



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ISSUED WITHOUT REDACTION: May 20, 2019

DISMISSED FOR FAILURE TO STATE A CLAIM: May 13, 2019

CBCA 6300, 6301

B.L. HARBERT INTERNATIONAL, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Thomas B. Drohan of Drohan, Hitt & Hadas LLC, Boston, MA, counsel for Appellant.

Catherine Crow and Kelly Y. Burnell, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **ZISCHKAU**, and **SULLIVAN**.

VERGILIO, Board Judge.

B.L. Harbert International, LLC (contractor), disputes two decisions of a contracting officer with the General Services Administration (agency), denying claims for additional money (\$83,062 in CBCA 6300; \$47,486 in CBCA 6301) said to arise from a change when the agency did not permit the contractor to utilize manufacturers of its choosing that differ from those specified in the contract. The agency has moved to dismiss the cases for failure to state a claim upon which relief can be granted, Board Rule 8(e), on the theory that no change occurred because, for the items at issue, the contractor was not entitled to substitute a product by a manufacturer of its own selection that was not named in the contract. The contractor has filed submissions in opposition.

The Board resolves the motion by examining the complaint and the referenced claims and contract. The Board concludes that the contractor cannot obtain relief on its claims because the contract does not entitle the contractor to substitute the products it wanted. The Board grants the agency's motion and dismisses the appeals.

Background

1. The parties entered into a contract requiring the contractor to construct a building. Two items to be installed in the project are at issue here. The contract specifications name one manufacturer and product for one item, and list three manufacturers (one identified as the basis for design) for the other item. Complaint at 2 (¶ 2).

2. The product requirements section of the contract, division 1, § 01 6000, details requirements for product selection, including:

Product: Where Specifications name a single manufacturer and product, provide the named product that complies with requirements. Comparable products or substitutions for Contractor's convenience will not be considered.

Exhibit 3 at 355, 359. And, regarding manufacturers:

Restricted List: Where Specifications include a list of manufacturers' names, provide a product by one of the manufacturers listed that complies with requirements. Comparable products or substitutions for Contractor's convenience will not be considered.

Exhibit 3 at 359. Further, for a basis of design product:

Where Specifications name a product, or refer to a product indicated on Drawings, and include a list of manufacturers, provide the specified or indicated product or a comparable product by one of the other named manufacturers.

Exhibit 3 at 359. The substitution procedures section of the contract, § 01 2500, contains procedures for the contractor to make substitutions, but also recognizes that other provisions identify specific requirements and limitations for substitutions. The section specifies that the division 1 requirements, which include those quoted above, identify requirements for submitting comparable product submittals for products by listed manufacturers. Other portions of the contract detail other procedures. Exhibit 3 at 175-78; Complaint at 5 (¶ 18).

3. The contractor references, without objection, a Materials and Workmanship (APR 1984) clause, 48 CFR 52.236-5 (2018), as part of the contract. It provides:

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*.

(Emphasis added). The contractor also relies upon the Changes clause, 48 CFR 52.243-4, which it states, without objection, is part of the contract. Complaint at 4 (¶ 14).

4. For the item with one product of one manufacturer identified, the contract specifies that substitutions are not permitted. However, a provision states that proposed substitutions must be submitted in writing for approval a minimum of ten working days prior to bid (actually proposal) date and must be made available to all bidders. The contractor did not propose a substitution prior to award. Exhibits 3 at 359, 5 at 2486; Complaint at 4 (¶ 16) (the contractor notes that the contract identified a product by a manufacturer as the only one that would be accepted). The agency did not permit the contractor to install the post-award proposed substitute, which the contractor avers is functionally equivalent to that identified in the contract. Complaint at 5 (¶ 21), 6 (¶ 22).

5. For the other item at issue, the contract states that the contractor is to provide products by one of three named manufacturers, the first identified as a basis of design. Exhibit 5 at 2557-58; Complaint at 8 (¶ 37). Post-award, the contractor proposed an item, said to be equivalent, from a manufacturer not listed, which the agency rejected. Complaint at 8-10 (¶¶ 39-42).

6. After unsuccessfully attempting to obtain approval for products from manufacturers not named in the contract, the contractor filed claims seeking \$83,062, and \$47,486, alleging that the agency improperly rejected its post-award attempts to use products from manufacturers not identified in the contract, in violation of the contract and the Materials and Workmanship clause. The contractor contends that these amounts reflect additional costs its subcontractor incurred above those that would have been incurred with substitute products. It sought a change order under the Changes clause to receive compensation for the additional costs it states were incurred. The contracting officer denied the claims. Complaint at 2-3, 7, 12. Within ninety days, the contractor filed notices of appeals.

Discussion

The contractor contends that, under the contract specifications and the Material and Workmanship clause, it was entitled to propose products beyond those identified, and that the agency altered the contract by refusing to reasonably consider equivalent products, such that the contractor is entitled to payment for changes. In its motion, the agency asserts that no change occurred, as the agency simply required the contractor to comply with the terms and conditions of the contract.

The standard to resolve a motion to dismiss for failure to state a claim is well established. The contractor must point to factual allegations that, if true, would state a claim to relief that is plausible on its face, when the Board draws all reasonable inferences in favor of the contractor. The Board decides legal issues, and may treat any document that is incorporated in or attached to the complaint as part of the pleadings. *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, 6298, 19-1 BCA ¶ 37,272.

The contract clearly states that the contractor is not entitled to substitute a product or utilize a manufacturer of its own choosing, not identified in the contract, for the items in question. The language relevant to these two situations (“[c]omparable products or substitutions for Contractor’s convenience will not be considered” for the first item, and the requirement that the contractor is to submit a product from the named basis of design manufacturer “or a comparable product by one of the other named manufacturers” for the second item) is limiting. While substitutions for the first item could have been proposed prior to proposal submission, the contractor did not take advantage of that opportunity. The Material and Workmanship clause (substitutions will be considered “unless otherwise specifically provided in the contract”) does not assist the contractor because the contract specifically provides otherwise in limiting what the contractor can substitute. By operation of these provisions, the contractor cannot make a plausible claim that the agency was required to consider its proposed substitutions after award, or that a change occurred when the agency rejected the proposed substitutions.

While the contractor suggests that language that permits a substitution if raised prior to submission of bids (actually proposals) creates an ambiguity, such is not the case. The language permitted one to propose a substitution prior to proposal submissions such that competition with an expanded list of acceptable manufacturers or products could occur. The contractor did not utilize that opportunity (or successfully object to the terms and conditions of the procurement). The agency properly concludes that these allegations of failing to achieve free and open competition are not appropriate for dispute resolution.

The terms of the contract must be enforced. *Madigan v. Hobin Lumber Co.*, 986 F.2d 1401, 1403-04 (Fed. Cir. 1993). The agency simply insisted on performance in compliance with the contract specifications; there was no change. *S.S. Silberblatt, Inc. v. United States*, 433 F.2d 1314, 1323 (Ct. Cl. 1970). The contract did not entitle the contractor to make the substitutions it sought. The contractor has failed to set forth facts sufficient to state a viable claim for the requested relief under the theories presented.

Decision

The Board grants the agency's motion and **DISMISSES** these appeals.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge