ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Southern Playground, 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.
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U.S. Army Engineer Division,
Pacific Ocean
Fort Shafter, HI

OPINION BY ADMINISTRATIVE JUDGE DELMAN

These appeals are from two contracting officer's decisions under two contracts denying the appellant's claim under each contract for additional costs to supply contractually prescribed aluminum support columns for playground equipment in lieu of steel supports offered by the appellant. Appellant contends that the contracting officer wrongfully rejected its proposed substitute. The Government contends that the contracting officer exercised reasonable judgment in rejecting the proposed substitute. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq*. A hearing was held on entitlement only.[1] For reasons stated we deny the appeals.

1 The hearing was held in two phases at different locations to accommodate the location of the witnesses. The transcription of the proceedings was not consecutively paginated or identified by volume number. For purposes of citation, the first day of hearing, 30 May 2001 shall be identified as Volume No. 1, and each succeeding day of hearing shall be numbered consecutively thereafter. For *e.g.*, "tr. 3/16" shall refer to testimony given on the third day of hearing, 5 June 2001 at page 16. Our citation reference to "R4" relates to the documents in the Rule 4 files, as supplemented, that are part of the evidentiary record.

FINDINGS OF FACT

1. On 8 December 1988 the U.S. Army Engineer District, Honolulu (the Government) awarded Southern Systems, Inc.[2] (appellant) Contract No. DACA83-88-C-0128 (Contract 0128) in the amount of $175,330, and Contract No. DACA83-89-C-0004 (Contract 0004) in the amount of $172,000. The contracts called for the installation of playground equipment and structures at various Navy family housing areas on the island of Oahu in the State of Hawaii. (R4, tabs C-1, C-2)

2. Each contract contained the 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.

(R4, tabs C-1 at II-42, C-2 at II-42)

3. Each contract contained the clause entitled CONTRACTOR SUBMITTALS AND SUBMITTAL CONTROL which stated in pertinent part as follows (R4, tabs C-1 at III-5, C-2 at III-6):

> (c) All submittals shall be made using ENG Form 4025 as the transmittal document and shall be furnished in five (5) copies. If the Contractor proposes to deviate in any respect from the contract requirements for any item submitted, it shall so indicate on the ENG Form 4025 in the column entitled "Variation" and provide a full justification explaining the reasons for the variation in the "Remarks" section of the ENG Form 4025.

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2 By order dated 11 December 2000, the caption of these appeals was changed from "Southern Systems, Inc." to "Southern Playground, Inc." This change originated from the parties' request dated 5 December 2000.

4. Each contract contained the clause entitled SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (1984 APR) FAR 52.236-21 which stated in pertinent part as follows (R4, tabs C-1 at II-46, C-2 at II-46):

> (d) Shop drawings . . . includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the Contractor to explain in detail specific portions of the work required by the contract.
>
> . . . .
>
> (f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission.

5. Each of the contracts also contained drawings for the playground equipment to be installed. A number of different pieces of equipment were identified, including slides, ladders, and swings with bucket seats for infants or toddlers (tr. 1/90-92). The drawings provided catalog numbers for the playground equipment. For example, Drawing No. 6 identified "Tunnel Slide #24056" and "Spiral Slide #74084" as well as the names of several other pieces of playground equipment and their catalog numbers. (R4, tab E-23) The Government stipulated at hearing and we find that the catalog numbers listed on the drawings were those of a playground equipment manufacturer known as "Landscape Structures" (Landscape) (tr. 1/90-97). The drawings also identified equipment that was exclusive to Landscape (tr. 1/92-93). The drawings contained the following caption: "Equipment Shown And Part Numbers Given Are For Graphic Display, Contractors May Substitute Approved Equals." (R4, tab E)

6. In each contract, Section 02486, PLAYGROUND EQUIPMENT, provided the following with respect to the support columns for the equipment:

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

The specifications also provided for aluminum support columns for specific pieces of playground equipment, such as the belt swing, horizontal ladder and turning bar. Other pieces of equipment, such as the slides, were to be supported by galvanized steel tube support legs. (R4, tabs C-3 at 02486-1 to 02486-3, C-4 at 02486-1 to 02486-3)

7. By letter dated 14 December 1988 appellant requested a deviation from aluminum support columns to steel columns under Contract 0128, contending that the

specification was proprietary. Appellant did not identify the type of steel proposed, nor did it enclose any performance or technical data in support of its request for deviation. Appellant stated in this letter that it had been assured by certain playground manufacturers that steel pipe columns would be acceptable to the Government, but it did not state that the Government had given these assurances or that steel columns were functionally equivalent to aluminum. While appellant did not expressly mention the MATERIAL AND WORKMANSHIP clause, we find that its request for substitution based upon claimed proprietary specifications in effect invoked the operation of the clause. (R4, tab D-38)

8. Appellant submitted an ENG Form 4025 for its submissions under Contract 0128, dated 23 December 1988, in accordance with Section 02486, ¶ 1.1 of the specifications. In Block "b" of the form appellant indicated that it would be providing "Playground equipment per plans and specs." In Block "c" of the form appellant indicated that the equipment would be manufactured by Landscape, the manufacturer whose playground equipment was identified by catalog number in the drawings. Block "d" indicated that 5 copies of the manufacturer's catalog or brochure were submitted with the request. Neither appellant nor the Government was able to locate a copy of this document for use as evidence in the hearing. In the "Remarks" section of the form appellant wrote: "Steel support instead of Aluminum. Aluminum support posts are a proprietary item." In Block "g" of the form appellant entered a "v" which indicated that its request was a variation from the specifications. (R4, tab D-58)

9. Mr. Robert Morishige, project engineer and the authorized representative of the contracting officer, signed the form as the approving authority, dated it 30 January 1989, and provided 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." (R4, tab D-58)

10. Appellant also submitted an ENG Form 4025 for Contract 0004 on 30 December 1988. Appellant's request was in all material respects identical to that made under Contract 0128, as was the Government's approval action thereon. (R4, tab D-59)

11. At the hearing appellant offered evidence that coated, galvanized steel support columns were the functional equivalent of the contract-specified aluminum support columns (R4, tab D-126; tr. 1/16-18, 136-43, 5/392-96). However as far as this record shows, none of the three written requests made by appellant in December of 1988 referred to galvanized or coated steel, or to any particular type, name, grade or quality of steel.

12. On 12 January 1989 appellant met with Government representatives to discuss Contract 0128. A memorandum of the matters discussed was prepared by Mr. Darren Michibata, civil engineer, who attended the meeting on behalf of the Government along with Mr. Morishige. Based upon this memorandum we find that the following pertinent matters were discussed (R4, tab D-57):

> 2. Mr. Ray DuBois visited our office and inquired if any decision had been made by the Corps of Engineers on his written request to substitute steel support columns in lieu of aluminum support columns for playground equipment. I informed Mr. Ray DuBois that HRO was awaiting a response from Family Housing Branch (CEPOD-ED-H) indicating the user's position on this subject. I informed Mr. Ray DuBois that I expected a response shortly and will contact him immediately on HRO's findings.
>
> . . . .
>
> 4. Mr. Ray DuBois then requested a meeting between HRO, Quality Assurance Branch (QAB), and Southern Systems Inc. to discuss the proposed material variation of playground equipment support columns. Mr. Morishige informed him that HRO was not in a position to conduct a meeting at this time without obtaining more information from our technical and legal support offices. He also mentioned that we will contact him when more information becomes available. *I also advised Mr. Ray DuBois to collect additional manufacturer's literature, material data, technical data, cost information to support his proposed material variation submittal*.

(Emphasis added) As far as this record shows, appellant did not collect any material or technical data at this time to support its request for substitution.

13. The record contains a Government memorandum for record, dated 5 January 1989, signed by Ms. Priscilla Ligh, the Government's pre-award design project engineer, which stated in pertinent part as follows (R4, tab D-47):

> Per fonecon [sic] 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.

14. After receiving the above input, Mr. Morishige disapproved appellant's request for material variance by letter dated 19 January 1989 (R4, tab D-51). This subject was addressed in a meeting between the parties on 19 January 1989 (R4, tab D-56). It does not appear that appellant provided the Government with any information establishing the functional equivalence of steel support columns at this time.

15. By letter to the Government dated 20 January 1989, appellant reiterated its request for variance under both contracts. Appellant did not provide any data establishing the functional equivalence of steel support columns, nor did it even describe the type of steel product it was offering. The Government again denied the requested substitution by letter dated 26 January 1989. (R4, tabs D-52, D-55)

16. By letter to the Government dated 14 March 1989 (R4, tab D-69), appellant disputed the Government's decision. In a lengthy letter, appellant discussed the bidding history of the contracts and reiterated its contention that the specifications were proprietary. However appellant still did not describe its proffered substitute or provide any information establishing the functional equivalence between steel and aluminum support columns. The Government advised that its position remained the same (R4, tab D-71). As a result, appellant ordered and installed the Landscape playground equipment with aluminum support columns as identified in the specifications.

17. By letter to the Government dated 5 May 1989, appellant submitted a request for a contracting officer's decision under both contracts with respect to the denial of its request for substitution. Appellant contended, *inter alia*, that it was damaged by the Government's proprietary specifications. However it still did not provide any data with this letter establishing the functional equivalence of steel support columns. (R4, tab D-84)

18. The contracting officer issued decisions under both contracts, denying appellant's claims. Insofar as pertinent, the contracting officer denied that the specifications were proprietary and also stated 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." (R4, tabs B-1, B-2)

19. These appeals followed. The appeal under Contract 0004 was docketed as ASBCA No. 43797 and the appeal under Contract 0128 was docketed as ASBCA No. 43798. The appeals were dismissed without prejudice for a number of years, but were reinstated by appellant.

20. Mr. Raymond H. DuBois was president of appellant at the time these contracts were performed. He was appellant's chief witness at the hearing. In support of appellant's assertion that the steel which it proposed was the functional equivalent of the specified aluminum, Mr. DuBois provided a brochure produced by a steel manufacturer that describes

the rust resistance of coated, galvanized steel and which indicated that this particular steel product was coated with 3 different processes making it rust resistant for 20 years. (R4, tab D-126; tr. 1/135-42) This manufacturer's brochure was first presented to the Government as part of an affidavit submitted in opposition to the Government's motion for summary judgment in 1999, roughly 10 years after the dispute arose. In the affidavit Mr. DuBois also stated that the Government failed to inquire as to why appellant sought to use steel, failed to adequately research the issue and failed to timely explain the basis of its rejection to appellant.

21. The brochure was shown to have been written sometime after 1991, well after the contract was performed (tr. 2/431). No such documentation was provided to the Government in support of appellant's request for deviation in late 1988 and early 1989. Moreover the record does not affirmatively establish through any credible documentation that the type of steel identified in the brochure was the same steel that appellant and/or its equipment supplier planned to use on these contracts.

22. Mr. DuBois testified that appellant was not given the opportunity to provide any technical documentation in support of its position (tr. 2/428). This testimony was not persuasive. We find that appellant had numerous opportunities to support its request for substitution (findings 7, 8, 10, 12, 14, 15, 16, 17) but did not take advantage of them. The Government also encouraged appellant to collect such data (finding 12), but appellant did not do so. Mr. DuBois testified that he discussed the features of certain coated steel products with Mr. Morishige (tr. 2/427-28), but this testimony was not corroborated by any of the many letters exchanged by the parties on this subject. We do not find this testimony credible.

23. Mr. DuBois also testified that at the time of these contracts there was no manufacturer other than Landscape that could provide playground equipment with aluminum support columns. This testimony was not persuasive. The record shows that a contractor could have obtained playground equipment with aluminum supports from a manufacturer known as "Play World" as a special order (tr. 4/296). The evidence also showed that another manufacturer, "Game Time," provided playground equipment with aluminum column supports although they were not in cylindrical form.

24. As part of its evidence the Government provided photographs of playground equipment installed under these contracts and other Hawaii contracts which showed considerable rust and related deterioration on certain steel supports. Mr. DuBois testified that the rusted equipment was likely made of a thinner steel with thinner galvanization than what he planned to use for the vertical support system (tr. 2/445-47, 5/392-97). However appellant did not provide any contemporaneous documentation to show what type of steel it planned to use on these contracts. Accordingly, we found this testimony to be speculative and generally unpersuasive.

25. Ms. Ligh, the Government's pre-award design project engineer, testified as a Government witness. She was involved in putting together the specifications and drawings under these contracts. Based upon her testimony we find that the decision to require aluminum support posts in the specifications was based in large part upon the Government's concern about durability and rust (tr. 3/130), and the common or general knowledge that aluminum is a material that is rust-resistant (tr. 3/132).

26. The Government also called Mr. Morishige as a witness. Mr. Morishige recalled little of the meetings held between the parties and his decision to reject appellant's proposed substitute beyond those matters that are documented of record. These events occurred over 12 years prior to the hearing.

27. Appellant called Mr. Roger Hill, a playground equipment supplier in Hawaii as a rebuttal witness (tr. 4/271-72). Based upon his considerable experience Mr. Hill stated his belief that galvanized steel was just as strong and durable as aluminum for playground equipment (tr. 4/276-78). When shown photographs of the rusted steel equipment, Mr. Hill noted that certain equipment appeared to have rusted from the inside which was not unusual since the steel is not galvanized on the inside (tr. 4/300-01).

DECISION

The general rule in federal contract law is that the Government is entitled to strict compliance with its specifications and is not obligated to accept substitutes. The MATERIAL AND WORKMANSHIP clause provides an exception to this rule. *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.

Invariably, a contractor who seeks to invoke the MATERIAL AND WORKMANSHIP clause offers a substitute product from a manufacturer or supplier that is different from the one whose product is identified in the specifications. In the instant case however, appellant sought to substitute a different product manufactured by Landscape, the same manufacturer identified in the specifications. The Government argues that the MATERIAL AND WORKMANSHIP clause applies only to products of a competitor, or to products from an entity different than the one identified in the specifications, and thus appellant was unable to invoke the clause under these circumstances.

We agree with the Government that a primary purpose of the MATERIAL AND WORKMANSHIP clause is to promote competition. *Jack Stone Company, Inc. v. United States*, 344 F.2d 370, 373-74 (Ct. Cl. 1965); *R.D. Lowman General Contractor, Inc.*, ASBCA No. 36961, 91-1 BCA ¶ 23,456 at 117,675. However we are not persuaded that

the clause by its express terms excludes from consideration a competing or a different product line from the same manufacturer identified, or whose product is identified in the contract. There could be many reasons why a contractor would seek to substitute one such functionally equivalent line for the one identified in the specifications, including cost and availability. We believe the MATERIAL AND WORKMANSHIP clause is broad enough to encompass such product diversity and still be consistent with its overall purpose of promoting market choice without jeopardizing Government requirements. We conclude that appellant had the contract right to invoke the clause under the circumstances of this case.

We also conclude that the playground equipment, identified by Landscape catalog number on the contract drawings and containing items exclusive to Landscape, was proprietary. *Sherwin v. United States*, 436 F.2d 992, 999-1000 (Ct. Cl. 1971). Appellant had the contract right to offer a substitute that met the salient or essential characteristics and the standard of quality of the playground equipment.

The contracts did not expressly state the salient or essential characteristics of the playground equipment. However this does not mean that appellant was entitled to proffer and the Government was obligated to accept any equipment of whatever standard of quality under the contracts. This playground equipment was to be used by small children (finding 5). It is self evident that the durability and safety of the overall structure would be of paramount importance, as would the durability of the vertical columns supporting that structure. In this respect, the Government defined the standard of quality it required by specifying that the vertical supports were to be made of aluminum, given the special properties – such as rust resistance – that this particular material brought to the integrity of the playground. Rust resistance was of particular concern to the Government in the moist, saline environment on Oahu, and aluminum is commonly known to be rust-resistant (finding 25). *See Overstreet Electric Co., Inc.*, ASBCA No. 52401, 00-2 BCA ¶ 30,981, *aff'd*, 20 Fed. Appx. 878 (Fed. Cir. 2001) (table) (size and intensity of military airfield beacon were self-evident salient characteristics). Rusted-out vertical supports could affect the durability, integrity and the safety of the playground equipment, as shown by the photographs of record showing rusted and deteriorated steel playground type products in areas at or near the installation sites under these contracts.

Hence, under the MATERIAL AND WORKMANSHIP clause appellant had to show that the steel vertical support system it proposed was functionally equivalent to the aluminum support system identified in the contract. The MATERIAL AND WORKMANSHIP clause requires the contracting officer to exercise judgment in determining whether the contractor's proffered product is equal to that identified in the specifications. The contract terms make clear that when a contractor seeks to vary from the specifications it must explain and provide support for its request (findings 3, 4). This is necessary so that the contracting officer is able to make a reasoned and informed judgment on the contractor's submission. The case law under the MATERIAL AND WORKMANSHIP clause also supports

this contract requirement. *See Sherwin v. United States, supra,* 436 F.2d at 1002. As we stated in *North American Construction Corp., supra,* 96-2 BCA at 142,299:

> We have frequently stated in appeals applying the Material and Workmanship clause that appellant must prove 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. [Emphasis added]

We believe that appellant failed to meet its responsibility under its contracts and under the law. Appellant's requests to offer steel columns in lieu of aluminum were summary in nature and totally unsupported. Indeed, appellant failed to identify the type of steel product it was offering (*i.e.* coated, galvanized, etc.). Appellant was asked by the Government to gather technical information in support of its position. It did not do so. Appellant wrote a number of letters to the Government regarding its proposed substitution. In none of them did it describe the nature of the proposed substitute or did it show the comparative qualities of steel and aluminum support columns in playground equipment. The parties also met on 12 January 1989 and 19 January 1989. The record does not establish that appellant provided any comparative data at these meetings.

We hear appellant to argue that it was the Government that failed appellant here insofar as the Government failed to inquire of appellant as to why it sought the substitution, failed to adequately research the comparative values of steel and aluminum, and failed to explain to appellant the basis of its position when it rejected appellant's unidentified "steel" product. However, appellant misstates the nature of the parties' respective responsibilities under the MATERIAL AND WORKMANSHIP clause. Appellant, as the party seeking the substitution, has the burden of going forward with sufficient information in support of its position so as to activate the Government's duties of review under the clause. The Government has no contract duty to perform research or to conduct comparative technical studies for appellant's benefit.

Under the circumstances, we believe the Government's exercise of judgment to reject appellant's unidentified and unsupported substitute was not unreasonable or erroneous.

Appellant's evidence at the hearing regarding the purported superiority of certain coated galvanized steel products was not persuasive. Simply stated, we were not persuaded that the particular steel product discussed at the hearing was the same product appellant sought to offer the Government 12 years earlier.

We also hear appellant to argue that at the time of bid, Landscape was the only manufacturer that could provide a playground equipment system with aluminum vertical supports. The evidence, however, shows that another manufacturer could have provided such supports on a special order (finding 23). In any event, appellant's argument talks to the unduly restrictive and anticompetitive nature of the specifications as issued by the Government. Such a claim must be brought against the agency as a preaward protest of the specifications. Appellant did not file a protest, and we cannot hear such a claim in this forum. *Tidmarsh Ventures, Inc.*, ASBCA No. 12661, 68-2 BCA ¶ 7352.

The appeals are denied.

Dated: 6 May 2002

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
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 Nos. 43797, 43798, Appeals of Southern Playground, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services

Board of Contract Appeals