided to its request for relaxation of the height requirements for this chassis, and clarification of the requirement that the vans withstand the impact of a 150 pound object traveling at thirty miles per hour, were inadequate. Rowe was unwilling to undertake the effort to try to build the cargo bodies on the vans only to fail inspection when it could not satisfy these standards. Implicit in Rowe's argument is that it would be impossible, or commercially impracticable, to perform the contract in compliance with these specifications.

The Board has recognized that the "failure of a contractor to comply with defective specifications may not serve as the basis for a default termination because by writing those flawed directions, the Government has made performance in accordance with them impossible." American Power, Inc., GSBCA 8752, 90-2 BCA ¶ 22,811, at 114,556. That is, if the Government specifications are faulty and cause the contractor problems, the general rule is that the Government is liable--under an implied warranty theory--for any resulting delay or expense caused to the contractor. United States v. Spearin, 248 U.S. 132 (1918); J.D. Hedin Construction Co. v. United States, 347 F.2d 235 (Ct. Cl. 1965). In essence, the Government guarantees that the specifications, if followed, will result in work that can be produced and performance requirements that can be attained. To establish an excuse for nonperformance or an excusable delay based on defective specifications, a contractor bears the burden of proving (1) that there is a defect in the specifications, (2) that the contractor's difficulties were caused by the defect, and (3) that the defect affected the contractor's performance in such a way that entitles the contractor to an extension of time or an excuse for stopping the performance. Wild Wood Associates, Inc., AGBCA 96-150-3, 97-2 BCA ¶ 29,263, at 145,590.

With regard to the conflicting interior and exterior heights issue, however, we note that GSA's engineer carefully explained at the hearing how the internal and external height

requirements could be reconciled with the use of wheel wells. Findings 52-55. His testimony was corroborated by an industry witness.[7] We found his testimony to be both credible and persuasive. Although Rowe vigorously disagrees with the engineer's calculations and his assessment that the specifications are technically feasible,[8] there is little in the way of credible rebuttal evidence provided by Rowe other than its allegation that the requirements are inherently in conflict. Although Rowe has submitted materials from Ford's body building manual that it believes show that the specification cannot be met, these materials do not make this point clearly and do not suffice to counter the testimony provided by GSA and the witness from Carter Chevrolet.

GSA, in responding to this argument, points out that the specifications were available for review at the time the solicitation was issued and that GSA, through the quality assurance specialist, reviewed the specifications with Rowe several times prior to award and shortly thereafter. At no time prior to bidding did Rowe suggest that the specifications for the vans were unclear or defective. Rowe's questions arose when it finally arranged for subcontractors to provide the cargo bodies, and the questions appear to be based on the fact that the height specification could not be met using the standard boxes sold by these companies. This, as GSA points out, does not make the specification impossible of performance, or even impracticable. Thus, GSA maintains that the complaints, even if valid, were untimely raised and should not suffice to make Rowe's default excusable.

More importantly, GSA contends, the allegations about the specifications are not valid. It fully addressed Rowe's clarification questions shortly after they were received, and the testimony of record demonstrates that the specifications were clear and capable of being implemented. The real problem appears to be that Rowe did not want to meet the specifications because it would have required paying the subcontractors it selected to customize the conversion process, rather than to use their standard boxes. This does not establish that the specifications were either defective or impossible to meet. For a technical specification to be actually impossible of performance means that the contract requirements as stated cannot be met by any contractor. In other words, the test is an objective one, not a subjective one. Koppers Co. v. United States, 405 F.2d 554, 565-66 (Ct. Cl. 1968). Rowe has not shown by a preponderance of the evidence that neither it nor any other contractor

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[7]Rowe states that the testimony of Carter Chevrolet's employee should be disregarded because she is not an engineer. Ms. Borelli was, however, familiar with the requirement from procurements that her company participated in and attested that her company had been able to meet the requirement using the approach described by Mr. Globerman. Her testimony that Carter Chevrolet could produce a vehicle that complied with this particular specification suffices to support Mr. Globerman's expertise as an engineer and is consistent with his testimony that the specification is not impossible to meet from a technical standpoint.

[8]Rowe also criticizes Mr. Globerman's expertise on the ground that he has little or no experience in production. Be this as it may, Mr. Globerman established that he has many years of experience overseeing the specifications used by GSA for these vehicles and providing technical support to GSA on similar contracts for comparable vehicles and has the requisite familiarity with these vans to provide a cogent explanation of how the specification can be met.

would have been able to meet or achieve these technical specificationss. To the contrary, we have the testimony of two knowledgeable witnesses that the requirement can be and has been met, supporting the conclusion that the specifications are neither technically impossible nor commercially impracticable to achieve. It is well-settled that if other contractors are able to perform the same or similar contracts, nonperformance will not be excused. Pauley Petroleum, Inc. v. United States, 591 F.2d 1308 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979).

Similarly, Rowe complains that it did not have adequate guidance from the agency concerning the meaning of the requirement that the bulkhead be able to withstand the impact of a 150 pound object at thirty miles per hour. Rowe asserts that the QAS said it would have to certify that the cargo body met this requirement, which Rowe apparently construed to mandate a certification to the structural integrity of the cargo body. Regardless of any misunderstandings that may have been generated in the course of the QAS's visits to Rowe's facility, GSA addressed Rowe's concerns about this in its letter setting a new completion date. In this letter GSA made it clear that the contractor would not be required to certify to the structural integrity of the cargo body. Finding 56.

Once Rowe memorialized its clarification requests and furnished a copy to the agency, it received a prompt response. Although Rowe regarded certain communications from the quality assurance specialist as tantamount to a stop-work order,[9] the record does not support appellant's argument that the Government delayed it for any significant period of time. In any event, even allowing that appellant might reasonably wait until receiving responses to its request for clarifications to resume performance, once those clarifications were forthcoming, appellant had no further justification for failing to complete the cargo body conversions within the time established by the contracting officer. Having determined that the complained of specifications are neither defective nor ambiguous, nor impossible of performance, we conclude that Rowe has not met its burden to show that its failure to perform was excusable.

Procedural Defects

Rowe also argues that the contracting officer's default termination was improper due to various procedural defects. Specifically, Rowe asserts that GSA failed to consult with

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[9]In particular, Rowe refers to an apparent communication from Mr. Mould in January 1997 to the effect that it should schedule another review of the specifications with him prior to undertaking to build cargo bodies onto the chassis. Appeal File, Exhibit 134. Even if it was reasonable in January for Rowe to believe that it was required to do this, there is no indication that Mr. Mould would not have promptly scheduled a review with Rowe once notified that it was ready to begin conversion of the vans. Indeed, Mr. Mould indicated that he conducted such a review with one of Rowe's employees in early February and again offered assistance if needed once a subcontractor was found. Id.; Finding 34. Certainly, by April, when the contracting officer formally responded to the clarification requests and reestablished a schedule, it should have been clear that GSA expected Rowe to proceed forthwith. Notably, at the time of termination, Rowe does not appear to have made any additional effort to move forward with contract work after receipt of the contracting officer's April 17 letter.

SBA or the GSA small business specialist and neglected to notify Rowe's surety. It is well established that, when reviewing the propriety of a default termination, we must determine whether the contracting officer reasonably exercised his or her discretion to ensure that the termination was neither arbitrary nor capricious. A termination that is found to be arbitrary or capricious must be converted to one for the convenience of the Government. Darwin Construction Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987). Having said this, however, certain deficiencies, even if proven, will not necessarily operate to invalidate an otherwise proper default termination in the absence of a showing by appellant that the deficiencies were prejudicial. Rowe v. General Services Administration, GSBCA 14136, 00-1 BCA ¶ 30,668, at 151,466-67 (1999), aff'd, No. 00-1277 (Fed. Cir. Mar.15, 2001).

The main deficiencies cited by appellant essentially involve FAR provisions encouraging consultation with SBA and with the agency small business specialist prior to implementing a default termination of a contract with a small business. 48 CFR 49.402-3(e)(4). First, GSA had previously put SBA on notice that it was considering a partial default termination of the contract. Nothing in the record indicates that SBA objected to GSA's taking this action. Second, the requirement to notify SBA and the agency small business specialist of a pending default termination does not provide a basis for relief. The requirement is imposed for informational purposes. The contracting officer is not constrained to obtain a response from SBA or from the small business specialist before terminating a contract for default. S & W Associates, DOT CAB 2633, 96-2 BCA ¶ 28,326, at 141,454; McQuiston Associates, ASBCA 24676, 83-1 BCA ¶ 16,187, at 80,441. Appellant has not shown how the subsequent omission harmed it.

In this same vein, Rowe also contends that the failure of the contracting officer to consult with the small business specialist in accordance with FAR 49.402-3(e)(4) renders the termination procedurally defective. However, consultation with the small business specialist is not a mandatory requirement. The contracting officer need do so only if it is "practicable." While there is no evidence that it was not practicable to consult with the small business specialist, appellant has not shown that this omission prejudiced it. Consequently, we conclude that the failure to consult with the small business specialist did not affect the propriety of the termination for default. S & W Associates, 96-2 BCA at 141,455; AIW-Alton, Inc., ASBCA 45032, 96-1 BCA ¶ 28,232, at 140,980. Similarly, we see no reason why failure to notify Rowe's surety would invalidate an otherwise justified termination for default action.

Overall, we find that the contracting officer properly considered all of the factors specified in FAR 49.402-3(f) and reasonably exercised her discretion to default terminate line item four of the contract. She testified persuasively that she reviewed the entire contract file and came to this conclusion on her own. She was not instructed to take this action by her supervisor or by anyone else in GSA. Moreover, the contracting officer was not required, merely because the contractor was a small disadvantaged business and the default termination action might adversely affect its ability to perform under other contracts, to afford more lenient treatment to the contractor. The decision to terminate for default was not made arbitrarily or capriciously, nor did it constitute an abuse of discretion. See Consolidated Industries, Inc. v. United States, 195 F.3d 1341 (Fed. Cir. 1999).

Finally, Rowe suggests that the termination for default was improper in light of GSA's awareness that the customer for these two vans no longer had a need for these items. This, too, is not a factor that mandates invalidation of the termination decision. A justified termination for default does not lose its validity because the Government no longer has need for the item being purchased. This would be the case even if the lack of need for the items to be produced is part of the motivation for the termination, which has not been demonstrated here. See, e.g., Jerry W. Ikard, ASBCA 37405, et al., 96-2 BCA ¶ 28,577, at 142,644-45; H&R Machinists Co., ASBCA 39655, 90-3 BCA ¶ 22,948, at 115,206; R & O Industries, Inc., GSBCA 4800, 80-1 BCA ¶ 14,195, at 69,875 (1979).

Having thoroughly examined the record and considered all of appellant's arguments, we conclude that the termination for default was proper.

Decision

The appeal is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ANTHONY S. BORWICK
Board Judge