

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
R. P. Richards, Inc.) ASBCA No. 51340
)
Under Contract No. F02604-96-C0012)

APPEARANCE FOR THE APPELLANT: C. Patrick Stoll, Esq.
Herrig & Vogt, LLP
Rancho Cordova, CA

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
Tedd J. Shimp, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This appeal arises from a contracting officer's (CO) final decision denying appellant's claim for additional costs incurred to provide three brand name products after he rejected appellant's submittals of "or equal" products. Respondent moves for summary judgment on the following grounds: (1) the contract precluded consideration of substitutes for two of the three products in issue; (2) appellant's "or equal" submittals were not timely; (3) the brand name products were not proprietary or sole source; (4) the proposed "or equal" products did not meet the required salient characteristics; and (5) the delay claim was based solely on rejection of submittals. Appellant opposes the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

A. *General Requirements.*

1. On 28 June 1996, the Air Force awarded Contract No. F02604-96-C0012 (the contract) to R. P. Richards, Inc. (appellant) for repair of HVAC (heating, ventilation, air conditioning) and Life Safety Deficiencies Support Center at Luke AFB, Arizona (R4, tab 1 at 1). The contract's FAR 52.212-3 "Commencement, Prosecution, and Completion of Work (APR 1984)" clause required appellant to begin performance within 10 calendar days after receipt of notice to proceed (NTP) (R4, tab 1 at 10).

2. The 26 July 1996 NTP stated: “Work shall be started on the Notice to Proceed date,” which was shown as “01 AUG 96.” The present record does not disclose when appellant received the foregoing NTP. (Gov’t mot., attach. 1)

3. The contract incorporated by reference: (a) the FAR 52.214-29 “Order of Precedence--Sealed Bidding (JAN 1986)” clause, which provided—

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits and attachments; and (e) the specifications.

and (b) the FAR 52.236-5 “Material and Workmanship (APR 1984)” clause, which provided in pertinent part—

(a) . . . 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*.

(b) The Contractor shall obtain the Contracting Officer’s approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish . . . the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. . . . Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection. (Emphasis added)

(R4, tab 1 at 11 of 34, 13 of 34)

4. The “AF66-Schedule of Material Submittals” in contract § J, Attachment 2, required submittals for the cooling tower and variable frequency drives (VFD) “30 days after Award of Contract,” and for the built-up roofing “30 days after NTP” (R4, tab 1).

5. Specification § 01300, “SUBMITTALS,” provided in pertinent part:

1.02 PROCEDURES

A. Deliver all submittals to Contracting Officer within 10 days after the Notice to Proceed *unless otherwise specified*.

....

1.03 PROPOSED SUBSTITUTIONS

A. Submit proposed substitutions to Contracting Officer within 10 days after the date of Notice to Proceed is issued. [sic]

....

B. Approval or Rejection: Approval or rejection of substitutions is at the Contracting Officer’s discretion, whose judgement will be final. Factors for acceptability of proposed substitutions are as follows:

1. Quality of materials, structural strength, and details of construction or fabrication.
2. Performance and function.
3. Appearance and finish.
4. Impact on other work shall be identified.

C. Resubmission of Proposed Substitutions: Do not resubmit any previously rejected proposed substitutions.

....

1.08 PRODUCT DATA

....

C. Trade names of specific products used in this specification [sic] are used for purposes of defining general quality and performance. They are not used to preclude the use of products of equal characteristics by other manufacturers [sic]. The Government reserves the right to determine equality.

D. The Contractor shall submit to the Government with any request for approval of substitutions, complete data including performance and chemical makeup for both the specified and proposed item.

....

3.01 SUBMITTALS AND TECHNICAL DATA. This section applies only to the items specified.

A. SUBMITTALS

....

2. All submittals should be furnished no later than dates determined at the pre-construction conference. [Emphasis added]

(R4, tab 2)

6. Specification § 01600, "MATERIAL AND EQUIPMENT," provided in pertinent part:

1.01 MATERIAL AND EQUIPMENT OF ACCEPTABLE MANUFACTURE. An item of material or equipment may be submitted for review as a substitute for an item which is specified by manufacturer and model number, type, provided that all of the following provisions are met:

A. The item is manufactured by an acceptable manufacturer that is judged by the Contracting Officer to be "or equal" to the item specified.

....

C. It must meet the requirements of service and maintenance features of the specified item of material or equipment including compatibility with the specific or related systems of the installation.

D. The item of material or equipment meets or exceeds minimum qualities and does not exceed dimensions (given or drawn to scale on the drawings) established by the specified item.

1.02 SUBSTITUTIONS

....

B. The Contractor will provide sufficient documentation to substantiate that the substituted items will meet all requirements of the specified item. Insufficient documentation will result in disapproval.

(R4, tab 2)

7. Specification § 15010, “BASIC MECHANICAL REQUIREMENTS,” provided in pertinent part:

1.03 RESTRICTIONS AND SPACE REQUIREMENTS

A. Restrictions: Contractor shall note that for all items of equipment and materials, the names of selected manufacturers have been specified. Bids shall be based on use of product of one of the selected manufacturers, and only such products may be submitted for approval. No substitutions will be accepted.

B. Choice of Equipment: Equipment has been chosen which will properly fit into the physical spaces provided and indicated, allowing ample room for access, servicing, removal and replacement of parts. Adequate space shall be allowed for clearance in accordance with Code requirements and manufacturer’s recommendations. Physical dimensions and arrangements of equipment to be installed shall be subject to Contracting Officer’s approval. Submit Shop Drawings of

equipment layout for approval where it does not comply with Drawings.

C. Space Requirements: . . . Since space requirements and equipment arrangement vary according to manufacturer, the responsibility for initial access and proper fit rests with the Contractor. . . .

....

2.01 MATERIALS AND EQUIPMENT

A. Acceptable Manufacturers: In general see individual sections of these specifications.

B. Within the Contract documents relating to mechanical work, manufacturers' names, catalog numbers, and other proprietary references to materials and equipment are made. Such references are made to establish the standards of quality and type required, and not to limit competition. Most known or acceptable manufacturers of competitive products are listed in applicable sections as "Acceptable Manufacturers". Reasonable requests for substitution or additions to "Acceptable Manufactures" [sic] will be considered, but the Contracting Officer will be the sole judge of acceptability of items proposed as substitutes.

....

D. Where substitutions are desired, comply with the requirements of Division 1, Substitutions and Product Options.

(R4, tab 2)

8. Appellant's employee, Ross M. Britt, reviewed the specifications under Division 15, mechanical, and identified 10 submittals under §§ 15080, 15145, 15240, 15250, 15401, and 15890, in which appellant proposed "or equal" products later than 10 days after the NTP date, and which respondent approved (Britt affid.).

B. Built-Up Roofing.

9. Specification § 07500, "BUILT-UP ROOFING & RIGID INSULATION," provided in pertinent part:

1.6 SUBMITTALS:

A. Submit, upon Award of Contract, in accordance With Section 01300: SAMPLES AND SHOP DRAWINGS:

1. Submit at Pre-Construction Conference:

a. Product Compatibility

1) Written verification from roofing material supplier that major roofing components, including (but not limited to) coatings, cold process adhesives; roofing ply sheets; reinforcement fabric felts and mats; mastics; and sealants are all compatible with each other.

b. Test Reports:

1) Written verification from roofing material supplier that roofing system meets or exceeds regulatory agency/s requirements.

c. Red label products:

1) Written verification from roofing material supplier that cold process coatings are not red label.

d. Product data:

- 1) Product data sheets.
- 2) Material safety data sheets.
- 3) Samples of coatings, adhesives, and roofing ply sheets.
- 4) Samples of each material specified, properly labeled.
- 5) Shop drawings or samples of metal flashings, showing exact profile, lengths,

joints, terminations, and methods of attachment.

6) Sample of each fastener type.

....

2.02 ACCEPTABLE MANUFACTURER

1. Tremco Inc. . . . or equal. The Tremco T02A318A system is the minimum acceptable standard. Approved felts for the roofing system are: Tremco, Schueller, and Tamko.

In ¶ 2.08, “ROOFING MATERIALS,” the “flashing tape” and “sealants” subparagraphs required Tremco products; the adhesives, stripping bitumen, and walkway panels subparagraphs required products “by system manufacturer,” apparently Tremco. (R4, tab 2 at 07500-2, -6, -7, -8) The record does not disclose the occurrence or date of a preconstruction conference.

