

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
)  
Southern Systems, Inc. ) ASBCA Nos. 43797, 43798  
)  
Under Contract Nos. DACA83-89-C-0004 )  
DACA83-88-C-0128 )

APPEARANCE FOR THE APPELLANT: David A. Hearne, Esq.  
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APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.  
Engineer Chief Trial Attorney  
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Engineer Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WILLIAMS  
ON THE GOVERNMENT’S MOTIONS TO DISMISS  
AND/OR FOR SUMMARY JUDGMENT

These appeals arise from two contracting officer’s final decisions denying appellant’s claims for additional costs incurred when the Government refused to accept the coated steel support posts for certain playground equipment which appellant proposed as a substitute for the coated aluminum support posts described in the contracts’ specifications. The Government has filed substantially identical motions under both appeals. We treat the motions as motions for summary judgment and deny them.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The U.S. Army Engineer District, Honolulu (the Government) awarded Southern Systems, Inc. (appellant) Contract No. DACA83-88-C-0128 (Contract 0128) on 30 September 1988 at the price of \$175,330 and Contract No. DACA89-89-C-0004 (Contract 0004) on 8 December 1988 at the price of \$172,000 for the installation of playground equipment and structures at various Navy family housing locations in Hawaii (R4, tab C). The contracts each contained a clause entitled, DISPUTES (1984 APR) FAR 52.233-1 (43797 R4, tab C at II-39; 43798 R4, tab C at II-39).

2. The contracts also each contained a clause entitled, MATERIAL AND WORKMANSHIP (1984 APR) FAR 52.236-5, which provided, in pertinent part:

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

\* \* \*

(43797 R4, tab C at II-42; 43798 R4, tab C at II-42)

3. Each of the PLAYGROUND EQUIPMENT sections of the contracts' specifications contained the following relevant provision:

3.1 Support Columns: Approximately 4" to 6" aluminum pipe column with baked on polyester powder coated finish.

The specifications also reiterated that aluminum support columns were required for specific pieces of playground equipment. For example, the specifications provided:

3.10 Belt Swing: Approximately 8' high 4" to 6" o.d. aluminum swing beam and support columns with polyester powder coated finish. . . .

3.21 Horizontal ladder: 4" to 6" o.d. aluminum beam and columns and 1" to 1 1/2" o.d. heavy wall aluminum rails with a baked on polyester powder coating.

3.24 Turning Bar 4" to 6" o.d. aluminum columns and 1" to 1 1/2" o.d. heavy wall aluminum rail with a baked on polyester coating.

(43797 R4, tab C at 02486-1 to 02486-3; 43798 R4, tab C at 02486-1 to 02486-3)

4. Each of the contracts contained drawings of the playground equipment to be installed. The drawings included catalog numbers for certain playground equipment. For example, one of the drawings lists "PIPEWALLS (2) #10644" and "SPIRAL SLIDE #74084" as well as the names of several other pieces of equipment and their

corresponding catalog numbers. The Government and appellant agree that the catalog numbers listed were those of a playground equipment manufacturer, Landscape Structures. In an affidavit, Mr. Raymond H. DuBois, who prepared appellant's bid, stated that the drawings showed "Landscape Structures products in dimensioned plan and overhead view." Each of the drawings also contained the following caption: "EQUIPMENT SHOWN AND PARTS NUMBERS GIVEN ARE FOR GRAPHIC DISPLAY. CONTRACTOR MAY SUBSTITUTE APPROVED EQUALS." (43797 R4, tab E; 43797 Gov't br. at ¶ 16; 43798 R4, tab E; 43798 Gov't br. at ¶ 20; DuBois affidavit at ¶ 5)

5. By letter dated 14 December 1988, submitted under Contract 0128, appellant requested a deviation from the specification's requirement for aluminum support columns. The letter stated, in pertinent part:

Section 02486-3.1 of the playground equipment specs. states, support columns are to be aluminum pipe with baked on polyester powder coated finish. We are asking for a deviation to steel support columns. Landscape Structures is the only company able to produce aluminum support columns with steel platform decks and, therefore, the specification is proprietary. Playworld and Columbia Cascade actively bid this and other similar projects of yours, assuring us and our competitors all along that their material was acceptable to the Corps, however, they both use steel pipe columns to support their steel platforms.

By letter dated 19 January 1989, the Government disapproved appellant's request for a material variance from aluminum to steel support columns. (43798 R4, tabs D-1, D-3)

6. Appellant submitted an ENG FORM 4025 for Contract 0004, dated 30 December 1988, on which appellant indicated that it would be providing "Playground layout per plans and specs" and that the equipment would be manufactured by Landscape Structures. In the REMARKS section of that form, appellant wrote: "Steel support post instead of Aluminum. Aluminum support posts are a proprietary item." A Government official signed the form, dated it 30 January 1989, and typed the following comment on the back of the form: "Material variation for supports is being addressed by separate correspondence. As Landscape Structures are being furnished as specified, submittal is otherwise acceptable." (43797 R4, tab D-1)

7. The records for both appeals contain copies of a Government memorandum for record, dated 5 January 1989, signed by Priscilla Ligh, Project Engineer, which stated, in pertinent part:

Per phone call this day with Mr. Ben Eligio (APZV-OHP), the Pearl Harbor Housing Office preferred to have aluminum post over steel post for the playground equipment. Mr. Eligio's conversation with Mr. Mel Weiss and Mr. Roy Nakamura (APZV-OHP), conveyed that much of the playground areas under these projects are subject to a rust-promotable environment. As much as possible, the housing office would like to adhere with the existing contract specifications, stating aluminum post.

(43797 R4, tab D-2; 43798 R4, tab D-2)

8. By letter dated 20 January 1989, submitted under both contracts, appellant again requested a variance from aluminum support posts to steel posts. The Government denied the requested substitution by letter dated 26 January 1989. (43797 R4, tabs D-3, D-5; 43798 R4, tabs D-4, D-5)

9. By letter dated 5 May 1989, appellant submitted a request for a contracting officer's final decision under both contracts. Appellant stated that "only Landscape Structures [was] able to comply with the 'aluminum requirements of the specification. All other manufacturers construct their metal playground structures from tubular STEEL." Appellant stated that it had cost it \$53,967 "to provide Landscape Structures aluminum product" and that it was seeking its "increased costs due to the proprietary (non competitive) nature of the specifications." The letter also provided:

It is our claim that Landscape Structures is the only manufacturer of components who can meet all of the specification requirements at standard, volume production, costs and with cataloged sales prices and specifications that match those of the contract specifications.

(43797 R4, tab D-10; 43798, tab D-11)

10. Appellant later submitted change order estimates, dated 25 September 1989, which specified that its total cost for providing aluminum items, instead of steel items was \$40,135 under Contract 0004 and \$36,586 under Contract 0128 (43797 R4, tab D-14; 43798 R4, tab D-15).

11. In his affidavit, Mr. DuBois stated, in pertinent part:

3. In preparing the bids, I did determine that the specifications and drawings were written to describe playground equipment manufactured by Landscape Structures and that aluminum was indicated for the supports. However,

other playground equipment manufacturers and I assumed that equipment from manufacturers other than Landscape Structures could be used on the procurements pursuant to the Materials and Workmanship clause. In preparing the bid for the contracts, I did not consider the reference to aluminum supports to state a salient or limiting characteristic and did not consider that Southern Systems, Inc. had no choice on these contracts but to use aluminum supports. I assumed that aluminum supports were indicated in the specifications only because Landscape Structures wrote the specifications and manufactures its supports out of aluminum.

\* \* \*

5. The contract drawings included Landscape Structures catalog numbers for playground equipment required to be installed on these contracts. The drawings also show Landscape Structures products in dimensioned plan and overhead view. The contract specifications refer to certain equipment by the Landscape Structures brand name for such equipment. Items of equipment so identified in the specifications by Landscape Structures brand name include “Snake Slide” and “Spring Up”. The contract drawings for the subject contract contain exact dimensions for Landscape Structures equipment.

6. It appears that the design engineer for the Government on this project copied the drawing design, dimensions and specifications provided directly from Landscape Structures. The copying of such information from a specific manufacturer is not unusual on a playground equipment contract; . . .

7. To the best of my knowledge, at the time these contracts were bid and performed, no manufacturer other than Landscape Structures produced supports out of aluminum. Any manufacturer other than Landscape Structures would have been required to specially manufacture the supports out of aluminum as a single specialty “mill” order solely at the request of Southern Systems, Inc. There are also different processes used to produce the aluminum rather than coated steel including use of different machines and methods to bend the material. Give the expense for such a specialty order, the use of any other manufacturer to produce supports out of

aluminum was practically impossible. Southern Systems, Inc. would not have been able to provide such a specialty order within its bid price for these contracts. Also, given the long lead time for production of such a specialty order and the required changes in the production process, Southern Systems, Inc. would not have been able to provide such a specialty order within the time allowed to complete the subject contracts.

8. The Government wrongfully insinuates that the issue in these appeals is substitution of raw steel instead of raw aluminum and that the aluminum offers superior protection from rust. In fact, the steel product submitted by Southern Systems, Inc. is not raw steel and is vastly superior to the aluminum product which the Government eventually required to be installed. . . .

9. In preparing its bid for this contract, Southern Systems, Inc. utilized quotes from two manufacturers other than Landscape Structures who expected their equipment would be considered equal to the Landscape Structures equipment specified by the Government.

10. After bid opening, the Contracting Officer advised Southern Systems, Inc. that he would not accept any substitutions to the product called for in the specifications.

11. In an effort to still be able to utilize the two low bidders, Southern Systems, Inc. requested that these bidders attempt to match the Landscape Structures product in design, layout and material. While these competing suppliers would have been able to comply with the overall layout design for the playground equipment, only Landscape Structures was able to comply with the “aluminum requirements of the specification”. Neither of the two low bidders could match the Landscape Structures specification exactly, particularly the use of aluminum supports rather than coated steel. All manufacturers other than Landscape Structures construct their metal playground structures from tubular steel.

12. As a result of the Contracting Officer’s refusal to consider an alternate to the product required by the specifications, Southern Systems, Inc. lost the two substantially lower bids that it had received for the

playground equipment on bid day. When these low bidders were asked to revise their quotes to include aluminum supports, both cancelled their original quotes.

13. Southern Systems, Inc. did make the Government aware of the features and benefits of using the coated steel product. I have attached to this Affidavit an information program from the tube manufacturer that explains the benefits of coated steel and shows that coated steel has the same or better rust resistance properties as aluminum plus superior product strength. The Government never advised Southern Systems, Inc. that the basis for the rejection of the coated steel product was due to concerns over rust resistance. The Government rejected the coated steel post submittal without providing any basis for the rejection and without providing Southern Systems, Inc. with the opportunity to address any such concerns. . . .

\* \* \*

(DuBois affidavit)

12. The contracting officer issued final decisions, dated 27 August 1991 under Contract 0004 and dated 28 August 1991 under Contract 0128, denying appellant's claims in their entirety. The contracting officer stated that he did not accept appellant's contentions that the specifications were proprietary. The contracting officer did not specifically identify a "salient characteristic" which appellant's proposed substitution allegedly failed to meet; however, the contracting officer did note that it was "clear that the Navy family housing office's comments concerning the ability of the playground equipment to withstand the corrosive, saline environment, which is commonly known to exist on Oahu, carried great weight with the technical personnel." (43797 R4, tab B; 43798 R4, tab B) These appeals followed. The appeal under Contract No. DACA83-89-C-0004 was docketed as ASBCA No. 43797 and the appeal under Contract No. DACA83-88-C-0128 was docketed as ASBCA No. 43798.

### DECISION

In its motions, the Government asserts that appellant's complaints should be dismissed for failure to state a claim upon which relief can be granted. However, the Government also recognizes that its motions should be treated as motions for summary judgment since matters outside the pleadings have been presented to and not excluded by the Board. The Board uses the Federal Rules of Civil Procedure as a guide in procedural matters. Under Rule 12(b) of the Federal Rules of Civil Procedure, if a motion asserts that an action should be dismissed for the failure of a pleading to state a claim upon

which relief can be granted, and matters outside the pleading are presented to and not excluded by the court, then the motion shall be treated as one for summary judgment. The Government's motions fall into this category and shall be treated as motions for summary judgment.

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). "The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment." *Id.*

Appellant alleges that the contracts' specifications describe only the product of Landscape Structures and are therefore proprietary; the coated steel support columns it wanted to provide are the functional equivalents to the coated aluminum support columns described in the specifications; the specification reference to "aluminum" does not state a salient characteristic; and the Government wrongfully denied appellant's request to use coated steel, rather than coated aluminum, support columns. In moving for summary judgment, the Government asserts that the specifications were not proprietary and that, even if the specifications were proprietary, appellant has not met its burden of proving that its proposed substitution of steel support columns was functionally equivalent to the aluminum support columns referenced in the specifications because the aluminum requirement was a salient characteristic of the products specified.

