



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON JULY 31, 2024**

DENIED: July 23, 2024

CBCA 7513

FRAMACO INTERNATIONAL INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin and Erik M. Coon of Bradley Arant Boult Cummings LLP, Washington, DC; and Sam Z. Gdanski and Abraham S. Gdanski of Gdanski Law PC, Teaneck, NJ, counsel for Appellant.

Matthew S. Tilghman, Thomas D. Dinackus, and Alexandra N. Wilson, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **RUSSELL**, and **O'ROURKE**.

RUSSELL, Board Judge.

Appellant, Framaco International Inc. (Framaco), has filed 131 cases with the Board (certain of which are consolidated) based on its contract with respondent, Department of State (State or agency), Bureau of Overseas Building Operations (OBO), to construct an embassy compound in Port Moresby, Papua New Guinea.

This decision is being issued in accordance with the Board's order on further proceedings of October 19, 2023 (Order), which largely adopted the parties' proposal to resolve approximately 100 of appellant's non-consolidated appeals brought pursuant to Board Rule 53 (48 CFR 6101.53 (2023)), along with certain claims in four of its consolidated appeals that were not based on Government-caused delay. *See* Rule 53 (governing accelerated procedures, which are available at an appellant's election but limited to appeals involving amounts in dispute of \$100,000 or less); *see also* Rule 1(a) ("The Board may alter [its] procedures on its own initiative or on request of a party to promote the just, informal, expeditious, and inexpensive resolution of a case."). The Order states that "[t]he presiding judge with the two members of the panel . . . will decide the following appeals for which the parties will submit briefing: CBCA 7508, 7512, 7513, 7549, 7561, 7572, 7573, 7625, 7695, 7712, 7847, and 7859 ('Selected Appeals')." The Order additionally states, "Decisions rendered by the panel will be in summary form either in writing or orally, if a hearing is held; will be final and conclusive; will not be set aside, except for fraud; and will not be precedential."

As agreed to by the parties, quantum in the non-consolidated appeals and certain claims in four of Framaco's consolidated appeals (to which the Order applies) will be decided based on a formula derived from any damage amounts awarded to Framaco in the Selected Appeals. In a subsequent joint response filed with the Board on March 19, 2024, the parties confirmed that the Order applies to the appeals described above.

This appeal (CBCA 7513) arises from State's denial of Framaco's claim for increased costs (\$47,742) resulting from an alleged government directive for the sole-source procurement of a kitchen exhaust hood outside the scope of the embassy construction contract.

Background

I. The Contract

In September 2015, State awarded Framaco a firm-fixed-price contract, initially valued at approximately \$97 million to construct the New Embassy Compound (NEC) in Port Moresby, Papua New Guinea.¹ Appeal File, Exhibit 1 at DOS-PTMO-00982321.² The project was originally designed in 2010 as a "Standard Secure mini-Compound" (SSmC)

¹ The contract was issued on July 6, 2015, and awarded on September 30, 2015. Appeal File, Exhibit 1 at DOS-PTMO-00982303-04.

² All exhibits are found in the appeal file, unless otherwise noted.

with a scope including a lock-and-leave new office building, a perimeter security wall and fence, a main compound entry pavilion (MCAP), a service entry/utility building, and a support annex. Exhibit 2 at DOS-PTMO-00982414. Construction of the SSmC facility began in 2012, but in 2013, after forty percent of the project was completed, a future marine detachment was planned for Port Moresby and the embassy staffing requirement was increased. *Id.* State therefore descope the work under the 2012 contract and closed out that contract. The project was redesigned under an expanded NEC, incorporating the completed portions of the SSmC project as well as surplus equipment and materials, where appropriate. *Id.* The redesigned project included the perimeter security wall and fence, the MCAP, a new service compound entry pavilion, a new four-story office building (NOB), a marine service guard residence, a service entry/utility building, an enlarged support annex, and a new recreation facility. *Id.*

The Framaco contract included a specification regarding the installation of a Type I kitchen exhaust hood, which is the subject of the present appeal. Exhibit 6. Section 114005 of the contract, "Food Service Equipment," reads in relevant part at specification 2.6:

- A. Available Manufacturers: Subject to compliance with requirements, manufacturers offering products that may be incorporated into the Work include, but are not limited to, the following:
1. Aerolator Systems, Inc.
 2. AHR Metals, Inc.; Air Saver Systems.
 3. Air Tech; Delfield Company (The).
 4. AyrKing Corporation.
 5. Captive-Aire Systems.
 6. Carroll Manufacturing International.
 7. Duke Manufacturing Company.
 8. Gaylord Industries, Inc.
 9. Giles Enterprises, Inc.
 10. Grease Master; a division of Custom Industries, Inc.
 11. Greenheck.
 12. Halton Company.
 13. LCSystems, Inc.
 14. Sturdi-Bilt Restaurant Equipment.
 15. Vent Master; Div. of Garland Commercial Ranges, Ltd.

B. General: Type I exhaust hood. Fabricate hoods indicated from minimum 1.27-mm thick stainless steel, unless otherwise indicated.

1. Refer to Item 32 for fire-extinguishing system requirements.
2. Refer to Division 23 Sections for duct, fan, and damper requirements.

Id. at DOS-PTMO-00985711. The food service equipment schedule lists the exhaust hood, which is characterized as “Item #B33,” as follows:

ITEM #B33	EXHAUST HOOD
Quantity:	One (1)
Manufacturer:	Halton Co.
Model:	KVE
SIS No:	HOP046
Features:	- See Drawing #U14-271-1 - 240/50/1, 8amp - Shop drawing required

Id. at DOS-PTMO-00985727. Similarly, drawing NOB QF140 lists the requirements for Item #B33, which stipulates the requirements for the hood. Exhibit 9. Specifically, State requested one combined hood for both exhaust and supply, with a required exhaust air volume of 936 liters per second (L/s) and a supply air volume of 562 L/s. Exhibits 7, 9, 46 at DOS-PTMO-03100163.

If a contractor could not procure the specific exhaust hood required, the contract allowed, in section H.39.1.6, for substitutions. Exhibit 1 at DOS-PTMO-00982384. Section H.39.1.6.1 explains that prior approval of any substitution is required, noting that:

[In order to use substitutions] the Contractor must receive approval in writing from the Contracting Officer. Any substitution request must be accompanied by sufficient information to permit evaluation by the Government, including but not limited to the reasons for the proposed substitution and data concerning the design, appearance, performance, composition, and relative cost of the proposed substitute. . . . Requests for substitutions must be made in a timely manner to permit adequate evaluation by the Government. If, in the Contracting Officer’s opinion, the use of such substitute items is not in the best interests of the Government, the Contractor must obtain the items originally specified with no adjustment in the contract price or completion date.

Id. Similarly, if the contractor was unable to procure the exhaust hood requested, section H.39.2 provided an “Or-Equal Clause,” which stipulates:

References in the Specifications/Statement of Work to materials, products or equipment by trade name, make, or catalog number, or to specific processes, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may propose for approval or rejection by the Contracting Officer the substitution of any material, product, equipment or process that the Contractor believes to be equal to or better than that named in the Specifications/Statement of Work, unless otherwise specifically provided in this contract.

Id. at DOS-PTMO-00982384-85. Contract specification section 013305-3.08-C.1 also provides:

Proposals for substitutions of materials or products required by the Contract specifications and drawings shall include a specific description of each substitution in writing and provide justification. No proposals for substitutions of materials or products will be accepted after 90 days from the initial [notice to proceed (NTP)]. . . . The Contractor shall identify all potential scope, cost, time, and quality changes at the time of the submittal.

Exhibit 5 at DOS-PTMO-000984247. Specification 013305-3.10 also includes a Material/Product Substitution Request Form as a supplement, which specifies:

Within 30 days after the construction NTP, this formal request will be considered for substitution of products specified as minimum standard. After the end of this period, substitution requests will be considered only if the specified product or material is no longer available or deemed unsatisfactory for the intended function.

Id. at DOS-PTMO-000984250. On March 27, 2017, State sent a limited notice to proceed (LNTP), giving the completion date for all work to be performed by September 27, 2019. Exhibit 11. On November 2, 2017, State issued a final notice to proceed. Exhibit 13.

II. Framaco's Submittals for the Kitchen Hood

Submittal 114005-02-0

On July 4, 2019, Framaco submitted Item #B33 for approval, listing the manufacturer as K-TECH, Model PK-ND-2 Q-SB-F. Exhibit 14 at DOS-PTMO-02240191. State marked this initial submission as “revise and resubmit,” Exhibit 15 at DOS-PTMO-03007742-43, partly because there was “no project specific data provided.” Exhibit 16 at DOS-PTMO-00943685_001. Additionally, State asked Framaco to “provide project specific shop drawing with control panel for variable speed fan drive fan” and instructed that “[i]f resubmitted, UL listing will prohibit proposed substitution from meeting air flow, static pressure and design for equipment to be served,” ordering Framaco not to “resubmit this [manufacturer].” *Id.*

Submittal 114005-02-1

On September 19, 2019, Framaco resubmitted the previously submitted K-TECH model with additional details. Exhibit 17 at DOS-PTMO-03007746. The documents included in the submission displayed two hoods side by side, despite the design requiring a single kitchen hood. *Id.* at DOS-PTMO-03007760. Similarly, “[t]he provided air volumes . . . were 1804 l/s for exhaust and 1444 l/s for supply, a significant deviation from the requirement.” Exhibit 46 at DOS-PTMO-03100163. On September 25, 2019, State rejected this resubmission, stating that “Item # 833 is Rejected. Provide as per section 114005-3.9.A: Halton-KVE--HOP046.” Exhibit 18 at DOS-PTMO-02042977.

On October 28, 2019, Framaco sent a letter to the project director explaining that it believed that it was being subjected to “unreasonable review and rejection comments from OBO as the result of the Government’s misinterpretation of the contract requirements during the submittal reviews.” Exhibit 20 at FRAM-0438794. Framaco argued that State’s position was improper based on the agency “not only reject[ing] the proposed brand/model but also declar[ing] that it would not consider any of the other (14) manufacturers listed in” the specification. *Id.* at FRAM-0438795. As such, Framaco asserted that State turned the contract into a sole-source procurement. *Id.*

Submittal 114005-02-2

On December 26, 2019, Framaco resubmitted Item # B33 for approval, this time proposing the Halton-KVE model. Exhibit 21. The listed air flow for the submitted model was 1701 L/s for exhaust and 1361 L/s for supply. Exhibit 21 at DOS-PTMO-02787665. State advised Framaco to revise and resubmit, explaining:

B33 Kitchen Exhaust Hood does not meet the design drawing . . . intent to be a singular unit with one exhaust and one supply air duct collars. Halton submittal has two hoods each with an exhaust collar with no supply air collars [sic]. . . . Submittal states [an] air supply . . . which is not acceptable.

Exhibit 22 at DOS-PTMO-02042979.

Submittal 114005-02-3

On January 30, 2020, Framaco resubmitted the Halton-KVE exhaust hood for consideration, attaching a letter from the manufacturer, which explained:

The Halton KVE hood model manufactured according to UL 710 standard do[es] not have an integrated make-up air plenum. The supply air (make up) duct shall be provided by others (MEP³ Contractor) to the area where Halton's KVE hood is installed. The largest stainless-steel sheets in our production have a maximum length of 3048mm hence it is not possible to manufacture a 3700mm long hood in a single hood section. It is necessary to split the hood into 2 hood sections of 1850mm length each.

Exhibit 23 at DOS-PTMO-02787672. Halton further provided a revised airflow, with the manufacturer's letter listing the exhaust flow rate as 1165 L/s and the supply flow rate as 932 L/s through an MEP diffuser. *Id.* In response, State rejected the submission, stating:

1. . . . Halton cannot provide a hood that meets the design intent of IFC drawing NOB QF 140 to be a singular hood with one exhaust collar and one supply air duct collar on the hood. Submittal has two hoods, each with an exhaust collar and no supply air collars. 2. Please Do Not resubmit this manufacturer unless they can comply with the basis of design intent of exhaust and supply air from and to one singular hood. 3. Specification 114005 2.6 A. lists 14 other hood manufacturers that can do so. Duke Manufacturing and Greenheck Hoods have been successfully installed at Embassies in Africa and Norway.

Exhibit 24 at DOS-PTMO-02042981.

Submittal 114005-02-4

³ Acronym believed to stand for "Mechanical, Electrical and Plumbing."

On February 18, 2020, Framaco submitted a Greenheck hood model GHCWX-145-00-S for approval. Exhibit 26. State explained that this submission would need additional quality control review. Exhibit 28. The decision further stipulated that, “[a]s discussed on 06Mar2020 OBO/AE/Framaco conference call, Framaco to contact BOD exhaust hood manufacturer Halton Co., USA (Halton-USA) to confirm one piece kitchen exhaust hood fabrication availability.” *Id.* at DOS-PTMO-02551555.

On March 6, 2020, Framaco sent a letter to the project director explaining that the continued rejections hindered the company’s ability to proceed with the procurement, leading to a delay in the project execution. Exhibit 27.

Submittal 114005-02-5

On March 26, 2020, Framaco resubmitted a Halton-KVE exhaust hood, noting that Halton-USA could “manufacture one piece kitchen exhaust hood fabrication.” Exhibit 29 at DOS-PTMO-03086776-77. The new submission could handle a total exhaust airflow of 936 L/s. *Id.* at DOS-PTMO-03086779. State returned the submission with no review comments, requesting Framaco to upload the correct submittal for State’s review. Exhibit 37.