10. On 14 February 1997, appellant submitted manufacturers’ data for Henry, Trumbull, Schuller, Celotex, Atlas, and Burkentine roofing system components. Respondent disapproved that submittal on 1 March 1997, stating: “This submittal does not comply with the requirements of the specifications, section 01300, Para. A.1. thru 3 [without identifying whether the reference was to ¶ 1.03A or ¶ 3.01A in § 01300]. Resubmit as specified in section 07500, para. 2.01, 1 [sic]” (R4, tab 18). Paragraph 2.01.1 required compliance with “quality control, references, specifications, and manufacturer’s data,” and use of “only asbestos-free products.” (R4, tab 2 at 07500-5)

11. Appellant’s second roofing submittal, dated 3 April 1997, included two letters from the Henry Company, which stated that all products met the criteria of the Henry Company for incorporation into the Henry built-up roofing system, the assembly qualified for a Henry 10-year systems warranty, and that “all products . . . are asbestos free, not red label and are in compliance with Air Quality regulations.” (R4, tab 21)

12. On 30 April 1997 respondent disapproved that second submittal on five bases: (1) Specification ¶ 2.02.1 specified the “Tremco T02A318A system”; the proposed Henry system components were “a col[l]age of different manufacturers’ products.” (2) “Items A.1 and A.2 [unidentified] are from Owens-Corning Trumbull Asphalt Division, and not by Henry,” citing ¶ 2.08. (3) The submittal lacked mechanical fasteners samples, and Rawl concrete fasteners (10 inch long, coated, wood screws) and aluminum roofing nails did not meet specifications and did not provide the manufacturer’s name, citing ¶ 2.07 A-F. (4) ¶ 2.09 required copper counterflashings, but the submittal did not identify the metal and consisted “of multiple styles of reglets,

without identifying proposed style to be used.” (5) ¶ 2.08 required silicone roofing materials, but the submittal was for urethane; and sealants were “not by ‘system manufacturer.’” (R4, tab 21)

13. Appellant submitted a Tremco system on 8 May 1997, which included product data sheets from Crysen, Tremco, Schuller, CCSC, Sika, Celotex, ELS, and Tomen, of which only the ELS and Tomen products bore Tremco labels. There is no evidence that this submittal complied with the § 07500, ¶ 1.6, requirements, other than product data sheets. Respondent approved the Tremco submittal on 11 May 1997. (R4, tab 22)

14. Appellant disputes respondent’s five bases for rejecting the Henry submittal by advertng to terms in its Henry submittal which allegedly comply with the specified insulation and counterflashings requirements (R4, tab 18), or to the approved Tremco submittal, which contained no proof that its product complied with the “system,” adhesive, mechanical fasteners, counterflashing and silicone requirements, which, therefore, were not salient characteristics of the Tremco product (R4, tab 22).

C. Cooling Tower.

15. In specification § 15690: (a) ¶ 1.02A, referred to § 15010 as “related work” and (b) ¶ 2.10 named “Marley” and “Tower Tech” as acceptable cooling tower manufacturers, but did not include the words “or equal” or their equivalent or warn that *only* products of those listed manufacturers would be accepted. Section 15690 provided:

2.02 COOLING TOWER

A. . . . Principal construction shall be molded fiberglass and polyvinyl chloride.

. . . .

C. Cold Water Basin: The cold water basin shall be FRP sealed watertight . . .

D. Air Inlet Louvers: Inlet louvers shall be wave-formed, fiberglass-reinforced polyester (FRP) spaced to minimize air resistance and prevent water splash-out.

E. Distribution System: A single inlet per cell shall automatically balance and deliver water to the distribution basins. The inlet chamber shall have an integral pre-strainer

....

G. Fan Assembly. . . .

1. Fan shall be heavy duty, axial flow, with aluminum alloy blades. It shall discharge through a fan cylinder designed for streamlined entry

....

3. Fan shall be driven by a 90 [degree] angle gearbox connected to the motor by a stainless steel driveshaft.

H. Corrosion Protection

1. Unit - All structural steel panels and structural elements shall be made from heavy-gauge G210 galvanized steel.

....

3.01 INSTALLATION

A. Install cooling tower as shown on the drawings and specified herein.

(R4, tab 1a)

16. Section 15690 and the pertinent drawings did not require the cooling towers to match the existing tower and § 15690 did not state why principal construction of “molded fiberglass and polyvinyl chloride” was prescribed. Drawing S-2 stated a 15,025 pound “maximum operating weight” for each of the “new platforms for the new cooling towers.” Drawing S-4, Note 1, stated: “Contractor to adjust framing dimensions for bearing points of actual mechanical equipment.” Drawing M-9 listed two Marley model No. 21303, 480-volt, cooling towers. (R4, tabs 1a, 2, 23)

17. On 21 August 1996, appellant proposed to substitute an Evapco model SST8-99B cooling tower for the Marley or Tower Tech product. Respondent disapproved that submittal on 26 August 1996, stating: “Not acceptable, per specification & Drwg. Schedule. Towers submitted need to be identical to existing tower. Resubmit on Marley Quadraflow mod. 21303, as listed in [drawing M-9].” (R4, tab 9)

18. On 13 September 1996, appellant proposed to substitute a Baltimore Air Coil Series 1500 cooling tower. On 18 September 1996 respondent disapproved the submittal, stating: “Resubmit in accordance with Addendum No. 3, of 8 April 96, Item 11, new Specification Section 15690: “FIBERGLASS COOLING TOWER.” (R4, tab 10)

19. Appellant resubmitted the Evapco cooling tower on 22 November 1996 and 10 January 1997, which respondent disapproved on 16 December 1996 and 14 January 1997, stating that the item did not comply with specification § 15690, ¶¶ 2.02 A, 2.02 C, 2.02 D, 2.02 E, 2.02 G.3, and “[r]submit as scheduled on drawings, Sheet M-9. New towers need to match existing tower. Substitution . . . will not be accepted” (R4, tabs 14, 15).

20. Appellant submitted a Marley model 21303 cooling tower on 18 February 1997, which respondent approved on 21 February 1997 (R4, tab 17).

21. Government Project Engineer Carl Bruning recommended the rejection of Evapco cooling towers for several reasons. Their principal construction was hot-dip galvanized steel, not fiberglass and polyvinyl chloride as required by ¶ 2.02 A. According to Mr. Bruning, respondent required fiberglass because it required no repainting, had an indefinite life expectancy, and would not corrode. Drawing S-2 showed the cooling tower installed in a 12’ 6” space, but the Evapco model was 8’ 11½” by 7’ 10” and needed support beams, which Mr. Bruning estimated would add 1,250 pounds of weight. The Evapco cold water basin was stainless steel, not “FRP,” as required by ¶ 2.02 C. FRP is “fiberglass-reinforced plastic.” (Bruning affid. at ¶ 5)

22. Appellant’s foreman Robert Lynch stated that: (a) Tower Tech’s 12’ x 24’ dimensions varied from the 12’ 6” space shown on the drawing S-2, and Drawing S-4, Note 1, contemplates differing cooling tower model dimensions; (b) the Baltimore and Evapco models weigh less than the 15,025 pounds specified in Drawing S-2, and the Evapco model, even with support beams, weighed less than the Marley (11,240 pounds) and Tower Tech (23,182 pounds) models; thus, weight and dimension were not valid bases to reject the Evapco and Baltimore models; (c) the Marley and Tower Tech models did not meet all of the characteristics cited in specification § 15690, ¶ 2.02; (d) the Evapco and Baltimore models are not subject to corrosion, and do not require repainting, the alleged reasons for requiring fiberglass; and (e) a cooling tower which met the requirements for both galvanized steel panels and structural elements (¶2.02 G), and the FRP basin (¶ 2.02 C), “is not available.” (Lynch affid.; app. br., encls. 7, 9)

D. *Variable Frequency Drives (VFD).*

23. The VFD specification, § 15702, ¶ 2.01, as amended, listed “Asea Brown Boveri, Utech Systems, York Air-Modulator or equal,” as “acceptable manufacturers” of the VFD, and further provided in pertinent part:

2.02 ADJUSTABLE FREQUENCY CONTROLLERS

A. The adjustable frequency controller shall convert 480v, $\pm 10\%$ Voltage - $\pm 5\%$ Frequency, three phase, 60 Hertz utility power to adjustable voltage/frequency, three phase, AC power for stepless motor speed control

B. The 1 through 25HP, 230VAC, and 1 through 100HP, 480 VAC adjustable speed drive shall be a pulse-width-modulated (PWM) design The adjustable speed drive shall maintain a 110% current overload capability for 60 seconds with automatic stall prevention and voltage boost to prevent nuisance tripping during load or line side transient conditions.

. . . .

E. [The controller’s] [a]verage efficiency at full load and full speed shall be not less than 97%; efficiency [sic].

F. The adjustable speed drive shall be subject to the following parameters and tests:

1. [Circuits tested to 0.5% AQL.]
2. [Circuit board testing to insure proper mounting and correct component values.]
3. [Printed circuit boards to be tested functionally by pre-programmed, computerized test equipment.]
4. [Assembled controls to be “combine-tested” for performance and functionality at manufacturer’s factory, and test data analyzed to assure compliance.]

H. The local service center shall provide as a minimum the following services:

1. Factory coordinated start-up services.
2. Emergency service calls for one year after start-up.
3. [A] one-day site visit for inspection of drives and accessories.
4. Training of customer personnel in basic troubleshooting.

5. Training shall be on site and shall be a minimum of one day's duration

. . . .

K. The adjustable speed drive shall . . . [c]atch a Spinning Load:

L. The controller shall include the following protective circuits and features:

. . . .

9. Automatic restart after momentary power loss or momentary overvoltage, undervoltage, or overcurrent due to acceleration rate set too fast

M. Fault indicators shall indicate the following fault conditions and shall be displayed on the front panel of the inverter

. . . .

8. Control function error (NULL) - Not on Graham.

(R4, tabs 1a, 2)

24. Appellant's 12 February 1997 submittal requested to substitute a Graham VFD for the brand name VFD. Respondent disapproved that request on 21 February 1997, with a notation to "submit per Mfrs. listed in specifications. Review Spec's. Section 01300, par. 1.03: Proposed Substitutions." Respondent apparently listed the following discrepancies on the reverse of, or with, the submittal form. (Appellant denies that it received this list, app. resp. at ¶11, attach.1.)

1. Graham no longer - now Danfoss.
2. Not user-friendly.
3. Mainly used for industrial processes, not HVAC.
4. Graham submittal did not state anywhere, that it is UL-approved assembly.
5. Only enclosure is UL approved.
6. Efficiency was lower than 97% specified
7. Delay 6 hrs on acceleration.

8. No local Parts & Factory Authorized Service.

(R4, tab 16)

25. On 25 March 1997, appellant submitted an Asea Brown Boveri (ABB) VFD, which the Government approved on 27 March 1997 (R4, tab 20).

26. Albert R. Regal, respondent's electrical engineer, recommended rejection of the Graham VFD submittal because Graham was not a recommended manufacturer and no substitutes were permitted, and the Graham VFD: (a) had an efficiency of 96% at "full load and nominal motor speed," but ¶ 2.02 E required not less than 97% average efficiency; (b) operated at 460 volts $\pm 10\%$, but ¶ 2.02 "required that the adjustable speed drive operate at 480 volts $\pm 10\%$ "; (c) omitted the "control function error (NULL)" fault indicator required by ¶ 2.02 M; (d) did not use the pulse-width-modulated design required by ¶ 2.02 B; (e) did not show how the product was protected from overloads, or that it met the overload protection requirements in ¶ 2.02 B; (f) did not address the "catch a spinning load" requirement in ¶ 2.02 K; (g) omitted to mention that the four tests specified in ¶ 2.02 F had been performed, would be performed, or could be passed; and (h) omitted several of the local service requirements in ¶ 2.02 H (Regal affid. at ¶¶ 3-4).

27. Robert Jeppesen, appellant's Electrical Division Manager, stated that the Graham product specifications were the functional equivalents of each of the contract specifications, and, in those instances where the Graham data was incomplete, the ABB and York product data did not provide any more information than Graham's data. Mr. Jeppesen said that the Graham model met the efficiency requirement, (¶ 2.02 E), because the 96% rating was simply for the "worst case size"; the efficiency would be 97% or greater for this project; and the Graham unit has a "selectable automatic energy optimization which . . . is functionally equivalent." (Jeppesen affid.) Appellant asserted that the ABB and York product data show that their VFDs did not meet the 97% efficiency requirement. The ABB product data did not contain a statement as to the "average efficiency" percentage, and the York data stated that "[f]ull load efficiency shall be greater than 96% at 100% load." (R4, tab 20; app. br. at ¶ 14, encls. 3-5)

E. Claim and Appeal.

28. On 17 October 1997, appellant certified its claims for an alleged constructive change in the "fire/smoke dampers" specifications, for costs incurred to provide the brand name items for the VFDs, cooling towers, and built-up roofing, and for "Eichleay" extended overhead costs for 174 days of delay, totaling \$269,991 (not \$264,122 as stated erroneously in the claim letter). The contracting officer reviewed and denied those five claims in his 29 December 1997 final decision, from which appellant filed a timely appeal

at this Board. (R4, tabs 3, 5, 7) Appellant’s complaint prayed for \$264,122, but also appended its 17 October 1997 claim letter.

29. The Board’s 30 March 1998 letter to appellant stated that its certification was incomplete or defective. On 9 April 1998 appellant submitted a certification conforming to the Contract Disputes Act of 1978.

DECISION

Respondent’s motion addresses only four of the five claims appellant identified in its 17 October 1997 letter, all of which the contracting officer reviewed and denied in his 29 December 1997 final decision. Appellant appended its claim letter to the complaint. (SOF 28) Therefore, we treat the motion as a motion for partial summary judgment.

Summary judgment is properly granted where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The non-movant is entitled to have all reasonable inferences resolved in its favor. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Summary judgment is mandated “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The cooling towers specification listed “Marley” and “Tower Tech” brand products, without including the words “or equal” or their equivalent, or warning that *only* products of those listed manufacturers would be accepted (SOF 15). Roofing was specified as “Tremco Inc. . . . or equal” (SOF 9), and the VFD was specified as Asea Brown Boveri, Utech Systems, York Air-Modulator “or equal” (SOF 23). As part of its entitlement case, appellant will have the burden to prove that it was entitled to propose a substitute (in the case of the cooling towers and VFD), that it timely sought the contracting officer’s approval of its proposed substitute products, and that its proffered substitute products were equal to the designated “brand name” products. *See The Jack Stone Co., Inc. v. United States*, 344 F.2d 370, 376, 170 Ct. Cl. 281, 290 (1965); *A. J. Kellos Const. Co., Inc.*, DOT CAB No. 76-7, 77-1 BCA ¶ 12,417 at 60,139 (specifications required metal wall siding “similar to” four brand name siding products, whose salient characteristics were specified unambiguously. The only element of proof was equality in all material and essential characteristics to the brand name products).

Preclusion of Substitutes. Respondent argues that specification § 15010, ¶ 1.03A precluded substitutes for the cooling tower and VFD. Paragraph 1.03A provided: “Bids shall be based on use of product of one of the selected manufacturers, and only such products may be submitted for approval. No substitutions will be accepted.”

This argument does not require judgment as a matter of law. Notwithstanding specification § 15010, ¶ 1.03 A, according to appellant's affiant Britt, respondent approved at least ten of appellant's Division 15 "or equal" substitute product submittals (SOF 8).

Untimely Submittals. Respondent argues that specification § 01300, ¶¶ 1.02 A and 1.03 A, required submittals and substitutions to be submitted within 10 days after NTP (SOF 5); the NTP date was 1 August 1996 (SOF 2); appellant submitted substitute cooling towers, VFD, and roofing submittals on 21 August 1996 (SOF 17), 12 February 1997 (SOF 24) and 14 February 1997 (SOF 10), respectively; and so respondent had no duty to review or approve those substitute product submittals.

Respondent's argument does not mandate summary judgment. According to appellant's affiant Britt, respondent approved at least ten of appellant's Division 15 product submittals proposed later than 10 days after the NTP date (SOF 8). Specification § 07500 for roofing ambiguously required submittals in accordance with § 01300, *i.e.*, within 10 days after NTP, or "at Pre-Construction Conference" (SOF 9). The record does not disclose the occurrence or date of a preconstruction conference (*id.*). Therefore, whether respondent waived the submission dates for the submittals in issue presents a disputed issue of material fact.

Proprietary Products. Respondent argues that the contract did not require appellant to use proprietary or sole source products because the specifications named "at least two potential suppliers who could meet the requirements" (Gov't br. at 26). Only the cooling tower specification had "brand names" with no "or equal" (SOF 15). For designated brand name products, proof of proprietary products is not an element of proof. *Jack Stone, supra, A.J. Kellos, supra.*

Salient Characteristics. Respondent argues that appellant's proposed substitute roofing, cooling towers, and VFD products did not comply with several pertinent specification and drawing requirements (SOF 21, 26). Appellant argues, and submitted affidavits and documentary evidence to show, that its substitute roofing, cooling tower and VFD products met such requirements, or the name brand products did not meet such requirements, so they were not "salient characteristics" (SOF 14, 22, 27). *See D.E.W., Inc., ASBCA No. 36698, 89-1 BCA ¶ 21,312 at 107,480* (Board overturned rejection of proposed equal product which was functionally equal to brand name product, which itself failed to meet ten specification requirements). Since these material facts are genuinely disputed, it is not appropriate to grant summary judgment

Delay. Since appellant's delay claim arose from the foregoing submittal delays, it too has facts in dispute.

We deny the motion.

Dated: 2 May 2000

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Acting Vice Chairman
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 No. 51340, Appeal of R. P. Richards, Inc., rendered in conformance with the Board's Charter.

Dated:

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