BY STEVEN NUDELMAN

Standard of Quality Clauses in Public Contracts

In this day and age of specialization, the area of "Construction Law" has plenty of subspecialties. Some construction attorneys focus solely on contract negotiation, while others focus strictly on commercial litigation, residential construction, and/or heavy highway construction. This variety has the potential to yield countless articles of interest to plumbing engineers.

To date, most of my columns have focused on litigation-based issues, such as claims, in the *private* construction context. This month, I am taking you through a narrow area of the law governing *public works* contracts.

PUBLIC CONTRACTING: AN OVERVIEW

Public contracting law is a huge area. Not only is the substantive law different than the law governing private projects, but the procedural law differs as well. Public contracting claims typically are asserted against a governmental entity, such as a town, county, municipal agency, state or state governmental body, or the United States of America. Claims against these "public defendants" are subject to strict time limits and venue requirements. Depending on the municipality or governmental entity, claims may need to be made before a contracting officer and may be subject to appeal before a contracting board of appeals and possibly further appeal to a court of claims (on the state or federal level).

This article will *not* be concerned with all of the vagaries of public contracting law. Rather, I will attempt to cut through the swath and focus on a discrete, substantive area that may be of interest to plumbing engineers, contractors, and suppliers: standard of quality (SOQ) clauses and their interpretation in public contracts.

To help you understand this type of clause and how it is interpreted by public contracting tribunals, I am going to focus on two reported cases, their underlying facts, and their controlling legal principles.

JACK STONE COMPANY, INC. v. UNITED STATES

In *Jack Stone Company, Inc. v. United States*, the plaintiff had a dispute over a contract for electrical work at the National Institutes of Health in Bethesda, Maryland. Jack Stone alleged that under its contract with the General Services Administration ("GSA"), it was required to install certain brand-name items that were more expensive than similar items manufactured by another firm, which were equal to the other and allowed under the contract. Jack Stone's contract had the following SOQ clause:

> Reference in the specifications to any article, device, product, materials, fixture, form, or type of construction by name, make, or catalog number, shall be interpreted as establishing a standard of quality, and not as limiting competition. The Contractor may make substitutions equal to the items specified if approved in advance in writing by the Contracting Officer.

The specification relating to the fire alarm system at issue provided, in pertinent part:

> The Contractor shall furnish all labor and materials necessary to install complete all additions and revisions to the existing Fire Alarm System as herein specified…The existing system is of Sperti Faraday manufacture. All new equipment and parts furnished shall be of the same manufacture to insure full and satisfactory performance of the completed system.

After Jack Stone obtained a price quote from Sperti Faraday, it complained to the contracting officer that the price was "very much out of line." Jack Stone also obtained a lower quote from American District Telegraph Company ("ADT") and sought permission from the contracting officer to utilize ADT equipment instead of Sperti Faraday's. The contracting officer refused to allow this substitution, and Jack Stone unsuccessfully appealed to the Board of Review of the GSA. Specifically, the Board held that the SOQ clause "merely authorized" the contracting officer to agree to a substitution if he desired; however, the contract mandated the use of Sperti Faraday and nothing else.

Jack Stone appealed the Board's decision to the U.S. Court of Claims (now known as the U.S. Court of Federal Claims).

Purpose of SOQ Clause

The Court of Claims examined whether Jack Stone's contract required the installation of brand-name items (i.e., Sperti Faraday) or, conversely, whether the contract allowed the use of alternate "equal" items. The Court honed in on the SOQ clause, noting that "[i]t was designed to discourage the potentially monopolistic practice of demanding the use of brand-name or designated articles in government contract work. The framers of the clause obviously thought that it was in the national interest to widen the area of competition, and to bar local procurement officials from choosing a particular source either out of favoritism or because of an honest preference."

As the Court summarized, "The normal understanding of this provision would be that, every time a brand name appeared in the specifications, it should be read as referring, not only to the particular manufacturer or producer which was designated, but also to any equal article or product."

Of course, the contracting officer still has a role in the process: He/she must exercise judgment to determine whether the item proposed to be substituted is equal in quality and performance to the designated proprietary product. However, the contracting officer may *not* outright reject a product that is equal in these respects.

The Court concluded that all references in the specifications to Sperti Faraday equipment should be "interpreted as establishing a standard of quality." Under the contract at issue in *Jack Stone*, the plaintiff was not required to furnish Sperti Faraday equipment;

rather, it could supply material from another source if the material was equal to Sperti Faraday and if the consent of the contracting officer was sought in advance.

As a result, the Court found in favor of the plaintiff, awarding Jack Stone an equitable adjustment for having to install the more costly Sperti Faraday equipment instead of the ADT material.

BLOUNT BROTHERS CORPORATION

The 1965 *Jack Stone* decision served as the underpinning for a number of subsequent public contracting cases interpreting SOQ clauses. In *Blount Brothers*, a 1988 case before the Armed Services Board of Contract Appeals ("ASBCA"), the contracting officer denied the contractor's request to substitute for a brand-name automatic cart washer (which is essentially a miniature car wash) or receive an appropriate equitable adjustment.

Blount had a $97.7 million contract to perform work at the composite medical facility at Wright-Patterson Air Force Base. Its contract had a very similar SOQ clause to the one in Jack Stone's contract. The specifications contained five, single-spaced, typed pages detailing the particulars for the automatic cart washer/dryer to be used. When read together, the specifications could be satisfied only by the use of one particular system: the Vernitron Better Built ("VBB") unit. Blount wanted to use a less expensive CRS cart washing model, yet its request was denied by the contracting officer.

After filing its appeal timely with the ASBCA, Blount argued that the Government used detailed, proprietary specifications for the cart washer that should be treated as if the Government specified a particular brand-name product. Moreover, according to Blount, the CRS unit was the functional equivalent of the VBB unit, and it should have been approved pursuant to the SOQ clause in the contract. The Government denied that the CRS unit was the functional equivalent to that which was described in the specifications.

The ASBCA started by noting, "Both the Court of Claims and this Board have held that a detailed description of the proprietary characteristics of an item, found in the product of only one manufacturer, is tantamount to the use of the brand name and is treated as if the brand name was used." Here it was clear that the specifications at issue described a VBB unit and only a VBB unit.

In light of the SOQ clause, the ASBCA found that "The contractor is entitled…as a matter of right, to substitute a product that is equal to the specification and where there is no warning in the contract that an equal product is not acceptable, or where the Government has an undisclosed special reason for requiring the brand name, substitution of an otherwise equal product cannot be denied."

Substituting for Brand-name Products

According to the ASBCA decision, the contractor who wishes to substitute for a brand-name product is required to demonstrate "(1) that the specifications are proprietary, (2) that he submitted information showing an equal substitute product, and (3) that the substitute is of the same standard of quality."

The ASBCA ultimately allowed the CRS unit to be used instead of the VBB unit, it did not approve all of Blount's submittals, and it awarded an adjustment to Blount to account for the difference in price between the CRS and VBB units.

CONCLUSION

Both *Jack Stone* and *Blount Brothers* serve to highlight the significance of SOQ clauses in public contracts. As the ASBCA said in *Blount*, such clauses "promote competition by providing a wider range of manufacturers which would be eligible to supply the item required." Moreover, these clauses—when read carefully in conjunction with the specifications at issue—allow the supplier an opportunity to substitute a brand-name product with an equivalent and often less expensive one in a manner that is consistent with the terms of the contract and governing public contracting laws. PSD

RECOMMENDED READING

1. *Jack Stone Company, Inc. v. United States*, 344 F.2d 370 (Ct. Cl. 1965)
2. *Blount Bros. Corp.*, ASBCA No. 31202, 88-3 BCA ¶ 20,878

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