BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

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| Appeal of<br>DOMINION CONTRACTORS, INC. | ) | Docket No. MSBCA 1040 |
| Under State Highway Administration<br>Contract No. AA-244-501-514 | ) | |

May 20, 1982

Equal Products — Contractor contractually was permitted to furnish "equal" materials and equipment provided that the items first were approved by the SHA Engineer. However, under the terms of its contract with SHA, where an "equal" item was not approved by SHA prior to bid and disclosed to all prospective bidders by addendum to the IFB, an equal only could be furnished as a change to the contract. Any increase or decrease in the cost of performance was to be the measure of consideration for such a contract change.

Contract Interpretation — A written contract must be construed if possible, to give effect to all provisions contained therein. Such an interpretation will be preferred to one which leaves a portion of a writing useless or inexplicable. In this appeal, the contract clauses, when read together, could not reasonably be read to distinguish between the furnishing of "equals" and substitutions for specified name brand items.

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OPINION BY CHAIRMAN BAKER
ON MOTION FOR SUMMARY DISPOSITION

This appeal arises from a State Highway Administration (SHA) construction contract. During performance of this contract, Appellant proposed three substitutions for specified mechanical equipment and installation. These substitutions were rejected and Appellant thereafter was required to supply and install the brand name items specified in the contract. Appellant now seeks the additional costs incurred in furnishing and installing this mechanical equipment as specified.

Respondent has moved for summary disposition on the grounds that:

1. Proposed "equal" items must be submitted prior to bid opening;

2. Failure to obtain prior approval obligated Appellant to furnish brand name; and

3. If the State permits a substitution after bid opening, the State is entitled to any resultant cost savings.

The parties thoroughly have briefed the legal issues presented by this motion.

Findings of Fact

1. On or about June 25, 1980, Appellant was awarded SHA Contract No. AA-244-501-514 for the construction of the new District 5 Office and Maintenance Shop Complex.

2. The mechanical work for this project was set forth under Division 15 of the contract technical specifications. Paragraph 8 of this section of the specifications provided as follows:

MATERIAL AND EQUIPMENT REQUIREMENTS

a. All materials and equipment shall be new, of best quality and all subject to Engineer's review. None shall be used until they have been reviewed. Use product of one manufacturer where two or more items of same kind of equipment are required.

b. One acceptable manufacturer's name and model number, plus additional acceptable manufacturer's name is listed for each item. For terms under which substitutions for specified items will be permitted refer to Special Conditions, Section 1A.

c. Items offered in substitution shall equal those specified in grade, quality, finish, efficiency, capacity, space and power requirements.

d. It is Contractor's responsibility to check allocated space for suitability of items furnished, including parts replacement and servicing. Any and all alterations, changed and modifications required in work specified under other Sections, and made necessary by reason of substitutions as specified above, shall be made at no additional cost to the Owner.

3. Contract Special Conditions, Section 1A, paragraph 20 permits the submission of substitute materials and equipment in the following manner:

a. Procedure and terms under which submissions of proposed substitutions may be made with reference to General Conditions, ART. 4, ITEM 8, and reference also to the Special Conditions, Paragraph 16, "Other Brands."

(1) All requests for approval of an unnamed material or items of equipment will be accepted only when submitted by the Prime General Contractor Bidders. Direct submissions to the Architect or Engineers by others will not be considered.

(2) All accompanying data, reports, tests, etc., shall be furnished at the expense of the bidder.

(3) The Architect in exercising judgment as to the acceptability of products will take into account all evidence before him whether or not submitted by the bidder, including that submitted by the Owner. The determination of the Architect shall apply only to the product under bid and shall have no force or effect applying to any other prior, concurrent or subsequent project.

(4) Where the proposed product is a "system" or when the characteristics of the product may cause changes to be required in other components, complete engineering data, signed by an official of the manufacturer of the proposed product, shall be submitted to completely describe all required changes. The cost required to effect these changes shall be included in the bid price.

(5) All requests shall be accompanied by:

(a) A detailed tabulation, signed by the manufacturer, listing all major components, size capacity, accessories, etc., of his product corresponding to the requirements noted in the specifications and on the plans. This is to show complete conformance with the specification requirements.

(b) A detailed list, signed by the manufacturer of the product, describing any and all variations by which his product differs from the specified product.

(c) If there is a national standard for corresponding product(s), an affidavit or published listing from a nationally recognized association (US, AGA, MCA, IBR, ARI, etc.) certifying that the exact product conforms to the standards of the association.

(d) A copy of the manufacturer's published catalog or brochure properly marked to identify the product and its related data.

4. Contract Special Conditions, Section IA, paragraph 16 further addresses the substitution procedure as follows:

a. Bidders wishing to obtain approval of manufacturers other than those specified by name shall submit their request to the Architect not less than 10 (ten) days before bid opening. Approval by the Architect will be in the form of an addendum

to the specifications issued to all bidders indicating that the additional brand or brands or manufacturers are approved as equal to those specified so far as the requirements of the project are concerned.

5. With regard to the acceptance and/or substitution of materials, Article 4A of the Contract General Provisions also provides, in pertinent part, that:

(1) Approval. All materials are subject to the Architect's approval as to conformity with the specifications, quality, design, color, etc. No work for which approval is necessary shall be contracted for, or used, until written approval is given by the Architect. Approval of a Sub-Contractor as such does not constitute approval of a material which is other than that included in the specifications.

* * * *

(3) Quality. Unless otherwise specified, all materials shall be of the best quality of the respective kinds.

(4) Samples. The Contractor shall furnish for approval all samples as directed. The work shall be the same as the approved samples.

(5) Proof of Quality. The Contractor shall, if requested, furnish satisfactory evidence as to the kind and quality of materials either before or after installation. He shall pay for any tests or inspections call (sic) for in the specifications and such as may be deemed necessary in relation to "substitutions", (sic) Par. (8) below.

* * * *

(7) "Or Equal", "Equal", "Approved Equal." These terms are used as synonyms throughout the specifications. They are implied in reference to all named manufacturers unless otherwise stated. Only materials fully equal in all details will be considered. The State Highway Administration is the final judge as to equality. (See 1, 3 and 5 above and 8 below).

(8) Substitutions. Should the Contractor desire to substitute another material for one or more specified by name he shall apply, in writing, for such permission and state the credit or extra involved by the use of such material. The Architect will not consider the substitution of any material different in type or construction methods unless such substitution effects a benefit to the State (See (1) and (4) above).

(a) Contractor shall not submit for approval, materials other than those specified without a written statement that such a substitution is proposed. Approval of a "substitute material" by Architect or Engineer when the Contractor has not designated such material as a

"substitute," shall not be binding on Owner, nor release Contractor from any obligations of his Contract, unless Owner approves such "substitution" in writing.

6. Among other things, the contract mechanical specifications required the furnishing and installation of air conditioning terminals and an automatic temperature control system. The air conditioning terminals were specified under Section 15C., paragraph 21a.of the mechanical specifications as follows:

> Furnish and install Barber-Colman Model (HSPM) variable air conditioning terminals of sizes and capacities shown on the plans and schedule.

The automatic temperature control system was specified under Section 15I., paragraph 1.A. of the contract mechanical specifications as follows:

> Furnish and install a complete system of Automatic Temperature Control as hereinafter described. The temperature control system shall be of the two pipe nonbleed pneumatic type. The control system shall be manufactured by the Barber-Colman Co. and installed by Machinery & Equipment Sales, Inc.

7. Sometime after contract award, Appellant requested permission to substitute ITT automatic temperature control equipment for the specified Barber-Colman equipment. This request was denied on November 7, 1980 by Mr. Edward H. Meehan, an SHA District Engineer.

8. Also after contract award, Appellant requested permission to substitute Buensod V.A.V. terminals for the specified Barber-Colman air conditioning terminals. This request was denied by Mr. Meehan on December 9, 1980.

9. In order to install the automatic temperature control equipment, Appellant further requested permission, after award, to utilize ATC Systems Engineering, Inc. as the installer rather than the specified installer, Machinery and Equipment Sales, Inc. This request was denied by Mr. Meehan on January 9, 1981.

10. Appellant appealed Mr. Meehan's rejection of the three foregoing substitutions to the SHA Chief Engineer, Mr. William K. Lee. Mr. Lee affirmed Mr. Meehan's rejection of the substitutions by written final decision dated June 26, 1981. This decision was approved on the date of its issuance by the State Highway Administrator.

