



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: January 15, 2016

CBCA 4060

R.A. GLANCY & SONS, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

James R. Mall of Meyer, Unkovic & Scott LLP, Pittsburgh, PA, counsel for Appellant.

Jennifer Hedge, Office of Regional Counsel, Department of Veterans Affairs, Pittsburgh, PA, counsel for Respondent.

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

POLLACK, Board Judge.

This appeal arises out of a contract, VA244-13-C-358, entered into between the Department of Veterans Affairs (VA) and R.A. Glancy & Sons, Inc. (Glancy), under which Glancy was to construct and provide renovations at Building 51/Unit 3B, VA Medical Center, Pittsburgh, Pennsylvania. A dispute arose between the parties as to what features were required to be provided for the patient headwall system identified in the contract. A hearing was held in Pittsburgh, Pennsylvania.

Among the items to be provided and installed by Glancy was a patient headwall system, identified in the specifications as being "Elements Headwall System Manufactured by Hill-Rom Co. or approved equal." The sole issue in this case is whether the VA interpretation of the contract is correct. The VA interpreted the contract language to hold

that the brand name system specified was only acceptable if it included features identified as “or equal” requirements. That is, the patient headwall system provided by appellant had to be composed of both thermofoil (for cabinetry) and quartz (for counter tops), rather than Corian and laminate, which are integral features of the Hill-Rom brand name headwall system identified in the contract. The appeal does not involve quantum.

Findings of Fact

The principal specification which identifies the Hill-Rom product by brand name also sets out various salient characteristics for the patient headwall system. Among the characteristics are that the patient wall system be Underwriters Laboratories (UL) listed, that structural framing and the consoles meet certain requirements, and that the system have various electrical and medical gas components. The listing of salient characteristics identifies the cabinet casework as requiring a thermofoil finish. The listing contains no designation for quartz. The listing also provides, at subparagraph E-2, that the assembly and all components be UL listed.

The specification is set out below:

Section 10 25 13, Patient Bed Service Walls:

PART 2 - PRODUCTS

2.1 PATIENT WALL SYSTEMS

- A. Elements Headwall System Manufactured by Hill-Rom Co. or approved equal.
 - 1. Contact 1069 SR 46 East, Batesville, IN 47006; Telephone: (812) 934-7777; Fax: (812) 934-8189; E-mail: us.customerservice@hill-rom.com; website: www.hill-rom/usa/AP_Elements.htm
- B. Shall be UL listed.
- C. Shall consist of a structural framework, removable panels and removable equipment console units, factory assembled to house all permanent bedside services including but not necessarily limited to fixtures, grounding jacks, power outlets, telephone outlet, nurses call patient station, medical gas outlets and other fittings or devices.
 - 1. Frame Assembly: 16 gauge role formed galvanized steel channels
 - 2. Service Panels: 16 gauge steel with high pressure laminate (HPL) finish.
 - a. Width: As indicated on drawings.

- b. Height: As indicated on drawings.
- c. Color: See color and finishes of the patient wall units, Section 09 06 00, SCHEDULE FOR FINISHES.
- 3. Access Panels: Edge banded particle board with high pressure laminate (HPL) finish on front and back.
 - a. Width: As indicated on drawings.
 - b. Height: As indicated on drawings.
 - c. Color: See color and finishes of the patient wall units, Section 09 06 00, SCHEDULE FOR FINISHES.
- 4. Cabinet: Casework: Constructed of panels with thermofoil finish.
 - a. Color: See color and finishes of the patient wall units, Section 09 06 00, SCHEDULE FOR FINISHES.
- 5. Gas Manifold: Machined aluminum block with D.I.S.S. (Diameter Indexed Safety System) gas specific check valves.
- 6. Junction Box: To provide normal and critical power (standard and isolated), as well as low-voltage power.
- D. Performance Criteria:
 - 1. Metallic Outlet Boxes: Comply with ANSI [American National Standards Institute] UL 514A.
 - 2. Cooper Joint Pressure Fittings: Comply with ASME [American Society of Mechanical Engineers] B16.22.
 - 3. Cleaning Equipment for Oxygen Service: Comply with G-4.1.
 - 4. Diameter Index Safety System: Comply with CGA [Compressed Gas Association] V-5.
 - 5. Isolated Power Systems Equipment: Comply with UL-1047.
 - 6. Sound Transmission Class ASTM [formerly, American Society for Testing Materials] E413: [46] [45] [40] STC
- E. Shall conform to the following:
 - 1. Applicable requirements in NFPA [National Fire Protection Association] 70 (NEC) [National Electrical Code] and NFPA 99.
 - 2. Assembly and all components shall be UL listed or labeled.
- F. Coordinate the mounting space provisions for the nurse call equipment with Section 27 52 23, NURSE CALL/CODE BLUE SYSTEMS.

