

*A/E's interpretation not entitled to deference*

1995-13(I)

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1995-13

In re:	)	
Protest of M.B. Kahn Construction Co., Inc. for	)	
Southern Contracting, Inc.; Appeal by M. B. Kahn	)	<b>ORDER</b>
Construction Co., Inc. for Southern Contracting, Inc.	)	

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This contract controversy came before the South Carolina Procurement Review Panel (Panel) on December 19, 1995, on the appeal of M. B. Kahn Construction Co., Inc. (Kahn), the general contractor, who filed a protest on behalf of Southern Contracting, Inc. (Southern), its subcontractor. Kahn and Southern filed an appeal of the decision by the Chief Procurement Officer (CPO) finding Kahn and Southern are not entitled to additional funds for specific water heaters provided under the terms of the construction contract.

Present and participating in the hearing before the Panel were Southern Contracting, Inc. represented by Jeff Leath, Esquire; and Office of General Services of the Budget and Control Board represented by Ed Evans, Esquire, Delbert Singleton, Jr., Esquire and Elizabeth Holderman, Esquire.

**FINDINGS OF FACT**

This contract controversy involves the Fire Academy Relocation Project (Project). The Budget and Control Board (Board), on behalf of the S. C. Fire Academy, signed the contract for the project September 11, 1992. M. B. Kahn Construction Co., Inc. (Kahn) is the general contractor and Southern Contracting, Inc. (Southern) is the mechanical and electrical subcontractor on the project. McNair, Johnson and Associates, Inc. (MJA) is the project architect, and Buford Goff and Associates, Inc. (Goff) is the project engineer working as a consultant for MJA.

The controversy concerns the purchase of two water heaters (WH-6 and WH-7) under the contract specifications at section 15458. (Record p. 98-103, 107). Section 15458 of the specifications, titled "Water Heaters", under subsection 1.03(C)(1), provides:

[t]he following water heater manufacturers are acceptable.

- a. A. O. Smith Water Production Company
- b. Pressure Vessels, Inc.
- c. State Water Heater
- d. Patterson Kelley
- e. Rheem Manufacturing Company
- f. Ruud Water Heater Division

(Record p. 99 )

The listing is for both electric and fuel fired water heaters. WH-6 and WH-7 are fuel fired water heaters. The specifications at Section 15458 at subsection 3.03(B) provide the following warranty information:

Water heater(s) 125 gallon storage and greater shall have an eight (8) year tank warranty to protect the Owner against defects in material and workmanship, discolored water or tank perforation due to erosion or corrosion. Should the tank fail within the first eight years following authorized start-up, the manufacturer will, at their option pay for all repairs or replacement, including material, labor, and freight or replace the tank at no expense to the Owner. No maintenance program shall be required by the manufacturer.

(Record p. 197& 198)

Disputed specifications for the WH-6 and WH-7 water heaters are contained in a contract drawing titled "Water Heater Schedule" dated July 29, 1992, which lists Pressure Vessels, Inc. (PVI) as the manufacturer and a PVI model number. Also listed are the specifications of 750 gallon storage capacity, 1250 G.P.H. (gallons per hour) and 120 degree water temperature, as well as the information that WH-6 and WH-7 are located in the dormitory. (Record p. 97). It is undisputed the PVI model number on the schedule is incorrect, as it lists a 225 gallon

storage capacity water heater, while the specifications indicate a 750 gallon storage capacity water heater.

Mr. Dennis Knight, Project Administrator for Southern, testified that Southern based its bid for WH-6 and WH-7 on water heaters manufactured by A.O. Smith, after receiving bids from three different suppliers that quoted the A.O. Smith water heaters on bid day. Southern submitted shop drawings for the A.O. Smith water heaters which were rejected by Goff. Goff noted "[N]ot approved. [P]rovide storage and recovery per drawing" on the A. O. Smith drawings submitted for WH-6 and WH-7. (Record p. 123). Over a year after the first submittal, Southern again submitted information on A. O. Smith water heaters.