11. Appellant furnished the specified Barber-Colman equipment as installed by Machinery and Equipment Sales, Inc.

12. Appellant filed a timely appeal to this Board alleging entitlement to equitable adjustments in the following amounts:

a. Rejection of ITT Automatic Temperature Control Equipment $2,592.00

b. Rejection of Buensod V.A.V. Terminals $ 3,746.73

c. Rejection of ATC Systems Engineering, Inc. $14,799.00

## DECISION

The technical specifications list manufacturer's names and model numbers for materials and equipment required to be furnished in performing the mechanical portion of the contract work. At issue in this appeal is when a substitute for these brand name items was to be submitted for approval by SHA and the effect of any such approval on the contractual agreement. Appellant contends that it was entitled to propose an equal at any time and, if approved, furnish it at the contract price. SHA argues that only those items specified in the bidding documents or otherwise approved as equals prior to bid could be furnished under the terms of the contract.

Division 15, paragraph 8b. of these technical specifications expressly apprised both the bidders and the eventual Contractor, Appellant, to refer to Special Conditions, Section 1A. for the terms under which substitutions for specified mechanical items would be permitted. Special Conditions, Section 1A., paragraph 20 sets forth the "Substitution Submission Procedure." This provision, however, also references other substitution requirements contained in paragraph 16 of contract Special Conditions, Section 1A. and Article 4, item 8 of the contract General Conditions. These latter contract clauses, therefore, must be read together with the former to ascertain Appellant's obligations prior to furnishing an item in substitution for specified brand name materials and/or equipment.

Contract Special Conditions, Section 1A, paragraph 20 details the information which must accompany all substitution requests. While this provision does not specifically indicate when a substitution request must be submitted, it does speak in terms of submittals by prime contractor bidders only. Contract Special Conditions, Section 1A., paragraph 16a. also discusses the responsibilities of bidders and specifically addresses the time for submissions of substitutions as follows:

> Bidders wishing to obtain approval of manufacturers other than those specified by name shall submit their request to the Architect not less than 10 (ten) days before bid opening....

These two contract clauses thus clearly require substitutions for specified brand name items to be submitted for approval prior to bid opening.

Article 4A.(8) of the contract General Conditions, however, speaks to the submittal of substitutions by the Contractor rather than the bidder. Specifically, this provision states that if the Contractor wishes to request permission to utilize a substitute "... he shall apply, in writing, for such permission and state the credit or extra involved by the use of such material." Further, where the Contractor improperly furnishes a material which has not been approved in the manner set forth in the contract, this clause provides that the Contractor is not released "...from any obligations of his contract, unless the Owner approves such 'substitution,' in writing." Clearly, therefore, this provision was intended to address the treatment of substitutions for specified items which are proposed for approval after award of the contract.

We conclude that the language of the foregoing contractual provisions, when read together, permits a substitution to be offered for approval either prior to bid or subsequent to award. Where the substitution is approved prior to bid, it becomes a part of the bidding documents and may then be furnished during performance at the contract price. However, where the substitution is proposed and approved after award of the contract, it may be furnished only under an agreed modification to the requirements of the contract.

Appellant initially contends that the foregoing interpretation unreasonably applies the "substitution" requirements of the contract to the furnishing of an "equal." In this regard, Appellant submits that a substitution is an item which is not functionally equivalent to material or equipment specified in the contract. Where a substitute is approved, therefore, an adjustment to the contract price would be required in consideration of the increased or decreased contractual performance. With an "equal," however, SHA would be getting exactly what it contracted for and an adjustment in contract price would not be mandated. Accordingly, Appellant argues that the post award substitution procedure which requires a Contractor to "...state the credit or extra involved by the use of such material..." would be meaningless if applied to "equals."

With regard to Appellant's general contention that a substitution is different than an equal, this is not supported by the contract specifications. Division 15, paragraph 8c. of the contract mechanical specifications expressly provides that "[i]tems offered in substitution shall equal those specified in grade, quality, finish, efficiency, capacity, space and power requirement." Article 4A, item 7 of the contract General Conditions conversely requires the submittal of "equals" to be made pursuant to a specified "substitution" procedure. See Article 4A, item 8 of the contract General Conditions, (Finding of Fact No. 5). When these contract clauses are read together, therefore, it is evident that the term "substitution" was intended to refer to an item which is equal in all material respects to an item specified by name in the bidding documents. Further, an item which was not "equal" to a specified brand name item was not even to be considered for approval.

With regard to Appellant's contention that the post award proposal and furnishing of an "equal" item would not require the exchange of consideration, we also cannot agree. An "equal"[1] is defined in Article I. i. of the contract General Conditions as referring to "... those items of material and/or equipment which meter (sic) [meet] the design requirements and quality as specified and have been authorized by the State for use in the execution[2] of the Contract." (Underscoring added.) This definition is consistent with contract Special Conditions, Section 1A, paragraph 16 which contemplates the pre-bid approval of "equals" and the issuance of an addendum incorporating any approved equal into the bidding documents. Together these contract provisions establish that the requirements of the contract were to become fixed prior to bid. All brand name items ultimately specified in the bidding documents were to be incorporated in the executed contract and the Contractor would be required to comply strictly therewith. While SHA clearly reserved the right to consider and approve post award substitutions, such approval was to constitute a modification to the contract requiring consideration. Accordingly, it was not unreasonable to require a statement of the credit or extra involved in furnishing an item in substitute for a specified brand name product.

It is a cardinal rule of construction that written instruments must be so construed, if possible, as to give effect to all the provisions thereof. Williston On Contracts, Third Edition, Section 618; Restatement of Contracts 2d, § 202. Such an interpretation will be preferred to one which leaves a portion of a writing useless or inexplicable. Chew v.

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[1]Article I. i. defines "approved equal." However, the terms equal and approved equal are used synonomously throughout the contract. See Finding of Fact No. 5.

[2]Execution is defined as the signing of the contract documents. See Section 10.03-7 of the Standard SHA specifications (March 1968).

DeVries, 240 Md. 216, 213 A.2d 742 (1965). Since Appellant's interpretation of the "Or Equal" clause of the contract would disregard and render meaningless the clear requirements of the contract "substitution" provisions, that interpretation cannot be accepted as reasonable where, as here, another interpretation harmonizes all requirements of the contract specifications pertaining to the substitution of equal materials and equipment.

Appellant further contends that the purpose of "brand-name or equal" clauses in public contracting is to "...discourage the potentially monopolistic practice of demanding the use of brand-name or designated articles..." and to promote competition. Compare Jack Stone Co. v. United States, 170 Ct. Cl. 281, 344 F.2d 370 (1965). This purpose allegedly would be frustrated by an interpretation of the instant contract to limit a contractor's opportunity to furnish "equal" items. The Board's interpretation, however, does not preclude the furnishing of equal items as contemplated by the contract "Or Equal" clause. Under our interpretation, any "equal" submitted for qualification and approval pursuant to the terms of the specifications could have been bid upon and/or furnished under the contract. Compare American Electric Contracting Corporation v. United States, 217 Ct. Cl. 338, 579 F.2d 602 (1978); Bowie & K Enterprises, Inc., VACAB 1588, 81-2 BCA, paragraph 15, 177; Murphy v. Salt Lake City, 236 P. 680 (Utah, 1925).

Finally, Appellant contends that an interpretation of the contract to require pre-bid submittal of equals is unreasonable in view of the realities of the bidding process. Whether this could be demonstrated by Appellant at hearing however is of no significance to the Board. We are satisfied that the contract terms pertaining to the submittal of substitutions were clear and unambiguous in their requirements. Accordingly, the resort to parol evidence for the purpose stated would be inappropriate. Applestein v. Royal Realty Corp., 181 Md. 171, 173 (1942).

While the Board has not authorized motions for summary disposition in its regulations, we previously have ruled that such motions may be considered, on a case by case basis, where appropriate to provide a just, inexpensive and expeditious determination of disputes. Appeal of Intercounty Construction Corporation. MDOT 1036 (February 8, 1982) at pp. 1-2. A motion for summary disposition shall be granted under the Board's procedures only where there are no genuine issues as to any material fact and it appears that one party clearly is entitled to a decision as a matter of law.

Here we are satisfied that no genuine issue as to any material fact exists and that the dispute may be resolved based upon a clear and reasonable reading of the contract documents. For the foregoing reasons, therefore, we partially grant SHA's Motion For Summary Disposition by finding that SHA would have been entitled to any cost savings realized by Appellant by the use of substitute materials and equipment approved after award of the contract.

To the extent any quantum issues now remain for our consideration, the parties are to apprise the Board within fifteen days of receipt of the decision.

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