BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of S. J. Groves & Sons Company	)	
	)	Docket No. MSBCA 1122
Under MTA Contract No. NW-05-04	)	

March 12, 1985

Severin Doctrine - The Severin Doctrine may preclude the recovery of subcontractor damages in a breach of contract action brought by a prime contractor against the State where the subcontract agreement fully exculpates the prime contractor from liability for the State's breach. However, the Severin Doctrine is inapplicable where, as here, the subcontractor's claims are cognizable under a remedy granting clause contained in the prime contract.

Contract Interpretation - Although the Board recognized its duty to attempt to reconcile conflicting contract provisions, the contract here was found to be in discord concerning the proper means of supporting ductwork. The conflict was noticed by Appellant prior to bid and inquiry was not made. Although Appellant sought to use an order of precedence clause to resolve the conflict in its favor, the Board ruled that the application of the clause in this manner was inequitable under the instant facts. Appellant, therefore, was held to the MTA's interpretation.

Contract Interpretation - Order of Precedence Clause - An order of precedence clause generally will obviate the need to make inquiry as to a contract ambiguity, instances where equity would intervene aside. Here, however, Appellant clearly overreached by failing to inquire prior to bid.

Brand Name or Equal - Appellant failed to carry its burden to establish that an offered system for the support of ductwork was functionally equivalent to the system specified. In determining the salient characteristics of the brand name system contained in the contract, the functional characteristics of this system, as set forth in the catalog cut referenced in the contract documents, were considered to be incorporated by reference into the contract.

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OPINION BY CHAIRMAN BAKER

This appeal has been taken from a final decision issued by the Maryland Mass Transit Administrator denying Appellant's request for an equitable adjustment to compensate it for the difference in cost between supporting ductwork by use of angle irons and the directed use of a more expensive Unistrut system. The primary issue before us is one of contract interpretation. By agreement of the parties, quantum issues are to be remanded to the Mass Transit Administration (MTA) in the event entitlement to an equitable adjustment is determined.

I. Findings of Fact

A. Introductory

On November 20, 1980, the MTA issued a Notice to Contractors soliciting bids on a project described as the "North Avenue Station Finish Contract." The successful contractor was to be responsible for architectural finishes, certain landscaping, and the installation of the mechanical and electrical systems throughout the previously constructed, multilevel North Avenue Station structure.

Pursuant to the foregoing notice, Appellant obtained a set of plans and specifications and thereafter submitted a bid. The MTA subsequently determined that Appellant was the low responsive and responsible bidder and therefore issued the captioned contract to Appellant on or about March 10, 1981.

In preparing its bid, Appellant relied on a subcontract quote from Halco Engineering, Inc. (Halco) for the mechanical work under the project. Appellant's estimators did not perform quantity takeoffs or otherwise estimate this aspect of the work. Upon receiving a notice of award from the MTA, Appellant issued a subcontract to Halco in the amount of the subcontract quote.

In preparing its subcontract bid to Appellant, Halco solicited a quote from United Sheet Metal (United) for the work required by Section 15800 of both the prime contract Standard and Special Provisions. United thereafter

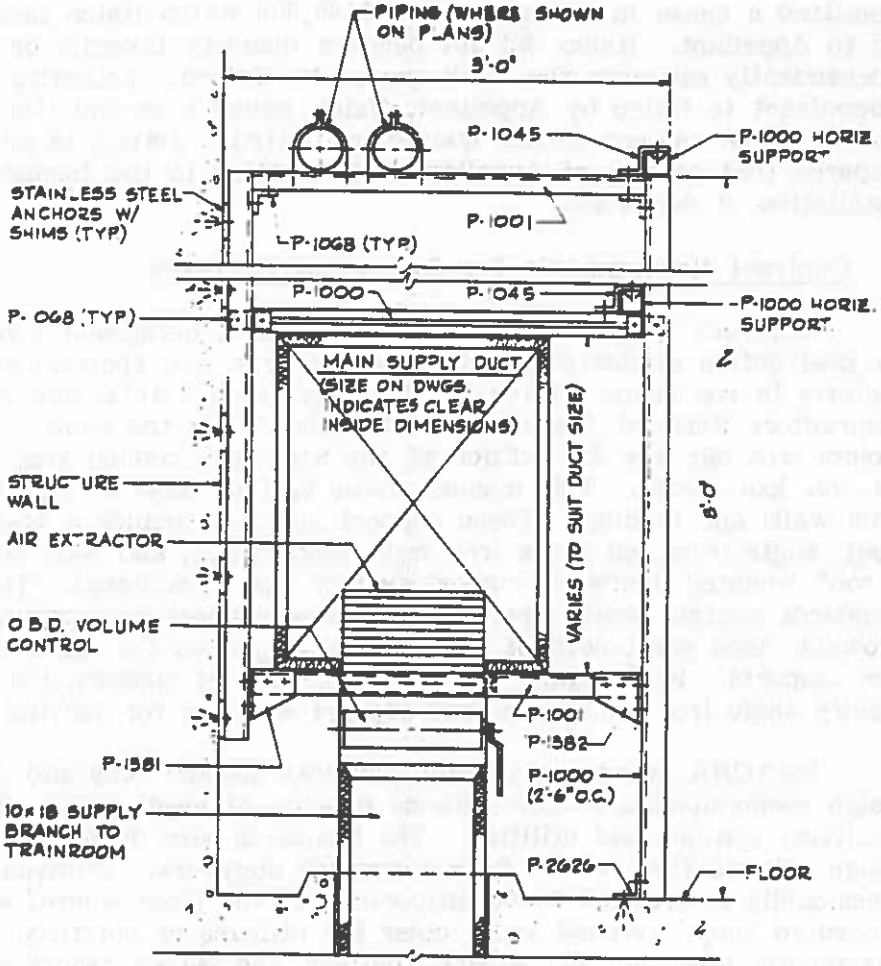
submitted a quote in the amount of $498,000 which Halco incorporated in its bid to Appellant. Halco did not perform quantity takeoffs or otherwise independently estimate the work quoted by United. Following award of a subcontract to Halco by Appellant, Halco issued a second tier subcontract to United in the amount earlier quoted by United. United, in actuality, thus prepared that portion of Appellant's bid relating to the furnishing and installation of ductwork.

B. Contract Requirements For Support of Ductwork

Contract Special Provision Section 15800, paragraph 2.03 states that "[c]onstruction of ductwork, plenums, supports, and appurtenances shall conform to the latest edition of SMACNA [Sheet Metal and Air Conditioning Contractors National Association] Standards." At the time the captioned project was bid, the 5th edition of the SMACNA manual was in effect. (Tr. 22, Exh. R-36). This manual shows various ways of supporting ductwork from walls and ceilings. These support methods include a trapeze arrangement, angle irons, an angle iron wall rack, straps, and wall mounted hangers. A roof mounted ductwork support system also is depicted. The SMACNA Standards contain design charts for trapeze support arrangements wherein the allowable load per length of ductwork is computed for different sized angle iron supports. With regard to the other types of support, the standards specify angle iron dimensions and support spacings for varying duct sizes.

SMACNA Standards address ductwork support only and do not contain design recommendations for systems capable of jointly supporting ductwork, electrical systems and utilities. The standards also do not set forth express design criteria for interior floor supported ductwork. Ductwork, however, occasionally is required to be supported off the floor where, as here, there is a need to keep overhead areas clear for utilities or electrical systems. In this regard, however, Mr. Albert Routhier, the MTA's expert witness, admitted that the SMACNA roof support design could be utilized within a structure to provide an acceptable floor mounted support for ductwork. (Tr. 181-182). Mr. Roberts testified that United, in fact, has installed ductwork on floor supports in a Washington subway project pursuant to SMACNA design recommendations for rooftop installation. (Tr. 76-77).

The contract drawings, in pertinent part, depicted the main supply air conditioning ducts to be placed through the North and South Ancillary Rooms and the public transfer levels between these rooms. (Contract drawings M-13-1/sheet 91 through M-17-1/sheet 95). Support for this section of approximately 450 feet of ductwork was shown on contract drawing M-47-1 (sheet 125) as follows:



SECTION (E) M-13 TYPICAL SECTION OF PUBLIC AIR CONDITIONING DUCT SUPPORT THROUGH ANCILLARY AREAS.

SCALE: 1½"=1'-0"

NOTES: 1. SUPPORT MEMBERS SHALL BE "UNISTRUT" OR EQUAL. P-1000, ETC. INDICATES PART NUMBERS FROM "UNISTRUT GEN'L. ENG. CATALOG 7R."
2. WHERE THERE ARE TWO MAIN SUPPLY DUCTS, PROVIDE AN ADDITIONAL INTERMEDIATE SUPPORT FOR UPPER DUCT.
3. DUCT SUPPORTS SHALL BE SPACED 2'-6" O.C..

As is apparent, the contract drawings called for a "Unistrut" or equal system with duct supports spaced at 2'-6" center to center. The Unistrut system was intended to support both ductwork and that piping shown on the contract drawings as being supported by the system.

Unistrut is a support system comprised of parts resembling those contained in an erector set. Support members are channel shaped steel pieces having predrilled holes which permit assembly with nuts and bolts. The Unistrut system is floor and wall mounted and the predrilled holes permit the system to act as a pegboard for easy attachment of utilities, electrical pipes and ductwork. (Tr. 177-178; 29). The system is quite rigid and thus also is capable of supporting water pipes and the high lateral forces they produce. (Tr. 121). Unistrut is not commonly utilized to support ductwork alone nor

would it be economically prudent to so require it. Concomitantly, Unistrut is not recommended expressly as a means of supporting ductwork in the SMACNA Standards. (Tr. 29-30).

Contract Standard Provision Section 15800, paragraph 2.02B addresses the basic materials to be used in supporting ductwork as follows:

1. For Ductwork Supports: Conform to ASTM A36 and hot dip galvanize in accordance with ASTM A123, coating Designation G90.

2. Hardware for Supporting Ductwork: Galvanize in accordance with ASTM A153.

While the record does not contain a description of the standard testing procedures and measures incorporated in the foregoing ASTM requirements, it is uncontroverted that the Unistrut system does not conform to ASTM A36. (Tr. 93-94).

C. United's Quotation

United's quotation to Halco was prepared by its vice president and chief estimator, Mr. Perry Roberts. (Tr. 20). Mr. Roberts had a copy of the prime contract drawings and specifications at the time he prepared his estimate and understood that United would be required to furnish and install the air distribution systems and subsystems mandated under these documents. (Tr. 48-49).

The air distribution system is comprised of many parts. We are concerned here only with the installation of low pressure ductwork. In this regard, United determined from the prime contract plans that 90,221 pounds of low pressure ductwork would be necessary to perform the work under the contract. (Exh. R-9). Although some of this ductwork clearly was to be supported from a concrete floor slab, the majority was to be hung approximately fifteen feet above floor level. For estimating purposes, Mr. Roberts conservatively assumed that all ductwork would be hung rather than supported off the floor since the former was the more expensive type of support and the one to be used predominantly on the job. Mr. Roberts also concluded that the ducts contractually were to be installed in accordance with the SMACNA Standards. The foregoing assumptions were entered into a computer program which was written to enable Mr. Roberts to obtain pricing factors both for the miscellaneous metal required to support ductwork and the labor expense to be incurred in installation. These pricing factors were calculated by computer based upon United's historical costs on similar projects. While Mr. Roberts was unable to state precisely what price factors were obtained from his computer program relative to the furnishing and installation of ductwork support on this project, he testified based on his worksheets that the total amount bid for these items was less than $5,000. (Tr. 53). Mr. Roberts also stated that he did not make provision for any special type of ductwork supports not expressly set forth in the SMACNA Standards. He further testified that it is his practice, where special support elements are called for under a contract, to separately estimate the cost thereof and list it on his worksheet as a separate item. (Tr. 26).

A Unistrut system is shown on contract drawing M-47-1 as supporting certain ductwork. Purchase and installation of such a system was said by Mr. Roberts to be roughly ten times more expensive than conventional ductwork supports. (Tr. 41). Mr. Roberts, although aware of contract drawing M-47-1 prior to bid, testified that he simply concluded that the Unistrut system was incompatible with the SMACNA Standards and thus did not have to be provided. (Tr. 56). Upon review of Mr. Roberts' prebid estimate, we conclude that he in fact did not include the substantial cost of a Unistrut system and instead estimated only the cost of SMACNA type angle iron supports. In making this decision not to include the cost of a Unistrut system, Mr. Roberts did not inquire either of Halco, Appellant or the MTA as to the proper interpretation of the contract concerning the support of ductwork.

D. Evolution of Dispute

Although we previously have found that United did not include money in its bid for a Unistrut support system, United did know by May 21, 1981 that the system was being required by the MTA. (See Exh. R-17). Mr. Roberts claims that he first learned of this requirement through a draftsman in his office. The draftsman was preparing shop drawings for the ductwork installation and noticed the Unistrut system depicted on contract drawing M-47-1. We are told by United's Mr. Roberts that this draftsman called the Resident Engineer's office and apparently learned that the Unistrut was intended to provide common support both for the ductwork and other electrical and utility systems. (Tr. 35). The MTA Resident Engineer, however, denies receiving any such call and we cannot find on the basis of the evidence as presented that either he or a member of his staff advised United's draftsman in the manner alleged. At any rate, the record clearly demonstrates that by late May 1981, United in some manner became aware of the requirement and had taken the position that if Unistrut was necessary, it had no responsibility to furnish the system. (Exhs. R-17; R-12; Tr. 67).

Although it is apparent that United's position was made known to Halco in late May or early June 1981, there is nothing in the record to enable us to pinpoint the exact date. However, by letter dated June 2, 1981, Halco wrote Appellant on behalf of United and requested a change from the Unistrut system to traditional angle iron supports for ductwork. (Exh. R-2B). This request for a change order in turn was transmitted by Appellant to the MTA Resident Engineer on June 3, 1981. (Exh. R-2A). The Resident Engineer denied the request on June 8, 1981 as follows:

> 1. The unistrut system, as designed and specified by the contract [,] is the minimal support system which will allow for support of both your duct and other mechanical equipment to be installed at a later date by follow-on contractors.
>
> 2. The unistrut system allows the flexibility required for future expansion and/or modification of the designed system.

(Exh. R-1). Upon receipt of this denial, Halco directed United to furnish and install the Unistrut system shown on contract drawing M-47-1. (Exh. R-13). This directive was reiterated by mailgram dated July 21, 1981 and by letter dated July 24, 1981. (Exhs. R-16, R-19). Pursuant to these directives,

United proceeded with the work under protest. By letter dated July 27, 1981, United formally requested a change order from Halco in the amount of $48,845.43 covering the difference in cost between standard angle iron supports and the Unistrut system. This claim was forwarded to Appellant by letter dated July 31, 1981 and then to the MTA Resident Engineer on August 27, 1981. (Exhs. R-6A, R-6B).

The Resident Engineer initially understood the dispute to be one solely between the prime contractor and its subcontractors and declined to process the claim. (Exh. R-5). Thereafter, Appellant denied the claim of United and concluded that the Unistrut system was a part of the contract requirements. (Exh. R-26B). Notwithstanding this position, Halco later persuaded Appellant that it had a contractual duty to pass subcontractor claims through to the MTA for resolution under the prime contract disputes procedure. (Exh. R-21). Appellant thus complied with Halco's request and again forwarded United's claim to the MTA Resident Engineer on May 6, 1982. (Appeal file, Tab IV(13)). The Resident Engineer rejected the claim on its merits by letter dated May 14, 1982. (Exh. R-3)

By letter dated August 30, 1982, the Resident Engineer's action was appealed by Appellant to the Mass Transit Administrator. (Appeal file, Tab IV (18)). Prior to this date, United's attorney had requested authorization from Appellant to present the claim to the MTA Administrator directly. (Appeal file, Tab IV (15)). In submitting United's claim to the Mass Transit Administrator, Appellant expressly stated that a decision on representation had not as yet been reached.

The record is unclear as to whether United's attorney was permitted to argue the claim prior to the Mass Transit Administrator's consideration thereof. It is uncontroverted, however, that the Mass Transit Administrator denied United's claim on October 25, 1982 and that a formal agreement as to representation was reached by November 15, 1982. This agreement was as follows:

1. Halco Engineering and United Sheet Metal agree that no claim exists or will be asserted against S. J. Groves' Sons Company [Appellant] by Halco Engineering and/or United Sheet Metal arising out of the matters involved in this claim.

2. Counsel of United Sheet Metal shall do nothing and take no action that will injure Groves or impair its relations with the owner. Nor shall counsel for United Sheet Metal have any authority to represent or bind Groves in any matter or thing without Groves express written consent. Groves is authorized to advise MTA of these limitations on counsel's authority.

3. All expense of prosecuting the appeal will be borne by Halco and/or United Sheet Metal, including any expense incurred by Groves of whatever nature.

4. Payments from funds received from the Owner through S. J. Groves on this claim will be prorated to both Halco and United based upon the final percentage paid by the Owner on the final submitted claim amount. If 100% of the claim is paid by the Owner, Halco will receive 100% of its markup; if 50% is paid,

Halco will receive one-half of its markup, etc. United would receive the same percentage share of its submitted claim amount.

5. Halco and United Sheet Metal shall each accept the above conditions by signing the acceptance set forth below.

(Exh. R-32). Pursuant to this agreement, United's attorney entered a timely appeal with this Board on November 17, 1982.

II. Decision

A. Severin Doctrine

The MTA initally argues that it is entitled to summary disposition under the "Severin Doctrine." This affirmative defense takes its name from a 1943 decision of the former U. S. Court of Claims involving a prime contractor's suit against the Federal government for breach of contract. See Severin v. United States, 99 Ct.Cl. 435 (1943), cert. den. 322 U.S. 733 (1944). Under the facts in Severin, the government admittedly breached its contract with the prime contractor by hindering the timely construction of a post office building. The prime contractor sought recovery of its own damages and those incurred by its subcontractor resulting from the breach. The subcontract agreement, however, contained an exculpatory clause wherein the subcontractor agreed that the prime contractor would not be held responsible for delays caused by the government. Based on this language, the Court denied recovery of the subcontractor's damages essentially on contract privity grounds. Simply put, the prime contractor had not established that, in the performance of its contract with the government, it became liable to the subcontractor for delay costs and hence had been damaged to the extent of the subcontractor's loss.

The Severin doctrine was reaffirmed by the U. S. Court of Claims in J. L. Simmons Company, Inc. v. United States, 158 Ct.Cl. 393, 397-98 (1962) as follows:

> Since our decision in the Severin case, supra, this court has repeatedly delineated the only grounds upon which a prime contractor may sue the Government for damages incurred by one of its subcontractors through the fault of the Government. The decided cases make abundantly clear that a suit of this nature may be maintained only when the prime contractor has reimbursed its subcontractor for the latter's damages or remains liable for such reimbursement in the future. These are the only ways in which damages of the subcontractor can become, in turn, the damages of the prime contractor, for which recovery may be had against the Government. [citations omitted]. The same result will follow when the subcontract provides for a complete release of the prime contractor's liability to the subcontractor upon the granting of additional time for the latter's performance, or the acceptance of final payment by the latter. [citations omitted]. Lying between these extremes are those cases involving situations wherein the prime contractor has agreed to reimburse its subcontractor for damages it has suffered at the hands of the Government, but only as and when the

former receives payment for them from the Government. This court has expressed the view that such clauses do not preclude suit by the prime contractor in behalf of its subcontractor. . . . [citations omitted].

The Court proceeded to rule in J. L. Simmons that a release executed by a subcontractor was not completely exculpatory even though the prime contractor was obligated to make payment only if the Court ruled favorably on the claim presented. The Court noted that neither the contract between the parties nor the release expressly negated liability to the subcontractor for damages sought from the government. In fact, the very execution of a release implied that some prime contractor liability existed with regard to the subcontractor's claim. The release simply set forth the manner in which the prime contractor's liability was to be extinguished. Compare Keydata Corporation v. United States, 205 Ct.Cl. 467, 504 F.2d 1115 (1974).

Although the Severin doctrine still has vitality in breach of contract actions, the defense may not be raised where subcontractor claims properly are asserted as a request for equitable adjustment under the provisions of a prime government contract. James F. Seger v. United States, 199 Ct.Cl. 766, 778, 469 F.2d 292 (1972). As stated by the U.S. Court of Claims:

> The Blount case [Blount Brothers Construction Company v. United States, 172 Ct.Cl. 1, 348 F.2d 471 (1965)] establishes that when the subcontractor's delay claims are eligible for inclusion in an equitable adjustment within the terms of the prime contract, the Severin rule does not apply. The rule continues to apply where the prime contractor asserts an action for breach of contract. Exculpatory clauses in the subcontract were intended to insulate the prime contractor from the possibility of being liable to his subcontractor for delay caused by the Government, and yet unable to recover from the Government because the prime contract did not provide for an equitable adjustment for delay claims. The need for the exculpatory clause is clear when the prime contractor's only remedy against the Government is an action for breach of contract. When the prime contract, however, provides that the Government will compensate the prime contractor for unreasonable delay costs, the necessity for such protection does not exist.
>
> The Severin rule where it is applicable produces harsh results. Where the provisions of the prime contract provide a mechanism that in a proper case can mitigate injury to the subcontractor, and such provisions are incorporated by reference in the subcontract, abstract legal doctrines of privity and exculpatory clauses in the subcontract do not control.

Id. at p. 780; see also Owens - Corning Fiberglas Corp. v. United States, 190 Ct.Cl. 211, 419 F.2d 439 (1969); Fischbach & Moore International Corp., ASBCA No. 18146, 77-1 BCA ¶12,300; CWC, Inc., ASBCA No. 26432, 82-2 BCA ¶15,907.

Turning to the substance of the MTA's motion, we note that the record does not contain a copy of the subcontract agreement between Appellant and Halco. However, the MTA has not alleged that this document contains an exculpatory clause and it appears that the Severin defense is founded solely upon the post-performance agreement reached between Appellant and its

subcontractors in November 1982[1] concerning representation and the disposition of recovered claim funds. While this agreement appears comparable to the release considered by the U. S. Court of Claims in J. L. Simmons, supra, it is unnecessary for us to so determine. The instant appeal involves the proper interpretation of the prime contract. In actuality, United is claiming through Appellant that the MTA Resident Engineer constructively changed the contract by directing the installation of a Unistrut system to support the required ductwork and other electrical and mechanical systems. If proven, the actions of the MTA Resident Engineer would not constitute a breach of contract but rather would be compensable in the form of an equitable adjustment under the prime contract changes clause.[2] Accordingly, the Severin doctrine is inapplicable.[3]

B. Contract Interpretation

It is well settled that in construing a contract, apparently conflicting contractual provisions should be reconciled if at all possible. Unicon Management Corporation v. United States, 179 Ct.Cl. 534, 537-38, 375 F.2d 804 (1967); compare Jeffrey Sneider - Maryland, Inc. v. LaVay, 28 Md. App. 229, 240 (1975). The rule as stated, however, quite clearly recognizes that it is not always possible to find concord within a contract document and that the bounds of reason should not be strained in order to avoid a conflict.

Focusing on the relevant contractual provisions creating the instant dispute, we look first to Special Provision §15800, ¶2.03A which expressly provides that the construction of ductwork and supports " . . . shall conform to the latest edition of SMACNA Standards. . . . " These SMACNA Standards address the construction and installation of low velocity ductwork and contain recommendations for the support of ductwork based solely on the weight of the actual ductwork to be hung or otherwise supported. Systems for the common support of ductwork and other mechanical or electrical systems neither are analyzed nor recommended in the SMACNA Standards. We conclude from the foregoing, therefore, that contract Special Provision §15800, when read alone, envisions the independent support of all ductwork by conventional sheet metal standards.

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[1]See findings of fact, pp. 9-10.

[2]The "changes" clause is contained in contract General Provision GP-4.05 and converts what otherwise would be a breach of contract into a claim arising under the contract. The clause provides for an equitable adjustment where the Engineer actually or constructively changes the contract requirements.

[3]We recognize that the Severin doctrine is inapplicable in the instant setting so long as the remedy granting clauses of the prime contract are incorporated in the respective subcontracts. Although the subcontract between Appellant and Halco is not before us and we thus are uncertain as to its content, the MTA had the burden to prove the absence of a subcontract flow down provision. Southern Construction Co. v. United States, 176 Ct.Cl. 1339, 1351-52, 364 F.2d 439 (1966); Garod Radio Corp. v. United States, 158 Ct.Cl. 596, 601, 301 F.2d 945, 947 (1962).

Contract drawing M-47-1, on the other hand, shows the main supply duct for the station air conditioning supported by a "Unistrut" system, or equal. Further, the Unistrut supports were shown at a spacing of 2'-6" center to center implying design loads much greater than the weight of ductwork alone. This spacing, together with the depiction of certain mechanical piping being supported by the Unistrut system, thus clearly evidenced a system that was capable of serving as a common support for at least the main supply ductwork and certain mechanical and electrical piping. Given that the Unistrut system was not intended to provide dedicated support to the ductwork and further did not comport with the requirements of ASTM A36, as mandated by SMACNA Standards and contract Standard Provision §15800, paragraph 2.02B, we find that it did not constitute a support system conforming to the latest edition of the SMACNA Standards.

Notwithstanding this finding, the MTA contends that the Special Provisions and contract drawings reasonably may be read to complement each other. In this regard, we are told that the contract drawings were intended simply to supplement the Special Provisions by providing a design detail for those circumstances where a common support of ductwork and mechanical piping was necessary. In our view, however, the MTA's interpretation ignores the unconditional language of contract Special Provision §15800 which mandates that all ductwork support required pursuant to the contract terms conform to SMACNA Standards. This requirement cannot be reconciled with contract drawing M-47-1 showing a Unistrut support system for the main supply duct and we thus conclude that a conflict exists between the contract Special Provisions and drawing M-47-1.

Contractual conflicts of the type existent here are addressed in contract Supplementary General Provision SGP-5.03, in pertinent part, as follows:

> B. Precedence of Contract Documents: The Contract Drawings shall govern over the Standard Specifications. The Special Provisions shall govern over the Standard Specifications, and the Contract Drawings. . . . " (Underscoring added).

United and Appellant contend that the foregoing language obviated any duty that otherwise may have arisen requiring a prebid inquiry as to the conflict. Reliance on contract Special Provision §15800 alone, in view of SGP-5.03, further was said by these parties to be proper.

The conflict between contract Special Provision §15800 and drawing M-47-1 was apparent to United's Mr. Roberts when he prepared his subcontract bid to Halco. (Tr. 56). In the absence of an order of precedence clause, the law is clear that United's prebid duty of inquiry would have been absolute. James A. Mann, Inc. v. United States, 210 Ct.Cl. 104, 122-123, 535 F.2d 51 (1976). The issue here, of course, is whether the duty to inquire under such circumstances remains absolute where an order of precedence is included in the contract.

The most authoritative decision on this issue is Franchi Construction Company, Inc. v. United States, 221 Ct.Cl. 796, 609 F.2d 984 (1979). In that case, the contract was ambiguous with regard to the sequencing of partition work and floor tiling. The specifications required tile work to be accomplished after the erection of wall partitions while the contract drawings

indicated that the partitions were to be placed atop the tiled floor. An order of precedence clause provided that the specifications would govern over the contract drawings in case of conflict. The recommended decision of the Claims Court Trial Judge was that:

> . . . The Government authored the order of precedence clause as a mechanism to automatically remove conflict between the specifications and drawings by assigning the preeminence to the former. . . .
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> * * *
>
> The plaintiff is entitled to take the Government sponsored order of precedence clause at face value. WPC Enterprises Inc. v. United States, 163 Ct.Cl. 1, 6-7, 323 F.2d 874, 876-77 (1963). Once its right to do so in the present situation is recognized, no conflict sufficient to occasion inquiry remains . . .

Id. at p. 805. The Court of Claims adopted the decision and conclusion of the Trial Judge with the following cautionary statement:

> We would assume arguendo that a bidder, who noticed or should have noticed a serious mistake in the invitation or other of the contract documents, must divulge what he has or should have noticed to the government, and will not in equity be allowed to profit by not doing so, as it would be an instance of overreaching. This is not this case, whether the discrepancy be patent or latent. . . . We cannot in the circumstances say in face of the precedence clause, our characterization of a discrepancy as patent automatically triggers an obligation to report. The clause itself seems designed to excuse such reporting, instances where equity would intervene aside.

Id. at p. 798. A number of Federal boards of contract appeals since have followed the foregoing ruling. See Blinderman Construction Company, Inc., ASBCA Nos. 23818, 24071, 24127, 80-2 BCA ¶14,804; Murray Walter, Inc., VACAB No. 1557, 82-1 BCA ¶15,476; John C. Grimberg Company, Inc., PSBCA No. 1085, 83-2 BCA ¶16,836. With regard to the Court's caveat concerning the intervention of equity, however, at least three Federal boards have concluded that where a bidder has actual knowledge of a conflict prior to bid, an order of precedence clause does not obviate the duty to inquire. In such cases, the conclusion consistently has been that a contractor overreaches by bidding the least expensive requirement in order to obtain a competitive advantage and then, if ordered to perform differently, by seeking compensation for the additional effort expended. Action Manufacturing Company, ASBCA No. 23773, 81-2 BCA ¶15, 239; Pettinaro Construction Company, Inc., DOTCAB No. 1257, 83-1 BCA ¶16, 536; Roubin & Janeiro, Incorporated, GSBCA No. 5010, 81-1 BCA ¶14,916.

It is unnecessary for us to conclude that, in all instances, a bidder's prebid knowledge of a conflict between contract provisions triggers a duty to make inquiry even where an order of precedence clause mechanically acts to avoid the discord. The facts here, however, conclusively demonstrate that United, and hence Appellant, acted in bad faith by omitting to make inquiry after recognizing a conflict prior to bid. The record shows that United is seeking an extra $48,845.43 in costs related to the purchase and installation of the Unistrut system. This amount is nearly 10% of the sum bid by United

to Halco. Regardless of whether a Unistrut system ordinarily is furnished by a sheet metal contractor, United should have inquired prior to bid both as to the need for the system and its responsibility to furnish same. By simply ignoring contract drawing M-47-1 and computing its bid based on the least expensive alternative, United was able to reduce its subcontract quote substantially, improve its chances of receiving a subcontract award, and place itself in a position where, if directed to install a Unistrut system, it would receive payment on a "cost-plus" rather than a competitive basis. United's action, in our view, clearly represents an attempt to subvert the competitive bid system and take fiscal advantage of the MTA. United accordingly must be held to the MTA's interpretation and cannot rely on the order of precedence clause to reap an unwarranted benefit.[4]

C. Did Appellant Offer To Provide A Support System Equal To The Unistrut System

Appellant contends that the only functional characteristic of the Unistrut system which was set forth in the contract was that it be able to support the main supply duct. While the Unistrut system admittedly was depicted on contract drawing M-47-1 as likewise supporting certain other piping, the remainder of the contract drawings do not contain any express reference to the piping which was to be supported on the Unistrut system. Further, during performance, the Unistrut was not used by the mechanical subcontractor in supporting any pipe required under the captioned contract. Thus, it is argued, that there neither was a need nor a requirement for the common support of ductwork and mechanical systems under the contract and, hence, that the SMACNA Standards would have provided the same function as the Unistrut system in supporting the ductwork alone.

We find as a fact that the Unistrut system was specified principally to accommodate the support of electrical systems which were to be installed under later MTA contracts. (Tr. 189-190). While it may have been possible under the instant contract for Halco also to have supported its mechanical piping on the Unistrut system had United furnished and installed it earlier, neither Halco nor the MTA insisted upon the Unistrut for this purpose. The issue here therefore is whether the contract adequately apprised Appellant and United that the Unistrut system was intended to support items in addition to ductwork.

Contract drawing M-47-1, Section E, referred Appellant to Unistrut General Engineering Catalog 7R.[5] In addition, this contract drawing specified that duct supports were to be spaced at 2'-6" center to center. We find that these two provisions were sufficient to put a knowledgeable contractor on

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[4]Appellant has called our attention to our previous decision in Martin G. Imbach, Inc., MDOT 1020, May 31, 1983 wherein we gave effect to the order of precedence clause. Imbach is inapposite to the instant facts, however, since there was no evidence in that case to demonstrate that the contractor recognized the ambiguity prior to bid or otherwise acted inequitably.

[5]Although there was testimony that this catalog had been superceded by the time bids were solicited, there was no testimony that the catalog was unavailable through a Unistrut distributor. (Tr. 91).

notice that the system being specified was intended to carry loads far in excess of what ductwork alone would generate. (See Appeal file, Tab IV(1)). This support capability, in our view, represented a functional characteristic of the Unistrut system which Appellant was obligated to provide in any equal system offered under the contract. Additionally, the ability to support commonly a number of mechanical and electrical systems was a functional characteristic which also should have been evident from the Unistrut catalog. Where a catalog cut expressly is referenced in a contract, the salient features of the product as described therein are incorporated into the contract and are considered to be functional characteristics which offered equals must provide. Ryan Electric Company, PSBCA No. 1020, 82-2 BCA ¶16,042.

Appellant had the burden here to establish that the support system envisioned by the SMACNA Standards would perform ". . . substantially the same function in substantially the same way and for substantially the same purpose" as the Unistrut system. J. B. Williams Co., Inc. v. United States, 196 Ct.Cl. 491, 511, 450 F.2d 1379 (1971); see also S. L. Haehn, Inc., ASBCA No. 20164, 76-2 BCA ¶12,036. This it was unable to do. The SMACNA Standards are written for the support of ductwork alone. The angle iron supports as designed under SMACNA Standards for the main supply duct neither would have provided the same support strength capability as the Unistrut system nor have permitted the common support of other electrical and mechanical systems. Accordingly, the evidence establishes that SMACNA supports would not have performed in a functionally equivalent manner to the Unistrut system and, for this reason, the offer to provide SMACNA type supports as an equal properly was rejected by the MTA.

For all of the foregoing reasons, therefore, the appeal is denied.