Mr. Mark Watts, a mechanical engineer with Goff, testified that he drafted the water heater specifications for this project, and the A. O. Smith water heaters were primarily rejected because they do not meet the required storage capacity of 750 gallons. Mr. Watts explained that storage was an important concern because of the need for a large number of showers in a short amount of time, which was the owner's desire for the dormitory. Mr. Watts, also testified that the specifications were not intended to be proprietary, but rather when he drafted the specifications, he believed A. O. Smith manufactured a water heater that would meet the specifications. Mr. Watts does acknowledge that the WH-6 and WH-7 specifications in the water heater schedule are based on review of PVI's manufacturer's data, and other manufacturers' data on the specifications was not reviewed prior to drafting the specifications. Mr. Watts also states he did not check the A.O. Smith water heaters to determine recovery rate, although a higher recovery rate in a 600 gallon water heater may perform similarly to a 750 gallon water heater with a lower recovery rate. Calculations were done with a 750 gallon capacity water heater, and A. O. Smith did not meet the 750 gallon

requirement. Mr. Watts also testified that the A.O. Smith water heaters did not meet the specification requiring an eight year warranty from the manufacturer. A comparison of A. O. Smith and PVI water heaters was not done.

Mr. Watts works under the supervision of Mr. Dan Reider, the Project coordinator, who testified he was not actively involved until the dispute over the water heaters. Mr. Reider testified that the critical specifications on the water heater schedule is storage capacity and recovery, and to determine recovery one must consider the number of showers, and length of showers, per hour. Mr. Reider points out that sizing a water heater is not a science and there are "a hundred different ways". However, Mr. Reider believes once the parameters are established, they should not be changed, as that changes the playing field, and it would be unfair to other bidders to allow a contractor to change a bid after the contract is entered. Mr. Reider does acknowledge that a 750 gallon capacity is relevant to the amount of recovery and if you have a larger recovery you can have a smaller tank. Mr. Reider did not do any calculations with the A. O. Smith water heater submittal, as the storage capacity was not met. Mr. Reider further testified that the intent of the specifications for water heaters was to meet the requirements to do the job. He acknowledges that the A. O. Smith water heaters meet the performance requirements, with minor exceptions to the specifications.

Mr. John Derrick, President of MJA, explained that MJA retained Goff as consultants on mechanical engineering, and although MJA has authority over the work of Goff, MJA relied on Goff's expertise in mechanical engineering. MJA has the authority under the contract documents to interpret and decide matters concerning performance under the requirements of the contract documents. (Appellee Exhibit #2).

The general contractor, Kahn Construction Co., Inc. (Kahn) has supplied the PVI water heaters as directed by MJA. Southern (through Kahn) now claims

\$63,636.00 to cover the additional cost of the PVI water heaters over the cost of the A. O. Smith water heaters. The PVI water heaters cost \$91,389.00, plus \$4,569.00 sales tax, and \$14,394.00 general contractor markup, totaling \$110,352.00. (Record p. 36). Although only the WH-6 and WH-7 water heaters were rejected for failure to have insufficient storage capacity, the remaining gas fired water heaters were apparently rejected for failure to meet the warranty requirement. MJA directed that Kahn supply PVI water heaters for all of the gas fired water heaters required. Thus, the cost in dispute involves all of the gas fired water heaters and not just WH-6 and WH-7. The total cost quoted for the A. O. Smith gas fired water heaters is \$59,148.00. The difference in the cost of the A. O. Smith and the PVI water heaters is \$51, 204.00. Southern's markup of \$7, 680.00 brings the total to \$58, 884.00. Kahn's markup is reflected in the cost of the PVI water heaters.

## CONCLUSIONS OF LAW

### Motions to Dismiss

The Board argues that the dispute is really about bid specifications, which must be protested within fifteen (15) days of issuance, under S. C. Code Ann. section 11-35-4210(1), and therefore, Southern's protest of the specifications is untimely. The Board also points to the instructions to bidders at section 3.2.1, which requires the bidder to report ambiguities in the specifications. (Record p. 208). The Board also relies on Panel Case No. 1994-10, In re: Protest of Ruscon Construction Co., Inc., for Triad Mechanical Contractors, for the finding that a bidder should seek written clarification of an ambiguous specification. The Ruscon case is similar in that inaccurate specifications are at the root of the dispute, but the case is distinguishable on its facts. In Ruscon, the specifications were questioned prior to bid, but the subcontractor's questions were not answered, and the subcontractor proceeded based on assumptions.

Southern is not challenging the specifications as ambiguous. Southern is requesting the resolution of a contract controversy involving the interpretation of contract documents.

Although specifications are involved in the dispute, this is a contract controversy, which does not have the fifteen day requirement, but comes under S. C. Code Ann. section 11-35-4230, which requires filing within one year of when the contractor performs the final work on the project. The project architect rejected shop drawings based on the interpretation of certain specifications under the contract documents, and the rejection is being disputed. Pursuant to S. C. Code Ann. section 11-35-4230, the Panel has jurisdiction to resolve contract controversies between the State and a contractor or subcontractor that is the real party in interest. The Panel does not agree that this dispute simply concerns specifications which should have been protested within fifteen (15) days of issuance. The Panel finds that this contract controversy involves the application of contract documents and regulations, in the evaluation of shop drawings, which is the focus of the dispute. The Panel denies the Board's motion to dismiss Southern's protest as untimely.

At the end of the Protestant's case, the Board made a motion to dismiss the Protestant's case for failure to prove its case. The Panel denied the motion to dismiss. As indicated in this Order, the Panel finds the Protestant provided sufficient evidence to prove its case.

#### Interpretation of Specifications

No one disputes that the project architect has the authority to interpret the specifications and contract documents relating to the construction work of the project in relation to a contract controversy dispute. However, the CPO and the Panel are given authority under S. C. Code Ann. section 11-35-4230, upon the filing of a request for review, to resolve contract controversies. While the

*Does not expressly state, but strongly suggests that A/E decision is not entitled to any deference.*

decision of the Architect and CPO are taken into consideration and given all due respect, the Panel's de novo hearing allows the Panel to evaluate the evidence presented and render a decision. The Panel rejects any suggestion that the Panel is bound by the decision of the Architect or the CPO.

State Procurement Regulation 19-445.2140(A) (4) defines specification as "any description of the physical, functional, or performance characteristics, or of the nature of a supply, service or construction item." A "brand name specification" is defined as "a specification limited to one or more items by manufacturers' names or catalogue number." The contract documents also provide guidance in interpretation of specifications. The Project Manual under General Requirements, at section 2.1.2.1, titled "non-proprietary specifications" provides that

[w]hen the specifications list products or manufacturers that are available and may be incorporated in the Work, but do not restrict the Contractor to use of these products only, the Contractor may propose any available product that complies with Contract requirements. Comply with Contract Document provisions concerning "substitutions" to obtain approval for use of an unnamed product. (Record p. 200).

All parties agree that the specifications for WH-6 and WH-7 were not written to be restricted to one manufacturer's brand name specification, or proprietary specification. A list of qualified manufacturers was provided, and competition was expected.

State Procurement Regulation 19-445.2140 (B) states the purpose of a specification and provides that "[I]t is the policy of the State that specifications permit maximum practicable competition consistent with this purpose. All specifications shall be written in a non-restrictive manner as to describe the requirements to be met." Thus, specifications should be interpreted in a way

that is not restrictive, in order to be in compliance with Regulation 19-445.2140(B). If a restrictive specification is written, it should clearly be a brand name or proprietary specification which names a specific brand/manufacture and model in order to avoid any confusion.

Mr. Watts drafted the specifications for WH-6 and WH-7, as well as the warranty specification, as if they were proprietary, using PVI water heater data for the specifications, without making sure the requirements of the specifications could be met by other manufacturers. If PVI is the only manufacturer that the Board will accept as able to provide a water heater that meets every detail of the specifications, as testimony indicates, the specification is being interpreted and applied as a proprietary specification. The specification for WH-6 and WH-7 does not state only one acceptable manufacturer, but appears to provide performance criteria which can be met by named manufacturers that are pre-approved. The specifications appear to be competitive and nonrestrictive with a list of approved manufacturers, while actually being restricted to one manufacturer. The specifications must be interpreted in their application to submittals for approval. While the Panel appreciates the concern that the playing field, as bid on, should not change to give an unfair advantage to contractors and subcontractors, the Panel suggests that such concern must be balanced against a concern for fair dealing with contractors and subcontractors that have relied on specifications, which are written and interpreted in such a restrictive way that they void competition and create a proprietary specification.

To interpret specifications in a non-restrictive manner, approved manufacturers of water heaters should be reviewed to determine if the manufacturer's product meets the performance requirements of the specifications, and thus gets the job done. Emphasis on the performance

requirements of the specifications is required by State Procurement Regulation 19-445.2140 (C), which provides that:

[s]pecifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies and services. Such preference is often not practicable in construction, apart from the procurement of supply type items for a construction project.

The Panel considers water heaters as supply items in this construction contract and therefore subject to the preference for performance or functional specifications. The Project Manual under General Requirements, at section 2.1.2.3, discusses performance specification requirements and section 2.1.2.2 discusses descriptive specification requirements. (Record p. 200).

The intended function of the WH-6 and WH-7 water heaters is to provide hot water for showers in the dormitory building. The gallon storage capacity requirement has no functional use on its own, but must be considered in conjunction with the recovery rate requirement to determine performance of the water heater. The use of the physical description of 750 gallon capacity is tied to the performance of the recovery rate, as described by Mr. Watts and Mr. Reider. Goff and MJA put more emphasis on the descriptive specification of 750 gallon capacity, rejecting the A. O. Smith water heater without attempting to evaluate the water heater's ability to perform through its higher rate of recovery. Collaborating testimony indicates that a higher rate of recovery and lower storage capacity may perform as well as the required storage capacity and rate

of recovery. Goff and MJA did not attempt to determine if the A. O. Smith water heater could perform as desired. Mr. Reider testified that there are many ways to size a water heater and it is not a science. Unless a proprietary specification is written, naming a brand name, manufacturer, or model number, it is presumed competition is desired, and the performance specifications can be met by the approved manufacturers named.

The Panel finds that Goff and MJA, in interpreting the specifications in a nonrestrictive way, should have evaluated the performance of the A. O. Smith water heater by examining the storage capacity in conjunction with the rate of recovery. When considering the 600 gallon storage capacity and 1515 gallons per hour recovery rate of the A. O. Smith water heater, the essential performance requirements of the specifications are met, as has been acknowledged by Goff.

The Panel finds, in light of the mandate for non-restrictive specifications, based on functional or performance needs, Goff and MJA's rejection of the A. O. Smith water heater because of the lower storage capacity, without looking into the claim of a higher recovery rate that meets the performance criteria required, is arbitrary. The Panel further finds that a reasonable application of the above mentioned regulations to the interpretation of the specifications involved in this dispute shows that the essential performance requirements are met by the A. O. Smith water heaters.

Goff also rejected the A. O. Smith water heater based on its failure to provide a manufacturer's eight year warranty. The specification does not state that the warranty must be from the manufacturer. However, a reasonable implication from the language of the specification is that the manufacturer is expected to supply an eight year warranty for repair or replacement of the tank, under certain conditions, "at no expense to the Owner". (Record p. 103, 107).

A.O. Smith provided a ten (10) year limited warranty, which provided the required warranty but charged a fee in the fifth through the tenth year. (Record p. 58). Southern offered to provide the additional three year warranty for the fifth through the eighth year at no cost to the State. The Panel notes that the warranty specification is verbatim the wording of the warranty provided by PVI. A subcontractor can only request that a manufacturer provide a specific warranty, but has no control over the warranty provided by the manufacturer. The purpose of a warranty is to ensure the purchaser receives quality goods and certain repairs or replacements do not cost extra. The State gains the benefit of no additional cost whether the warranty is provided by the manufacturer or the subcontractor. The function of the specification, to protect the State from additional cost associated with repairs for eight years, is accomplished through the subcontractor and the manufacturer. The Panel finds, in light of the mandate for non-restrictive specifications, the warranty specification, which is the exact wording of the warranty provided by PVI, should be interpreted to allow the acceptance of Southern's extended warranty as meeting the requirements of the specification.

Goff and MJA should have approved Southern's water heater submittal for WH-6 and WH-7, but it is apparent that PVI water heaters were the only water heaters acceptable to the State. Since the PVI water heaters have already been installed, the requested remedy is the difference in the higher cost of the PVI water heaters and the bid price of the A. O. Smith water heaters. It is noted that Southern and Kahn are not without responsibility in the development of this dispute, in that they failed to timely identify problems and provide information.

The Panel awards the following relief, pursuant to S. C. Code Ann. section 11-35-4320, in the equitable division of the additional cost of the PVI water heaters, \$58,884.00, over the low bid cost of the A. O. Smith water

heaters. The State will pay seventy-five percent (75%) of the additional cost and the contractor and subcontractor will share twenty-five percent (25%) of the additional cost. The Panel finds this to be a just and equitable division of the additional cost of the water heaters in light of the above facts and conclusions. The parties may agree to a different division of the cost if the parties agree to the compromise in writing, and submit a copy of the signed agreement to the Panel, for its approval. Payment is to be accomplished no later than thirty (30) days from the date of this Order.

For the foregoing reasons, the Panel grants the relief requested by Southern as outlined above.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:

  
Gus J. Roberts, Chairman

Columbia, SC

January 18, 1996.