The general rule is that the Government is entitled to strict compliance with its specifications and is not obligated to accept substitutes. The contracts' MATERIAL AND WORKMANSHIP clauses, however, provide an exception to the general rule. *See C&D Construction, Inc.*, ASBCA Nos. 48590, 49033, 97-2 BCA ¶ 29,283 at 145,696. "The Material and Workmanship clause provides a contractor the right to submit a substitute product for a proprietary item called for in the contract's specifications absent a warning that only the "brand name" will be accepted." *North American Construction Corp.*, ASBCA No. 47941, 96-2 BCA ¶ 28,496 at 142, 298.

To prevail in an appeal applying the MATERIAL AND WORKMANSHIP clause, appellant bears the burden of proving that:

- (1) the specifications are proprietary, (2) appellant submitted a substitute product along with sufficient information for the contracting officer to make an evaluation of the substitute, and (3) the proposed substitute meets the standard of quality represented by the specifications. *Central Mechanical, Inc.*, 84-3 BCA at 88,157.

*North American Construction Corp.*, 96-2 BCA at 142,299.

A specification is proprietary when it describes an item that can only be obtained from one source, even when a brand name is not expressly designated. *See C&D Construction, Inc.*, 97-2 BCA ¶ 29,283 at 145,697; *North American Construction Corp.*, 96-2 BCA at 142,298; *W.M. Schlosser Company, Inc.*, ASBCA No. 44778, 96-2 BCA ¶ 28,297 at 141,289; *Central Mechanical, Inc.*, ASBCA Nos. 29360, 29514, 84-3 BCA ¶ 17,674 at 88,157. “When the evidence is that other manufacturers can meet the specification it, by definition, could not be proprietary or sole source.” *J.R. Youngdale Construction Co., Inc.*, ASBCA 27793, 88-3 BCA ¶ 21,009 at 106,118.

Appellant asserts that the specifications are proprietary because they were written to describe only the product of Landscape Structures. Both parties agree that the contracts’ drawings included Landscape Structures catalog numbers for certain playground equipment (SOF 4). By affidavit, Mr. DuBois stated that the drawings showed Landscape Structures products in dimensioned plan and overhead view and that the specifications referred to certain equipment by the Landscape Structures brand name. Mr. DuBois further stated that, to the best of his knowledge, at the time the contracts were bid and performed, no other manufacturer than Landscape Structures produced supports out of aluminum. (SOF 11) In arguing that the specifications were not proprietary, the Government points out that the drawings, while including Landscape Structures catalog numbers, also included the following notation: “EQUIPMENT SHOWN AND PARTS NUMBERS GIVEN ARE FOR GRAPHIC DISPLAY. CONTRACTOR MAY SUBSTITUTE APPROVED EQUALS” (SOF 4). Further, the Government argues appellant has not shown that the specified aluminum support columns could not be obtained from a source other than Landscape Structures and points to paragraph 7 of Mr. DuBois’ affidavit, in which he stated that “[a]ny manufacturer other than Landscape Structures would have been required to specially manufacture the supports out of aluminum as a single specialty ‘mill’ order solely at the request of Southern Systems, Inc.,” as evidence that it was possible for manufacturers other than Landscape Structures to provide aluminum support columns (see SOF 11). On the record before us, we cannot say that appellant will be unable to meet its ultimate burden of showing that the specifications are proprietary. There are genuine issues regarding material facts with respect to the issue of whether the specifications are proprietary *vel non*.

Additionally, we think there is a genuine issue regarding facts material to the issue of whether appellant’s proposed substitute of coated steel supports meets the standard of quality represented by the specifications. “The burden of proof of equal performance and quality is upon the appellant who claims that its substitute item has been unreasonably rejected by the respondent.” *R.R. Mongeau Engineers, Inc.*, ASBCA No. 29341, 87-2 BCA ¶ 19,809 at 100,191. In reviewing a contracting officer’s decision that a proposed substitute is not equal to the item stated in the contract, we do not focus simply upon the substitute’s ability to function. Instead, “we examine all product characteristics set forth in the specification as salient to determine if the proposed substitute possesses those characteristics, whether they be functional, physical, or otherwise.” *Minority*

*Enterprises, Inc.*, ASBCA Nos. 45549, 45553, 45683, 45696, 95-1 BCA ¶ 27,461 at 136,828.

Appellant maintains that the coated steel support columns it wished to use were the functional equivalent of the aluminum columns referenced in the specifications. Appellant states that Mr. DuBois would testify at trial that coated steel offers superior rust resistance and product strength over aluminum. In his affidavit, Mr. DuBois stated that appellant made the Government aware of the features and benefits of using the coated steel product and, attached to the affidavit, is an information packet from the tube manufacturer which, Mr. DuBois maintains, “shows that coated steel has the same or better rust resistance properties as aluminum plus superior product strength.” (SOF 11)

On the other hand, the Government maintains that the contracting officer properly rejected appellant’s proposed substitution of coated steel support columns because the proposed substitution did not meet the salient requirements unambiguously set forth in the contracts’ specifications. The PLAYGROUND EQUIPMENT sections of the contracts’ specifications did set forth, in multiple places, a requirement for the support columns to be aluminum with a polyester powder coated finish (SOF 3). The Government argues that the correspondence between the parties made it clear that the Government’s position was that the aluminum requirement was a salient characteristic of the products specified and that appellant’s proposed substitution of coated steel was therefore not equal and was properly rejected (see SOF 5, 6, 8).

Appellant asserts that the contracting officer rejected appellant’s proposed submission of coated steel supports based on the conclusion that coated steel did not offer the same rust resistance as aluminum and that the rejection was improper because the specifications did not list rust resistance as a salient characteristic for the support columns (see SOF 3). When the Government uses a brand name or equal specification, it must identify the salient characteristics of the brand name product and use those characteristics in evaluating the equivalency of proposed substitutes. See *KEMRON Environmental Services Corp.*, ASBCA No. 51536, 18 November 1999, slip op. at 7. “While the Government may reject a substitute if the salient characteristics are not met, . . . bidders should not have to guess at the essential qualities and the Government cannot reject an item that is functionally equivalent to the brand name product.” *Id.*

Although appellant asserts that rust resistance was the salient characteristic upon which the Government based its rejection of appellant’s proposed substitution of coated steel support columns, we note that the contracting officer’s final decisions did not specifically state that rust resistance was the salient characteristic which appellant’s proposed substitute allegedly failed to meet (SOF 12). However, the final decisions did reference the Government Project Engineer’s 5 January 1989 memorandum which memorialized her telephone conversation with Mr. Eligio (SOF 7, 12). The contracting officer noted that it was “clear that the Navy family housing office’s comments concerning the ability of the playground equipment to withstand the corrosive, saline

environment, which is commonly known to exist on Oahu, carried great weight with the technical personnel” (SOF 12).

Appellant further contends, in its reply brief, that coated steel supports look exactly like aluminum supports so aesthetic concerns cannot be an issue, although appellant has offered no proof on this issue. Appellant also states its belief, as asserted by Mr. DuBois in his affidavit, that the drawings and specifications were written to describe Landscape Structures’ products and that aluminum supports were listed in the specifications because Landscape Structures manufactures its supports out of aluminum. Mr. DuBois also stated that he did not consider the references to aluminum supports to state a salient characteristic and assumed that aluminum supports were indicated in the specifications only because Landscape Structures wrote the specifications and manufactures its supports out of aluminum. (SOF 11)

Based on the record before us, we think there exist genuine issues of material facts over whether the salient characteristic upon which the Government based its rejection of appellant’ proposed substitution was “aluminum” or “rust resistance” and also whether coated steel support posts are the functional equivalent of coated aluminum support posts.

Because we hold that there are material facts in dispute, the Government’s Motions for Summary Judgment are denied. Within 30 days of receipt of this decision, the parties shall file a joint proposed schedule for resolution of this appeal.

Dated: 19 January 2000

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PAUL WILLIAMS  
Administrative Judge  
Chairman, Armed Services  
Board of Contract Appeals

I concur

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I concur

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MARK N. STEMLER  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

J. STUART GRUGGEL, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 43797 and 43798, Appeals of Southern Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals