BUTLER FORD,	)	**AGBCA No. 98-188-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Thomas C. Howser	)	
Thomas C. Howser, P.C.	)	
P.O. Box 640	)	
Ashland, Oregon 97520	)	
	)	
Representing the Government:	)	
	)	
Daniel N. Hylton	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
Room 3311 South Building	)	
1400 Independence Ave, S.W.	)	
Washington, D.C. 20250-1415	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

June 27, 2001

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

This appeal arose under Contract No. 53-6395-6-22 (the contract) between Butler Ford of Ashland, Oregon (Appellant), and the U. S. Department of Agriculture, Animal and Plant Health Inspection Service, Minneapolis, Minnesota (Respondent or APHIS). The contract was for the commercial leasing of vehicles. The appeal was received at the Board August 10, 1998, as a "deemed denial" of Appellant's claims for $241, 578.37 for what Appellant termed "inactivity under the contract" and $2,867.47 for damages to a stolen vehicle. The claim for damages to the stolen vehicle was later granted by the Contracting Officer (CO) and is no longer at issue. After docketing and the filing of pleadings, Appellant restructured its claim and filed an amended complaint. The Board concluded that the amended complaint included claims not previously presented to the CO. Subsequently, those claims were presented to, and denied by the CO. The Board conducted a hearing in Medford, Oregon, on November 29 and 30, 2000. At issue were three claims: (1) a claim for lost revenue under Federal Acquisition Regulation (FAR) clause 52.217-2, CANCELLATION OF ITEMS, Alternate 1 (APR 1984) in the amount of $241,578.37; (2) a claim for lost revenue resulting from the Government's return of vehicles to Butler Ford prior to September 30, 1996, in the amount of

$68,552.49; and, (3) a claim for lost revenue in the amount of $318,911.25 for vehicles ordered from the General Services Administration (GSA) during the effective period of the APHIS contract with Appellant. The appeal is denied. The Board has jurisdiction to decide this appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACT

1. The U. S. Department of Agriculture, APHIS, issued Request for Proposal (RFP) No. 22-M-APHIS-96 October 25, 1995, for the rental of specified types of vehicles for a base period beginning on the later of December 11, 1995, or the date of award and continuing through September 30, 1996. The RFP also provided for Option Period I of October 1, 1996 through September 30, 1997. Information regarding term and pricing of the then current contract with Allstate Rent-A-Car of Las Vegas, Nevada (Allstate), was included in the RFP. (Appeal File (AF) 223-28, 233-34.) The Allstate contract was to expire December 10, 1995. At some point during the solicitation period for this contract, a modification was issued to extend the Allstate performance period through February 29, 1996, or until a follow-on contract had been awarded and a phase-in phase-out period completed (AF 286).

2. FAR 16.105 "Solicitation provision" provides that except in specified circumstances not here relevant, the CO shall complete and insert in a solicitation the provision at 52.216-1, Type of Contract. Section L of the RFP contains FAR 52.216-1, TYPE OF CONTRACT (APR 1984), stating that the Government contemplates award of a firm-fixed price indefinite quantity contract resulting from this solicitation. (AF 282.)

3. FAR 16.506, "Solicitation provisions and contract clauses," subparagraph (a) requires insertion of FAR clause 52.216-18, "Ordering," in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated. FAR 16.506(c) requires insertion of FAR clause 52.216-20, "Definite Quantity" when a definite quantity contract is contemplated. FAR 16.506(d)(1) requires the CO to insert FAR clause 52.216-21, "Requirements," where a requirements contract is contemplated. FAR 16.506(d)(e) requires insertion of FAR clause 52.216-22, "Indefinite Quantity," when an indefinite quantity contract is contemplated.

4. At Section I.3, the contract contains FAR 52.216-18, ORDERING (APR 1984). It contains neither FAR 52.216-20, "Definite Quantity" nor FAR 52.216-21, "Requirements" nor FAR 52.216-22, "Indefinite Quantity." Paragraph (a) of the ORDERING clause provides that any supplies and services to be furnished under the contract shall be ordered by issuance of delivery orders and that such orders may be issued from the date of award through September 30, 1996 (September 30, 1997, if renewal option is exercised). (AF 250.)

5. Section I.4 of the contract contains FAR 52.216-19, DELIVERY-ORDER LIMITATIONS (APR 1984), which reads as follows:

(a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than 1 vehicle, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

(b) Maximum order. The Contractor is not obligated to honor–

(1) Any order for a single item in excess of 30 vehicles;

(2) Any order for a combination of items in excess of 50 vehicles; or

(3) A series of orders from the same ordering office within 5 days that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.

(c) If this is a requirements contract (i.e., includes the Requirements clause at subsection 52.216-21 of the Federal Acquisition Regulation (FAR)), the Government is not required to order a part of any one requirement from the Contractor if that requirement exceeds the maximum-order limitations in paragraph (b) above.

(d) Notwithstanding paragraphs (b) and (c) above, the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within 2 days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, the Government may acquire the supplies or services from another source.

(AF 250-51.)

6. FAR clause 52.217-2, CANCELLATION OF ITEMS (APR 1984) Alternate 1 (APR 1984) was incorporated by reference into the contract (AF 247). Paragraph (a) of the clause reads as follows:

(a) As used herein, the term "cancellation" means that the Government is canceling, pursuant to this clause, its anticipated requirements for items as set forth in the schedule for all program years subsequent to that in which notice of cancellation is provided. Such cancellation shall occur if, by the date of within the time period specified in the schedule or such further time as may be agreed to, the Contracting Officer (1) notifies the Contractor that funds will not be available for contract performance for any subsequent program year or (2) fails to

> notify the Contractor that funds will be available for performance of a requirement for the succeeding program year. "Cancellation" shall also be deemed to have occurred if, upon expiration of the final program year, the Government has failed to order the specified items in quantities up to the aggregate Best Estimated Quantity set forth in the Schedule. Following cancellation under this clause of any program year(s), the Government shall not be obligated to issue nor the Contractor to accept any further orders under this contract.

(AF 394-95).

7. The contract also contains Agriculture Acquisition Regulation (AGAR) 452.216-73, MINIMUM AND MAXIMUM CONTRACT AMOUNTS (FEB 1988), reading as follows:

> During the period specified in FAR clause 52.216-18 ORDERING, the government shall place orders totaling a minimum of 0 vehicles, but not in excess of 450 vehicles.

(AF 234.)

8. Section C.1, SPECIFICATIONS/STATEMENT OF WORK, describes the need for the vehicles as being in support of the Cooperative Medfly Program in the State of California, primarily the Los Angeles area. It also provides that the quantities in the Schedule represent the immediate needs of the Cooperative Medfly Program and that "additional vehicles may be ordered and returned throughout the contract period." Only the CO's Representative (COR) or USDA representative authorized in writing by him may order vehicles against the contract. Vehicles were required to have California license plates and comply with all applicable federal, state and local [regulations] (i.e., emissions, etc.). Vehicles were required to be "no more than 24 months old and have no more than 25,000 miles when delivered to the Government." Section C.1 addressed the order and return of vehicles, providing that vehicles shall be inspected as to condition at the time of delivery and pick-up/return. The Government shall provide the Contractor with a minimum of 5 days notice to pick-up vehicles. Monthly invoices shall include the following minimum information: - Rental period (beginning and ending date for each vehicle) and beginning and ending odometer reading.

9. Section B.1, SCHEDULE OF ITEMS - BASE PERIOD, of the Solicitation indicated that the estimated immediate needs per month were 115 compact shortbed trucks with automatic transmission; 115 fullsize shortbed trucks with automatic transmission; 70 4x4 shortbed trucks with automatic transmission; and, 24 4-door compact sedans with automatic transmission. (AF 235.) In a January 16, 1996 letter which also confirmed a telephone conversation with Appellant's representative, Michael J. Concannon on the previous "Friday afternoon," the CO requested best and final offers by January 22, 1996. The CO confirmed a revision in estimated quantities for Sections B.1 and B.2 discussed during the call. No compact trucks were required at that time. The estimate for fullsize trucks was 110. The estimate for 4x4 trucks was 20 and the estimate for compact sedans was 30. (AF 331.) Section B.1 identified the base period as December 11, 1995, or date of award

whichever is later, through September 30, 1996. Beneath the identification of the base period, it listed sequentially across the page, item no.; supply/service; estimated immediate needs; unit of issue; and unit price. Basis of payment was a unit price per vehicle per month. (AF 233, 235.)

10. Section F.1 contains AGAR 452.212-73, EFFECTIVE PERIOD OF THE CONTRACT, providing that the effective period of the contract is December 11, 1995, or date of award whichever is later, through September 30, 1996, unless extended in accordance with other terms contained in the contract.

11. APHIS personnel dealt with Appellant's president, Mr. Charles L. Butler, Jr. ("Chuck"), and Michael J. Concannon, Appellant's Contract Specialist. Both were witnesses at the hearing. During the contract formation period, the Medfly project was winding down with vehicle needs decreasing. This fact was well known to the CO and other APHIS personnel. APHIS personnel also knew that the project was unpredictable and discovery of a fertile Medfly could cause an abrupt upturn in needs (AF 286-88). The record is unclear whether and when Appellant was specifically informed that the program was winding down. The CO's February 15, 1996 memo states that he made a point of going over "the changing needs of this program & how the contract works with Mike Concannon and also with Chuck Butler." This memo also refers to the contract as a requirements contract. (AF 343.) The CO testified that he told Appellant that the program was winding down sometime after receipt of offers but before award (Transcript (Tr.) 431-32). Mr. Concannon testified that they would have told him (Mr. Concannon) the project was winding down; context indicates such conversations were post-award (Tr. 170).

12. The contract was awarded to Appellant February 7, 1996, with a stated effective date of January 31, 1996 (AF 221). APHIS first ordered 20 sedans from Appellant shortly after award. On February 14 and 15, 1996, Appellant delivered a total of 20 sedans (AF 341, 345). The sedans failed to comply with the contract requirement for California registration (AF 347).[1] APHIS verbally ordered 45 2x4 pickup trucks February 19, 1996, confirming the order in writing by facsimile February 26, 1996 (AF 339, 357). By letter of February 27, 1996 (mistakenly dated January 27, 1996), APHIS informed Appellant that no 4x4 pickup trucks were needed at that time and requested removal of nine 4x4 pickups which had been delivered although there had been no order placed (AF 340). Despite the fact that the contract allowed vehicles as sold as 24 months with mileage up to 25,000 miles, Appellant furnished new vehicles.

[1] The record indicates that the vehicles may have been used prior to discovery of the defects, taken out of service, the defects corrected and then placed back in service (AF 372, 374).

13. Prior to May 6, 1996, the question of vehicles being returned arose between the parties. Appellant used the verbiage "termination" to describe the return of vehicles by APHIS. (AF 372, 376). Appellant contended that Respondent had no right to return vehicles prior to the end of the contract performance period. Respondent asserted otherwise. Cars were returned to Appellant during the months of June and July (AF 538-40).

14. Concurrent with this contract and with the predecessor contract with Allstate, APHIS also used both USDA and GSA vehicles on the Medfly project. Many GSA vehicles were also returned in the period of June and July 1996. (Exhibit (Ex.) 1-13, 15-20, 23, 25, 27-28, 31-44; AF 537-46, 613, 615-16, 619, 629-49, 651-53, 657-58, 671, 673, 677-81, 694, 696, 699-700, 706, 714, 716-19, 722-26, 730, 738-42.)

15. As stated earlier, the Memorandum of Negotiations, authored by the CO, refers to the contract as a requirements contract. Also, in his February 15 hand-written record of a telephone conversation with another APHIS representative, the CO wrote: "Mike Concannon doesn't understand what's happening with the Medfly program & how a 'Requirements' contract works" (AF 343).

16. During direct examination the CO testified as follows:

> Q If you intended an indefinite quantity in a delivery contract, why did you refer to it in your 2/15 notes as a requirements contract?
>
> A It's something that within our office, any type of a contract where delivery orders are placed against it, it's refused – it's referred to under a generic term, a requirements contract. All three types of ID contracts, indefinite delivery contracts, are referred to generically as a requirements contract. But it was, indeed, an ID, indefinite quantity contract.
>
> Q Do you understand that the term "requirements contract" has legal significance?
>
> A Yes.
>
> Q That it's a term of art for legal purposes. Is that how you intended to use the term in your notes on 2/15?
>
> A On this, on these notes, is that how I intended to use that term? No.

(Tr. 410.)

He also testified that the minimum and maximum orders for the contract were zero and 450 respectively and that with an indefinite quantity contract, a minimum of zero is not allowed, but that at the time the contract was written, he did not know that a zero minimum was not allowed (Tr. 411.)

17. The contract expired September 30, 1996 (Tr. 97). It was not terminated (Tr. 138). The option was not exercised (Tr. 460).

18. Appellant claims entitlement to (1) an equitable adjustment in the amount of $241,578.37 for lost revenue under FAR clause 52.217-2, CANCELLATION OF ITEMS, Alternate 1 (APR 1984); [2] (2) an equitable adjustment in the amount of $68,552.49 for lost revenues for return of vehicles to Appellant prior to the expiration date of the contract; and, (3) an equitable adjustment in the amount of $318,911.25 for vehicles ordered from GSA during the effective period of the contract.

DISCUSSION

Contentions of the Parties

Appellant asserts that the contract is a requirements contract. It relies on out of context testimony of the CO, as well as the CO's use of the label "requirements" in the Memorandum of Negotiations and another post-award memorandum. Appellant also argues that the contract did not allow Respondent to return any of the vehicles initially ordered under the contract prior to the end of the contract term. Appellant also contends that the contract did not allow Appellant to order cars from GSA during the term of the contract. Appellant argues that Respondent owes Appellant for all vehicles used on the project between the effective date of the project and September 30, 1996.

Respondent argues that FAR clause 52.217-2 is inapplicable to this fact situation. Regarding the nature of the contract, Respondent argues that the contract was patently ambiguous. That ambiguity, it argues, is created by: (1) the statement in section L.2 of the solicitation anticipating a firm fixed-price indefinite quantity contract (Finding of Fact (FF) 2); (2) the stated minimum of zero in section B.5; (3) the failure to include either FAR 52.216-21, REQUIREMENTS, or FAR 52.216-22, INDEFINITE QUANTITY; and, (4) the notice in FAR 52.216-9, DELIVERY-ORDER LIMITATIONS, that a requirements contract would include the Requirements clause. Respondent

[2] Appellant's Opening Pre-Hearing Brief, attached to and incorporated by reference into its Opening Post Trial Brief, argues that its claim under the Cancellation clause becomes moot if the Board grants recovery under its second and third claims but if recovery is denied under those claims, the first claim "remains alive as a fall back basis for an award of reliance damages." Thus, it appears that the costs in the first claim are in some way duplicative of the costs in the second or third claim. Our decision obviates the need to discuss proof of quantum. However, we note that any discussion on quantum would necessarily address, among other things, Appellant's choice to provide new vehicles when the contract allowed vehicles up to 24 months old and with mileage up to 25,000.

argues that these conflicts undermined the consideration of the contract to the extent that this contract became an illusory contract enforceable only to the extent performed. Respondent also argues that procurement of vehicles from GSA not only did not violate the contract, but was mandatory. Respondent finds another patent ambiguity in that part of the Statement of Work which addresses order and return of vehicles. Finally, Respondent contends that Appellant has failed to meet its burden of proof as to damages.

FAR Clause 52.217-2, Cancellation of Items

The Cancellation of Items clause, by its terms, is applicable to a fact situation other than that presented by this appeal. The clause is to be applied where anticipated requirements for subsequent program years of a multi-year contract are canceled. The instant contract was for a portion of one year with an option for a full year thereafter. No cancellation for "anticipated" requirements in a subsequent year occurred. Appellant's claim here centers on events in the base year, numbers of vehicles ordered and returns of vehicles before the end date of the contract; fewer than estimated orders; and orders from another source, GSA. Appellant is not entitled to recovery under this clause.

Contract Type

While the solicitation stated APHIS' intent to award a firm fixed-price indefinite quantity contract and the CO stated that it was such (FF 2, 16), the contract was awarded without the Indefinite Quantities clause. It also lacked the Requirements clause (FF 4). Not only did it lack the FAR clause 52.216-21, REQUIREMENTS, clause, the contract contained an express provision that a requirements contract would contain the clause (FF 5). Respondent's failure to include an identifying clause or other clear indicia of the contract type, deprived the contract of the character of either an indefinite quantity or a requirements contract. Appellant overlooks the absence of the defining clauses for either type of contract. Instead, Appellant relies on the CO's written references to the contract being a requirements contract (FF 15) and to out of context testimony of the CO (FF 16) to argue that the evidence established conclusively that the contract was a requirements contract. However, those statements were post-award and thus Appellant cannot claim to have relied upon them.

We have taken into account and considered the CO's imprecise use of a term he now acknowledges to have legal significance.

We have also taken into account that he was unaware of the prohibition against setting a minimum of zero in an indefinite quantity contract. Nonetheless, those errors do not any more establish conclusively that the contract is a requirements contract, than they establish that it is an indefinite quantity contract. Just as the contract lacks the minimum quantity necessary (and prescribed clause) to make it an indefinite quantity contract, it also lacks the exclusivity language (and prescribed clause) essential to a requirements contract. A requirements contract

> is formed when the seller has the exclusive right and legal obligation to fill all of the buyer's needs for the goods or services described in the contract. . . . [A]n essential

> element of a requirements contract is the promise by the buyer to purchase the subject matter of the contract exclusively from the seller.

Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302 (Fed. Cir. 1998).

This contract neither contained the exclusivity language necessary to require Respondent to rent cars exclusively from Appellant nor did it contain a minimum quantity term. It is therefore not enforceable as either a requirements contract or as an indefinite quantity contract. In such a case, a contractor is entitled to payment only for services actually ordered and provided. *See* Williard, Sutherland & Co. v. United States**,** 262 U.S. 489, 43 S. Ct. 592, 67 L.Ed. 1086 (1923) ("By the conduct and performance of the parties, the contract was made definite and binding as to the [quantity] ordered and delivered according to its terms."). Coyle's Pest Control, at 1306. There is no argument that Appellant has not been fully compensated under the contract for the cars actually ordered for the period they were used. Thus, no further compensation is due for actual usage.

In a recent appeal on similar facts, the Armed Services Board of Contract Appeals (ASBCA) reached the same conclusion as we do here. A contract for contours restoration and fence repairs at an air force base contained FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) and did not contain FAR 52.216-21, REQUIREMENTS (OCT 1995). However, it omitted terms guaranteeing a minimum quantity of services as well as terms or conditions indicative of exclusivity in ordering all of the Government's requirements from the contractor. As a result, the ASBCA found the contract unenforceable as either a requirements contract or as an indefinite quantity contract. Citing Coyle's Pest Control, the Board held the contractor to be entitled to payment only for services actually ordered and provided. Konitz Contracting, Inc., ASBCA No. 52113, 00-2 BCA ¶ 31,121.

Appellant's reliance on ACE-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed. Cir. 2000) is misplaced. In that case, the Government entered into multiple awards contracts for transcription and court reporting services with ten companies. These contracts contained requirements clauses providing that "[e]xcept as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the schedule that are required to be purchased by the Government activity or activities specified in the Schedule." Covered agencies purchased some services from other companies not parties to the contracts. The contracts contained no guaranteed minimum and none of the companies had an exclusive arrangement. The contracts also allowed agencies to consider other sources, but did not authorize contracting with other companies unless a waiver were obtained. The Government argued these characteristics made them unenforceable. The court, however, found consideration to ensure mutuality of obligation and a sufficient definiteness providing a basis for determining the existence of a breach and for giving an appropriate remedy. The contractors' promises regarding price, availability, delivery and quantity, and the Government's limitation of competition to between two and five authorized sources in each of the geographic regions provided the mutual consideration necessary to make the contracts enforceable. The contract before us, devoid of both requirements and indefinite quantity clauses as well as a stated minimum and any language of exclusivity, does not provide a basis for determining the existence of a breach or the fashioning of an appropriate remedy. While Appellant quotes extensively from ACE-Federal Reporters, Inc., it cites no language from this contract imposing similar limitations on

ordering from other entities. Our decision on entitlement here obviates the necessity of our addressing the evidence in the record regarding remedy.

Appellant also cites Ceredo Mortuary Chapel, Inc. v. United States, 29 Fed. Cl. 346 (1996). This Board may look to the Court of Federal Claims, as well as to other boards of contract appeals for guidance. We are not, however, bound by their holdings. Moreover, Ceredo is distinguishable. There the contract contained language which disallowed the Government from using other ambulance services until Ceredo had first been offered the opportunity to respond and had failed to do so within a certain period. The court found this a limitation of the buyer's opportunity to shop elsewhere. In the instant case, Appellant has pointed to no contract language limiting Respondent from ordering vehicles from other sources nor have we, after careful perusal, found any.

Return of Vehicles

Appellant argues that the language in the Statement of Work specifying that additional vehicles may be ordered and returned throughout the contract period (FF 8) should be interpreted to mean that the vehicles initially ordered cannot be returned prior to the end date of the contract, although any vehicles ordered after the initial ("immediate needs") order can be. For the latter contention, Appellant points first to the identification in the Statement of Work of the "immediate needs" as being the "quantities identified in the Schedule." Appellant then contends that "Schedule B then expressly provides that the 'Base Period' for immediate needs vehicle leases is 'December 11, 1995, or date of award which is later *through* September 30, 1996' (*Emphasis added)*." (Appellant's Reply to Government's Brief, page (p.) 3).

We find Appellant's interpretation unreasonable. Appellant's interpretation of the identification of the base period of the contract as applying only to the number of vehicles immediately needed is strained and tortuous. Clearly, the base period is the base period for the entire contract (FF 9 and 10) and not solely applicable to any one set of ordered vehicles. We find no ambiguity regarding the right of the Government to return vehicles during the base period of the contract. As the option was not exercised, only the base period is at issue (FF 18). The contract contains no express language either requiring APHIS to keep any vehicles for a specific period of time or limiting return of any vehicles prior to the end of the period. The fact that the Statement of Work refers to "order and return" in its statement regarding "additional vehicles" does not constitute a prohibition on return of vehicles other than "additional vehicles" any more than it constitutes a prohibition on ordering vehicles other than "additional vehicles." Excessive parsing of the wording of this provision is unnecessary, however. We have held that where a contract is enforceable as neither a requirements nor an indefinite quantity contract, it is enforceable only to the extent that services were actually ordered and provided. The vehicles were provided only up to the dates they were picked up by Appellant. We find no basis for granting compensation for any additional period of usage.

GSA as a Mandatory Source

Respondent defends on the ground that GSA is a mandatory source and it had no choice but to order from it notwithstanding its contract with Appellant. Appellant cites Inland Container, Inc. v. United

States, 206 Ct. Cl. 478, 512 F.2d 1073 (1975) which holds that a valid requirements contract prohibited the Government from obtaining the requirements described in the contract from GSA. As we have found that no enforceable contract, requirements or otherwise, existed, except as to extent performed, we need not address this issue.

DECISION

Based on the above reasoning, the appeal is denied.

ANNE W. WESTBROOK
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
June 27, 2001