The specification and drawings identify, in some instances, the use of quartz for countertops and thermofoil for cabinets. In some instances, quartz and thermofoil were shown or identified for use with the patient headwall units, while in other instances, quartz and thermofoil were shown for other applications.

The contract also includes 4.13 VAAR [Department of Veterans Affairs Acquisition Regulation] 852.211-73, Brand Name or Equal (Jan. 2008), which provided:

Items called for by this invitation for bids have been identified in the schedule by a brand name or equal description, such identification is intended to be descriptive, but not restrictive and is to indicate the quality and characteristics of the products that will be satisfactory. Bids offering “equal” products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics requirements listed in the invitation.

....

The Brand Name or Equal clause continued:

(b) Unless the bidder clearly indicated in the bid that the bidder is offering an “equal product,” the bid shall be considered as offering a brand name product referenced in the invitation for bids.

Hill-Rom manufactured one headwall system product.

The design of the project was prepared by AE Works (AE or architect/engineer). Mr. Jason Dillaman, an architect, was the AE Works project manager. The designer based the specification for the patient headwall system on the manufactured product of Hill-Rom. Hill-Rom is a well-established supplier of items, such as patient walls, beds, and other hospital equipment. Mr. Dillaman testified that he was aware that the patient headwall system manufactured by Hill-Rom at the time of the solicitation did not use either quartz or thermofoil. He, however, believed at the time of the solicitation that Hill-Rom could not only modify its standard manufactured product to substitute quartz and thermofoil, but further that Hill-Rom was willing to do so, and willing to provide quotes to bidders in that regard. He stated that he was told by Mr. Jim Ekstrom, an architectural specialist with Hill-Rom, that Hill-Rom could do it. Mr. Dillaman did not provide a specific date for this conversation, and it is noted that by the time the VA issued the invitation for bids (IFB), responsibility within Hill-Rom for the VA project at issue had been turned over to Mr. Paul Hultgren, an architectural specialist with that firm. Mr. Dillaman stated that he did not recall Hill-Rom representatives saying that they could not provide a product with thermofoil and quartz.

Mr. Dillaman testified that he considered quartz or thermofoil to be a minimum change in material, looking at the system as a whole. Additionally, he stated that he believed then and believes currently that there are manufacturers other than Hill-Rom that could comply

with VA specifications as written. He provided no independent details to support that, however.

The contracting officer (CO), Mr. William Matelin, stated in his testimony that he expected the Hill-Rom headwall to be an off-the-shelf product.

The record contains information from four individuals associated with Hill-Rom that address interactions (at one time or another) between Hill-Rom and the AE. Direct testimony was provided by Mr. Hultgren. The remainder of the information was from various writings.

Mr. Hultgren took over responsibility for the VA project in May 2013, and he was responsible for the project at the time of the IFB and the award. He testified that he discussed the use of thermofoil and quartz during the design process with the VA designers. He said that due to prices and UL issues, Hill-Rom decided, going into the bid period, that it would not include quartz and thermofoil in what it offered potential bidders.

Mr. A. Michael Oszewski was an account executive with Hill-Rom and was employed by Hill-Rom both pre-bid and after award. At the request of Mr. Hultgren, to provide Mr. Hultgren a history as to Mr. Oszewski's involvement, Mr. Oszewski set out his understanding of events in a memorandum. The memorandum identified meetings on April 23, 2013, and August 13, 2013, both attended by Mr. Oszewski and Mr. Dillaman. Mr. Hultgren had attended the August 13 meeting. The April 2013, pre-solicitation meeting, with participants from Hill-Rom and Mr. Dillaman and his team, addressed the Hill-Rom product and reviewed drawings and specifications for Building 51. Mr. Oszewski's memorandum stated, "specifically, two items we emphasized 1) We would not do Thermofoil on the Cabinetry and 2) There would be an exception provided for Quartz, as our headwall system used Corian."

Mr. Travis Jackson was a Hill-Rom employee prior to and at the time of the Glancy bid. He provided further information regarding the meeting of April 23. He stated that at the meeting, Hill-Rom noted that it did not use thermofoil and that whether, or if, Hill-Rom used thermofoil in the future, was contingent upon securing Hill-Rom engineering approval and being able to obtain UL certification.

The final Hill-Rom information came from Mr. Ekstrom, who set out his recollection of Hill-Rom interactions with the AE in a summary provided to Mr. Hultgren dated October 13, 2013. Mr. Ekstrom recollected attending a meeting in February 2012 and said that at that time, Hill-Rom presented to the AE several headwall designs that were available or still in conceptual design. He said the architect was interested in the Elements system and requested several additional ideas that needed to be submitted for review. The AE design ideas were submitted to Hill-Rom management for review. Many of the requests required

additional testing and review by others to determine feasibility. The result was that Hill-Rom “could provide the cabinet for the sink, but thermofoil and quartz were not available due to the UL submission and process required since the Elements headwall is a UL listed system.” In addition to the above, Mr. Ekstrom provided a separate declaration, dated December 5, 2014. It identified a number of interactions between himself and Mr. Dillaman in 2012 and confirmed that he submitted the Dillaman design ideas to Hill-Rom management. The declaration also however confirms that he stopped his involvement on the project in November 2012, and at that time, “I was waiting on testing and approval by our design team.” No subsequent approval as to quartz or thermofoil was thereafter made.

The IFB was issued on May 31, 2013, significantly after Mr. Ekstrom ceased to be involved. Bid opening was scheduled for July 9, 2013. The IFB allowed bidders to submit questions through June 24, 2013. Mr. Hultgren testified that Hill-Rom held off providing its proposals to bidders until some time in July, just prior to the July 9 scheduled bid opening, thereby issuing its proposals after the question cut-off date. In its proposals to bidders, Hill-Rom made clear that it would not be providing a proposal using thermofoil or quartz.

The Glancy bid was prepared by Mr. Gary Guzak, Glancy’s project manager. He testified that at about the time he received the proposal from Hill-Rom, he spoke to Mr. Hultgren and asked about Hill-Rom providing a UL-listed Hill-Rom patient headwall system that would have quartz countertops and thermofoil finishes. Mr. Guzak said he was advised by Mr. Hultgren that a headwall system with such features was not a product that Hill-Rom was then manufacturing. Glancy was told by the Hill-Rom representative that Hill-Rom had no UL listed headwall product or any headwall product that used thermofoil and quartz, as its standard product at the time, and for the prior thirty years, it used a Corian countertop with high pressure laminate finishes on the cabinets. Hill-Rom advised that it would not be bidding a system with quartz or thermofoil. Mr. Guzak said he was told by Mr. Hultgren that Mr. Hultgren and his predecessor had worked with the design team at the VA and that the VA design team was well aware that the Hill-Rom system did not utilize quartz or thermofoil. Mr. Guzak stated that he was told by Mr. Hultgren that he need not to worry about the Hill-Rom limitations as the VA was well aware of them.

Mr. Hultgren testified that he did not recall telling Mr. Guzak that the VA agreed to the use of laminate and Corian. Mr. Hultgren further testified that Hill-Rom advised all bidders that contacted it of the same general information provided to Glancy. He recollected providing five bidders with the same proposal, regarding the headwall, as the one provided to Glancy. There was no evidence that any bidder secured a quote on the headwall, other than from Hill-Rom, and no other bidders were called as witnesses. The VA contended that Glancy’s not calling other contractors was evidence that other choices were available.

While Glancy based its bid on providing the standard Hill-Rom product with Corian and laminate, Mr. Guzak, as part of the bidding process, contacted four other manufacturers as to availability of an alternative headwall. None provided a bid. DIRTT, a vendor offered by the VA as being able to provide an equal product with quartz and thermofoil, was not among firms contacted by Glancy. After award, Glancy provided a submittal to the VA, and in that submittal, which reflected laminate and Corian, the AE approved the headwall units submitted, with a notation that the type of Corian and high pressure laminate was to be determined. The VA does not deny the review, but states the AE notations were in error.

Thereafter, the VA made it clear that it was insisting on both quartz and thermofoil and considered each to be required by the contract. Discussions ensued between the VA and Glancy, and several meetings were held. The parties were unable to agree as to what the contract required.

In April 2014, appellant filed an appeal with the Board regarding the meaning of the contract language as to the required headwall. The matter was docketed as CBCA 3825, but it was thereafter dismissed because there was no underlying claim or contracting officer's decision. *R.A. Glancy & Sons, Inc. v. Department of Veterans Affairs*, CBCA 3825 (Aug. 21, 2014). Appellant then sought a contracting officer's decision on the contract meaning and the VA issued a final decision on that matter on July 31, 2014. The decision addresses only the matter of interpretation and not quantum. Appellant filed a timely appeal. A hearing was held on December 12, 2014. At the time of the hearing, the appellant had requested Hill-Rom to produce a unit that included quartz and thermofoil, and to the best of appellant's knowledge Hill-Rom was attempting to move forward. At the time of the hearing, the matter of whether Hill-Rom could produce the unit and secure UL approval was still not known.

In conjunction with its assertion that the language mandated providing quartz and thermofoil, the VA asserted that there were available products that utilized quartz countertops and thermofoil cabinets and which could have qualified as "or equal" product. Evidence regarding the availability of potential "or equal" products is not relevant to the contract interpretation issue before us, so elaboration of testimony and related information in the record is not here included.

Discussion

The operative specification requires the contractor to provide "Elements Headwall System Manufactured by Hill-Rom Co. or approved equal." The contract then contains a list of salient characteristics, among which are thermofoil finished cabinetry and UL listed assembly. Although the VA interprets the contract to require appellant to also furnish quartz

countertops for the headwall system, we note that quartz was not listed among the salient characteristics. Quartz however was designated on several drawings, including drawings specific to the headwall system. Thermofoil was similarly identified in various specifications, including those directly involving the headwall system. Neither thermofoil nor quartz were features of the Hill-Rom system that was designated by brand name.

It is black letter law that we interpret contract language according to its plain meaning. *Coast Federal Bank, FSB v. United States*, 323 F.3d 1035 (Fed. Cir. 2003). We do not create ambiguity or conflict where none exists and we attempt to give meaning to all language. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009); *Alaska Lumber & Pulp Company, Inc. v. Madigan*, 2 F.3d 389 (Fed. Cir. 1993); *Ace Construction Co. v. United States*, 401 F.2d 816 (Ct. Cl. 1968). If we apply these principles to the designation of an “Elements Headwall System Manufactured by Hill-Rom Co. or approved equal,” then it is clear that the contractor is entitled to provide either the system as manufactured by Hill-Rom or an equal product that conforms with various salient features designated by the VA. While virtually all of the cases we have found, regarding the operation of the Brand Name or Equal clause, involve situations where the dispute is over whether a product qualifies as an “or equal” product, the cases are uniformly implicit that the clause allows for either/or. *See, e.g. Yardney Technical Products, Inc.*, ASBCA 53866, 09-2 BCA ¶ 34,277, *Maron Construction Co.*, ASBCA 53933, 05-1 BCA ¶ 32,904. There is simply no reasonable way to read the language in the Brand Name or Equal clause, other than to permit the contractor to provide the identified brand headwall system specified. Otherwise the term “or” is rendered meaningless. Applying the plain meaning, one of appellant’s options was to provide the Hill-Rom system that existed at the time of bidding. That was a system that did not feature quartz or thermofoil, but instead used Corian and high-pressure laminate (exactly what appellant proposed). The brand name satisfied the brand name portion of the clause. The contract does not limit the acceptability of that brand-named product.

Normally, we would stop our discussion at this point. However, the VA raised the defense of patent ambiguity, and before rendering our decision, we address that matter. The VA asserts that appellant has maintained that there is no product that could meet the requirements set out in the salient characteristics, and therefore, appellant is contending that no product could meet the combination demanded by the VA. The VA contends, citing *J.K. Richardson Co.*, ASBCA 46309, 94-2 BCA ¶ 26,900 (1994), that where the Government specifies a product that is non-existent or commercially unavailable, and the contractor is aware of that, the specification is patently ambiguous and the contractor cannot prevail on its interpretation, absent inquiry. In applying the argument to this case, it is clear that the VA misses the point as to the operation of the Brand Name or Equal clause. With brand name or equal, the contractor is given a choice. The Hill-Rom product, designated by brand name, did not have to conform to the salient characteristics. Rather, only a product which was

offered as an “or equal” would need to so comply. Therefore, it does not matter, for resolution of this case, that appellant concluded that there was no “or equal” product available. Appellant had the option to simply bid the brand name, which it did.

Having concluded there is no ambiguity when one can chose from options, this case does present a twist which calls for comment. At the time it bid, appellant did not analyze its rights on the basis of the plain meaning of the Brand Name or Equal clause or because it understood and concluded that the Brand Name or Equal clause gave it an unfettered choice. Rather, appellant understood that the VA was seeking a unit with quartz and thermofoil. Appellant attempted to secure those features, and ultimately it addressed the matter with Hill-Rom. Appellant abandoned the quest to secure the features, when inquiry to Hill-Rom told it that the VA knew that thermofoil and quartz would not be provided with the Hill-Rom product, and after it was told by Mr. Hultgren that the designer and implicitly the VA were “all right” with the standard Hill-Rom product that had been designated by brand name.

To the extent the VA asserts the appellant had an obligation to inquire, because it was aware of the VA desire for quartz and thermofoil, we find that not to be supportable. We find no patent ambiguity. It was the VA that chose to designate Hill-Rom by brand name, and not to include language indicating that the product could be used only if modified. Once appellant went to the designated vendor, and was told that its product had different features, but was acceptable to the VA, appellant had no need to go further. Since the VA designated Hill-Rom, it was logical that the VA would in fact be satisfied with the product which Hill-Rom manufactured.

When the Government designates a product as a brand name, the Government needs to understand that a contractor can bid on that product, notwithstanding whether the product conforms to otherwise listed salient characteristics or not. If the Government needs features that are different from those of the brand name, then the Government should not designate the brand name; or if it does, the Government must make it clear that the product will have to be modified to include certain features or it will otherwise not be acceptable. Placing features in the list of salient characteristics does not modify the brand name designated.

The VA presented testimony to show that there was an available alternative to Hill-Rom that could have met the VA criteria for thermofoil and quartz. Based on our reasoning above, the availability of another vendor does not change the outcome of this decision. Nevertheless, as guidance, we note that our conclusion from the evidence was that the DIRRT system did not meet the requirement for a UL listed assembly. Assembly means the combination of UL items together as a unit, individual UL listing for each item or component is not the same.

To the extent the VA argues that appellant is bound to provide thermofoil and quartz because specific drawings and patient headwall specifications referenced those products, we conclude that those details and requirements go to an “or equal” product.

Finally, the record shows that even if the AE believed, as Mr. Dillaman stated, that Hill-Rom would be willing to provide a system with the designated features, the AE never secured a firm commitment as to that and provided nothing in the specification to indicate that the product listed was going to have to be modified in order to be acceptable. Further, on the limited evidence provided, we conclude that the only manufacturer providing bidders a headwall quote was Hill-Rom, and that manufacturer provided the same standard product to all bidders. There is no evidence appellant secured a windfall.

Decision

We find that the language of the contract allows for the Hill-Rom product included by Glancy in its bid. The appeal is **GRANTED**.

HOWARD A. POLLACK
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

JONATHAN D. ZISCHKAU
Board Judge