Submittal 114005-02-6

Framaco resubmitted the request on April 18, 2020. Exhibit 41. In response, State stated, “Revise and resubmit for record. The product submitted is acceptable with the changes noted on the attached markups.” Exhibit 38 at DOS-PTMO-02042985.

Submittal 114005-02-7

On April 24, 2020, Framaco resubmitted the Halton-KVE exhaust hood for approval. Exhibit 43. The supply fan flow rate was 536 L/s and the exhaust fan flow rate was 823 L/s, which was under the rates set by the contract. *Id.* at DOS-PTMO-03084662. State accepted the final submission. Exhibit 44.

III. Framaco’s Claim

On July 14, 2022, Framaco submitted Claim 36, requesting a contracting officer’s (CO’s) final decision. Exhibit 45. In its claim, Framaco sought to recover its costs incurred due to the “Government’s directive for the sole-source procurement of the kitchen exhaust hood, and the associated scope changes to the relevant HVAC system . . . through the submittal and approval process.” *Id.* at DOS-PTMO-03087723. Framaco claimed direct

costs in the amount of \$47,742, derived from engineering and change management, plus the cost differential between the more expensive Halton-USA hood and the less expensive original K-Tech hood, as well as the additional installation materials, revisions in the HVAC system, and shipping costs. *Id.* at DOS-PTMO-03087723, -03087739.

On September 12, 2022, the CO rendered a final decision denying Framaco's claim. Exhibit 46. In the decision, the CO explained that the substitution requests were not timely and the substitutions were not of "equal size and performance characteristics" in order to be considered. *Id.* at 3-7.at DOS-PTMO-03100166-68.

This appeal followed.

Discussion

To determine whether Framaco can recover for its claimed damages, we start with a review of the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). We read the contract as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). "An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); see Restatement (Second) of Contracts § 203(a) (1981) (contract interpretation should not leave a part of a contract "of no effect").

It is clear that Framaco's submissions were not timely per the contract. As Specification 013305-3.08-C-1 provides, "[N]o proposals for substitutions . . . will be accepted after 90 days from the initial NTP." Exhibit 5 at DOS-PTMO-000984247. Further, the substitution request form stipulates that after thirty days following the construction NTP, "substitution requests will be considered only if the specified product or material is no longer available or deemed unsatisfactory for the intended function." *Id.* at DOS-PTMO-000984250.

The initial LNTP was issued on March 27, 2017. Exhibit 11. As a result, the ninety-day window after the initial LNTP lapsed on June 25, 2017.⁴ Framaco's first submission for substitution occurred on July 4, 2019. Exhibit 14. As such, the company submitted all of its requests for substitution for Item #B33 after the ninety-day period had lapsed. Because the period for submission of substitutions had elapsed, State was under no contractual obligation to evaluate substitutions. Further, because the requested materials were available, evidenced by the eventual procurement of the Halton-USA hood complying with the Government's standards, State was under no obligation to evaluate the substitution requests.

Framaco argues that its claim is timely because it "notified the CO of its reservation of rights and proceeded to procure and install the Halton-USA hood under protest," citing its October 28, 2019, letter as support. Appellant's Opening Brief at 9-10. However, the ninety-day period in which State was obligated to review submissions had already lapsed by July 4, 2019, when Framaco initially submitted the K-Tech hood, and October 28, 2019, when it allegedly reserved its rights. As such, State was under no obligation to review the substitution requests.

Additionally, Framaco claims that State "waived" the timeliness issue through its consideration of substitutions. Framaco also argues that State engaged in a sole-source procurement by denying Framaco's submissions, causing a delay for which it seeks damages. However, even if State waived the timeliness issue, to the extent there was a delay, Framaco's repeated submissions of noncompliant kitchen hoods was a significant cause. Specifically, the noncompliant submissions caused a delay between July 2019, when Framaco submitted its first noncompliant substitution, to February 2020, when Framaco submitted the potentially compliant Greenheck hood that State did not reject.

Because State ultimately did not reject the Greenheck hood, and Framaco had repeatedly submitted noncompliant hoods, we cannot find that State engaged in a sole-source procurement leading to a delay. On the contrary, we find that any delays related to the kitchen exhaust hood were due to Framaco's repeated noncompliant submissions. And as such, Framaco, not the agency, must bear the costs of any delays.

⁴ Even using the final notice to proceed date of November 2, 2017, Framaco would not prevail, as ninety days after November 2, 2017, would produce an end date of January 21, 2018, a year and a half prior to Framaco's July 4, 2019, submission of its requests for substitution.

Decision

The appeal is **DENIED**.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge