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Enforcing Competition Through Government Contract Claims

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ENFORCING COMPETITION THROUGH GOVERNMENT CONTRACT CLAIMS

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I. INTRODUCTION

One of the principal objectives of Congress in enacting laws to govern federal government contract awards is to insure competition by maximizing the number of contractors who compete for these contracts.[1] To insure full and open competition, the specifications in government contracts must permit all responsible sources[2] of goods, services, and construction to compete for the work.[3] Specifications which are drawn so that only one source or a

1. *See* 10 U.S.C. § 2301(a)(1), (b)(1) (Supp. II 1984); 41 U.S.C. §§ 253(a), 401(1) (1982); Defense Procurement Reform Act of 1984, Pub. L. No. 98-525, § 1202(2), 98 Stat. 2588, 2589 (1984); Exec. Order No. 12,352, 47 Fed. Reg. 12,125 § 1(d) (1982); *see also* 33 U.S.C. § 1284(a)(6) (1982).

2. *See* 41 U.S.C.A. § 403(7) (West Cum. Supp. 1985).

3. *See id.*; Federal Acquisition Regulation (FAR) § 6.101(a), 48 C.F.R. § 6.101(a) (1985) (requiring full and open competition which FAR § 6.003 defines as allowing "all responsible sources . . . to compete").

very limited number of sources can compete for the work may effectively thwart competition. Whether and how to enforce this requirement for competitive specifications during contract performance is this article's subject.

A specification that prescribes requirements which exceed the government's minimum needs is considered unduly restrictive and may be successfully protested.[4] A proprietary specification names a brand name product, or precisely describes the unique features of such a product (without naming the brand), so as to require the procurement of that brand name product, and no other, if the specification is to be met in each particular.[5] A proprietary specification, however, may be appropriate at times and is only unduly restrictive when its requirements exceed the government's minimum needs.[6]

Protests relating to whether such a specification exceeds the government's minimum needs often arise during the award process.[7] The focus of this article is on the contractor's *claims*[8] arising during contract performance, which contend that the government has used a proprietary or unduly restrictive specification, which results in an unanticipated cost increase for the contractor. As will be discussed, the issues in such claims differ significantly from those presented by a protest. Claims may be based on failure to accept an equivalent product under "brand name or equal" clauses, failure of the government to disclose its superior knowledge of the difficulties to be encountered in performance of the contract, the use of a proprietary specification without disclosing its proprietary nature, and breach of an implied warranty of competitive specifications. First, however, this article will examine the impact of the

4. *See* 44 COMP. GEN. 302 (1964). A protest, for purposes of this article, constitutes a formal written opposition to the procurement under the existing specifications to the General Accounting Office, the agency conducting the procurement, or the courts. *See* P. SHNITZER, GOVERNMENT CONTRACT BIDDING 559-619 (2d ed. 1982).

5. *See, e.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Bldgs., Inc., 424 F.2d 25, 28 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), *on remand* 376 F. Supp. 125, 130, *aff'd*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

6. 45 COMP. GEN. 365 (1965).

7. *See generally* J. CIBINIC, JR. & R. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 209 (1982); 1B J. MCBRIDE & J. WACHTEL, GOVERNMENT CONTRACTS—CYCLOPEDIC GUIDE TO LAW, ADMINISTRATION, PROCEDURE § 10.50 (1981); 1 R. NASH, JR. & J. CIBINIC, JR., FEDERAL PROCUREMENT LAW 232-38 (3d ed. 1977); P. SHNITZER, *supra* note 4, at 195-98; Hopkins, *Bidding Federal Contracts*, 23 A.F. L. REV. 73 (1982-83).

8. For purposes of this article, a claim is a demand (1) for extra compensation made by a contractor under a contract provision, or (2) for breach of an express or implied duty.

competition requirements on the design, contract drafting, and bidding process. This will be followed by a general discussion focusing on the doctrines of strict performance and a bidder's duty to seek clarification of patent defects in specifications.

II. Impact of Competition Requirement on the Design

The design professional, whether employed by the government or in a private firm under contract to it, is responsible for preparing specifications, plans, and other contract documents to insure that the needs of his client will be met if the contract is performed in accordance with the specifications. The design professional's responsibility in this respect is the same whether he is employed by the government or a private client.

Although this responsibility is the same for the two types of clients, the designer faces a unique conflict with the government as a client. When a design professional identifies a product, service, or construction item which meets his private client's needs, he may specify that item and require the contractor to supply it exclusively. On a government project, however, a designer may not use a specification which requires the purchase of an item from a single source, i.e., a proprietary specification, unless the government determines only one source can meet its needs.[9] Thus, usually the designer must determine that his specifications allow all products meeting the government's minimum needs to be submitted. This determination necessitates a review of the available products. In conducting such a review, the designer may discover other products which will meet the government's needs, but then may fail to cross check those products' features against his specification to ensure that the specification does not preclude the use of some of those acceptable products. This failure often leads to problems.

This broad market search is not a normal part of the design professional's duties to his private clients.[10] Moreover, it conflicts with

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9. FAR § 10.004(a)(2), 48 C.F.R. § 10.004(a)(2) (1985); *see also* AIA Doc. A201/SC ¶ 16.1 (1977). Moreover, the designer may not exclude any product that meets the government's minimum needs regardless of how many products meet the specifications as drafted. *See* Charles J. Dispenza & Assocs., Comp. Gen. Dec. B-180720 (Aug. 15, 1974), 74-2 CPD ¶ 101.

10. One overlooked aspect of the design process which may be significant is that the minimum needs of the government, particularly when procuring commercial products, may be affected by the products the designer finds are available. For example, if the government needs valves, its principle concern may be to stop and start the flow of a substance. If the valves available on the market were only capable of doing that and the government did not

his design instincts. A designer instinctively wants to provide his client with the best product to meet its needs. Maximizing competition may not always require the designer to specify the lowest common denominator, but it may serve to preclude specifying only his personal first choice.

Thus, the design professional on a government project assumes a duty otherwise largely alien to him, i.e., maximizing competition by specifying less than what in his judgment may be the *best* choice for his client. One caveat, however, must be made to this observation: the design professional on a private job is not intent on gold-plating and does recognize the advisability of seeking competition to keep costs in line. Hence, the government goals discussed above are not completely alien to the design professional's practice, but in the government context, the emphasis is shifted dramatically.[11]

A. *Impact on General Provisions*

When a designer is putting together a specification for a private client, he may specifically designate the brand, make, and model of the product to be supplied regardless of its necessity; that is, he may use a proprietary specification. Because of the requirement of obtaining full and open competition in government contracting, however, such "brand name" designations usually may not be used unless the designer follows them with the words "or equal" and

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have other needs that dictated custom designing valves with additional features, on/off valves would be specified. However, if commercially available valves not only could start and stop the flow but had a feature that would allow the government to determine wear on the valve without taking it out of service, that feature might be justifiably deemed part of the government's minimum needs. Thus, in response to a protest (or claim perhaps), the government must prima facie demonstrate its minimum needs in noneconomic terms. *See* P. SHNITZER, *supra* note 4, at 196-97. A very real factor, however, is long-term costs or savings which might accrue to the government.

11. The designer's failure to properly draft and interpret specifications to allow competition on a government sponsored project can also result in personal liability for the designer. Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc., 564 F. Supp. 970 (C.D. Ill. 1983), *aff'd*, 775 F.2d 781 (7th Cir. 1985). *Waldinger* is also interesting since it excuses the equipment supplier from performing the contract as commercially impractical under U.C.C. § 2-615. Because the architect insisted on strict compliance with the specifications, which precluded competition and thus violated applicable government grant regulations requiring full and open competition, performance was excused. The court did not address whether Waldinger, the mechanical subcontractor and the project's prime contractor, would then be excused from performance of this part of the work. Arguably, they should have been excused or entitled to recover their increased costs of performance from the owner.

The Inspector General of the Department of Defense also considers such an action an indication of fraud. INSPECTOR GENERAL DEPARTMENT OF DEFENSE, INDICATORS OF FRAUD IN DEPARTMENT OF DEFENSE PROCUREMENT 2-4 (1984).

sets forth in the specification the characteristics essential to meet the needs of the government, i.e., the salient characteristics.[12] If the government determines only one product will meet its needs, however, it may specify that product by its brand name or otherwise. The standard "brand name or equal" clause allows bidders who wish to base their bid on equivalent but unnamed products to do so as long as those products meet the listed salient characteristics.[13]

Use of a "brand name or equal" specification[14] is one means by which a designer may resolve the problem of specifying a product which he is sure will meet the government's needs and at the same

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12. FAR § 10.004(b)(3), 48 C.F.R. § 10.004(b)(3) (1985); Department of Defense FAR (DFAR) § 10.004(b)(3)(i)(B), 48 C.F.R. § 210.004(b)(3)(i)(B) (1985); General Services Administration FAR (GSAR) § 510.004-70(b), 48 C.F.R. § 510.004-70(b) (1985).

13. DFAR § 52.210-7000, 48 C.F.R. § 252.210-7000 (1985); GSAR § 552.210-74, 48 C.F.R. § 552.210-74 (1985). The DOD regulations differ from the GSA regulations in that they require that the salient characteristics "should" be set forth while the GSA regulations state it is "imperative" to so specify the salient characteristics. DFAR § 10.004(b)(3)(i)(B), 48 C.F.R. § 210.004(b)(3)(i)(B) (1985); GSAR § 510.004(a)(2)(ii), 48 C.F.R. § 510.004(a)(2)(ii) (1985). The GSA regulations go on to specify that an offer may not be rejected if it meets all of the enumerated salient characteristics; however, if an essential characteristic is not specified, the entire procurement must be cancelled and readvertised with a new purchase description. GSAR § 510.004-71, 48 C.F.R. § 510.004-71 (1985). DOD regulations, on the other hand, only specify that bids may be accepted when the offered product is "equal in all material respects to the products referenced. Bids shall not be rejected because of minor differences in design, construction, or features which do not affect the suitability of the products for their intended use." DFAR § 10.004(b)(3)(iii)(A), 48 C.F.R. § 210.004(b)(3)(iii)(A) (1985). Thus, arguably, agencies operating under the DOD regulations have somewhat more flexibility in rejecting proposed equal products than those operating under the GSA regulations. *See* Ryan Elec. Co., PSBCA No. 1020, 82-2 B.C.A. (CCH) ¶ 16,042 (1982).

Professors Nash and Cibinic have indicated that it only makes sense to allow rejection of bids for their failure to meet nonspecified but essential characteristics, for otherwise the listing of salient characteristics would suffice for the purchase description. 1 R. NASH, JR. & J. CIBINIC, JR., *supra* note 7, at 243-44; *see* Solis Enters. Inc., VACAB No. 1576, 84-3 B.C.A. (CCH) ¶ 17,606 (1984); E.C. Ernst, Inc., ASBCA No. 14495, 71-1 B.C.A. (CCH) ¶ 8863 (1971). A judgment of whether an item can be rejected for failure to meet a nonlisted characteristic, however, must be fact specific. For instance, if an agency were procuring photocopiers by a "brand name or equal" specification without specifying as an essential characteristic that the machines be "photocopiers," the submission of a mimeograph machine might be so different as to justify rejection of the bid. On the other hand, one could more easily question rejection of a photocopier that used special glossy paper as opposed to regular bond paper when the solicitation failed to specify the use of bond paper as an essential characteristic. The naming of a brand name establishes a class or type of product; a proposed equal which does not fall in that class may be rejected even if it meets the salient characteristics. The salient characteristics serve to distinguish the products of the class that will meet the government's needs but may necessarily not be the only essential characteristics.

14. For purposes of this article, a "brand name or equal" *specification* is one that names a brand name and allows the submission of equivalent products. A "brand name or equal" *clause* provides that whenever a brand name is used, an equivalent product may be used.

time permit full and open competition. The Federal Acquisition Regulation (FAR), however, describes "brand name or equal" specification as "the minimum acceptable purchase description,"[15] and disfavors such purchase descriptions themselves, as opposed to specifications which are more precise.[16] The FAR goes on to require that defense agencies establish policies requiring that descriptions of agency requirements in specifications, "whenever practicable," be stated "in terms of functions to be performed or performance required."[17] Thus, the FAR disapproves the "brand name or equal" specification because it is a purchase description and because it is not a functional description. As a consequence, government designers avoid using "brand name or equal" specifications. Instead, designers draft specifications in terms of design or performance requirements with the belief that, if the requirements are met, they will coincide with the government's needs while still encouraging competition.[18]

When a brand name specification *is* utilized, the regulations require that the contracting agency insert into the solicitation of a supply contract a provision that requires bidders to identify proposed equal substitutions and submit sufficient data to enable the agency to determine whether the proposed substitute is equal to the named brand.[19] When the solicitation requires submission of

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15. FAR § 10.004(b)(3), 48 C.F.R. § 10.004(b)(3) (1985).

16. *Id.* § 10.004(b)(1), 48 C.F.R. § 10.004(b)(1). Purchase description and specification are defined in FAR § 10.001. The principal difference is that a specification describes "technical requirements" and the criteria for determining how the technical requirements will be met, whereas a purchase description merely describes essential physical characteristics and functions required to meet the government's minimum needs.

17. *Id.* § 10.002(b), 48 C.F.R. § 10.002(b); *accord* Exec. Order No. 12,352, § 1(d), 47 Fed. Reg. 12,125 (1985); *see also* 41 U.S.C. § 401(13) (1982).

18. Often these specifications are the result of the designer's copying, sometimes unknowingly, a proprietary product's features. *See, e.g.*, Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc., 564 F. Supp. 970, 974 (C.D. Ill. 1983); Urban Plumbing & Heating Co. v. United States, 408 F.2d 382 (Ct. Cl. 1969); Whitesell-Green, Inc., ASBCA No. 26159, 84-2 B.C.A. (CCH) ¶ 17,400 (1984); Baker & Co., ASBCA No. 21896, 78-1 B.C.A. (CCH) ¶ 13,116 (1977); Valley Constr. Co., ASBCA No. 18404, 74-1 B.C.A. (CCH) ¶ 10,606 (1974).

The terms "design requirement" and "performance requirement" will designate two relatively distinct means of specifying a product. The distinction between them is that a design requirement describes the means by which a government need is to be satisfied while a performance characteristic describes the objective which will meet the government need without indicating how the objective will be achieved. A functional specification is one that simply describes the use to which the government intends to put the product. *See* George Washington University, Government Contracts Monograph No. 13, *Specifications* 6 (1980); J. CIBINIC, JR. & R. NASH, JR., *supra* note 7, at 189-95.

19. DFAR § 10.004(b)(3)(ii), 48 C.F.R. § 210.004(b)(3)(ii) (1985); GSAR § 510.004-70, 48 C.F.R. § 510.004-70 (1985).

descriptive literature to enable the government to determine whether the proposed substitute is equal to the named product, the bidder's failure to include such literature can result in the rejection of his bid.[20] These provisions are also intended to be included in procurements where components of the final end products are identified by "brand name or equal" specifications. However, when components are so specified, the contracting agency may determine that the bidders' identification of proposed equals is unnecessary prior to the bid and therefore dispense with that requirement.[21]

In construction contracts, the mandatory material and workmanship clause[22] states, among other things, that if a product is specified by brand name, that name only establishes a standard of quality and other equal products may be submitted for approval. Such a provision applies to allow a contractor to substitute an equivalent product even where no brand is named if the specifications are drafted around a single product.[23] It thus serves the same purpose as the "brand name or equal" clauses in supply contracts.

B. *Impact on Bidding*

"Or equal" clauses, and the courts' interpretation of them, seek to ensure the free and open competition that the law requires.[24] An "or equal" clause encourages bidders to base their bids on products costing less but meeting the fundamental requirements of the government, that is, being equal to those specified.[25] The clause "de-

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20. *See* DFAR § 52.210-7000, 48 C.F.R. § 252.210-7000 (1985); GSAR § 552.210-74, 48 C.F.R. § 552.210-74 (1985); *see, e.g.*, J. CIBINIC, JR. & R. NASH, JR., *supra* note 7, at 269-70 (1982); 1 R. NASH, JR. & J. CIBINIC, JR., *supra* note 7, at 271-73; P. SHNITZER, *supra* note 4, at 190-91; Vickers, *Descriptive Literature*, 79-5 THE GOVERNMENT CONTRACTOR BRIEFING PAPERS (Oct. 1979); Witte, *Descriptive Literature—Its Use In IFB Responsiveness Determinations*, 23 CONT. MGMT. 24 (Dec. 1983).

21. DFAR § 10.004(b)(3)(ii), 48 C.F.R. 210.004(b)(3)(ii) (1985); GSAR § 510.004-70(c), 48 C.F.R. § 510.004-70(c) (1985).

22. *See* FAR §§ 36.505, 52.236-5, 48 C.F.R. §§ 36.505, 52.236-5 (1985) (set forth in the Appendix).

23. *See* 48 COMP. GEN. 345, 348-49 (1968); *see, e.g.*, Sherwin v. United States, 436 F.2d 992, 1000 (Ct. Cl. 1971); Danis Indus. Corp., VACAB No. 1456, 81-2 B.C.A. (CCH) ¶ 15,210, at 75,325 (1981); Davho Co., GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 13,564, at 66,440-41 (1978) (concurring opinion); Baker & Co., ASBCA No. 21896, 78-1 B.C.A. (CCH) ¶ 13,116, at 64,109-10 (1977) (holding clause allowing alternate bids is not equivalent to material and workmanship clause); Algernon Blair, Inc., GSBCA No. 2116, 67-2 B.C.A. (CCH) ¶ 6453 (1967), *aff'd on reconsideration*, 68-2 B.C.A. (CCH) ¶ 7353, at 34,149 (1968).

24. See Jack Stone Co. v. United States, 344 F.2d 370, 373-74 (Ct. Cl. 1965).

25. For purposes of this article, an "or equal" clause is any clause that allows a contractor

fines" the specified products as not only those actually described but also all those equal to them. Thus, the government obtains the benefit of bid prices lower than its specifications would otherwise yield. The "or equal" clause also puts all bidders on equal footing because the bidder who proposes an "or equal" substitution is not in any better position after being awarded the contract than any other bidder would have been. The risk that the proposed substitute may not, in fact, meet the government's minimum needs is on the bidder and not on the government. The bidder, however, does not assume the risk that the government will arbitrarily or unreasonably reject an "or equal" substitution.

People unfamiliar with the actual bidding process often picture it as a methodical procedure where a single individual or at least a single entity studies the government contract documents with great care over a period of weeks. During this period, the bidder would determine the potential risks, identify the supplies, services or construction items required, and gather estimates for each individual aspect of work based on an exhaustive solicitation of written quotations and in-depth discussions with potential suppliers. This is a misconception.

It is only on the most simple procurements, where the bidder on the project is supplying items which—if he does not manufacture them himself—he has procured many times and is intimately familiar with their features, that this described misconception comes anywhere close to reality. Even under those circumstances, however, the depth of the analysis does not come from that individual bidder's examination of the instant procurement, but instead reflects his experience over the years with similar procurements in which the government sought similar items.

Bidders simply lack the time to review solicitations in the depth described. Contractors are constantly bidding for work—each job is only one of many it is striving to procure. Thus, the time that a bid package is publicly available does not indicate how long an in-

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to propose the use of a product he judges to be equal to the product named or otherwise specified. The government must concur in his judgment before the product can be used on the project. The standard "brand name or equal" clauses, DFAR § 52.210-7000; GSAR § 552.210-74, and the material and workmanship clause, FAR § 52.236-5 are the most common "or equal" clauses. Contracts may contain largely equivalent clauses. *See, e.g.*, Henry C. Beck Co., VACAB No. 523, 66-1 B.C.A. (CCH) ¶ 5323, at 25,012 (1966); Scott-Griffin, Inc., ASBCA No. 28590, 84-1 B.C.A. (CCH) ¶ 17,110, at 85,166 (1983) (contract incorporating Material and Workmanship clause of DFAR by reference).

dividual bidder may reasonably be expected to study it. A bidder clearly has much less time to study the bid package than the designer who put it together. Truth be known, a bidder also lacks incentive to study it in any more depth because he will not get many of the jobs on which he bids. He does what time permits and what is reasonably likely to inform him of what the job will require.

A single bid is based on any number of quotes from a wide variety of subcontractors and suppliers. On most jobs, the bidder may or may not have a detailed knowledge of a particular area of the procurement. The contractor actually submitting the bid to the government may know nothing about the particular item that later becomes an issue. He relies on his suppliers and subcontractors to provide the expertise on the multitude of items to be supplied under the contract.[26]

These suppliers and subcontractors may or may not examine the entire solicitation package. At times, they may not even examine the specification documents directly applicable to the quotes they give the bidder. Instead, they may rely upon verbal descriptions from the bidder, the bidder's competitors, or other sources which may or may not accurately reflect the requirements of the contract.[27] Moreover, bidders, suppliers, and subcontractors are each striving to gain an advantage over their competitors by withholding information about the procurement, selectively disseminating information about the procurement, or promoting their products as the only products which can meet the specification.[28] In bidding a procurement under these circumstances, a bidder is forced to assume that subcontractors and suppliers are submitting quotations on products which will meet the requirements of the contract.

When directly faced with determining what a bidder reasonably should have done, the boards and courts have generally recognized that bidding is done in a high pressure atmosphere, in haste, and that bidders are only responsible for finding the most patent of errors and discrepancies in the contract documents before bid-

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26. *See, e.g.*, Montgomery Indus. Inc. v. Thomas Constr. Co., 620 F.2d 91 (5th Cir. 1980); Forsberg & Gregory, Inc., ASBCA No. 16489, 74-2 B.C.A. (CCH) ¶ 10,920, at 51,956-57 (1974).

27. *See* Wilner Constr. Co., ASBCA No. 25719, 83-2 B.C.A. (CCH) ¶ 16,886, at 84,033, 84,034 (1983); Parker's Mechanical Constructors, Inc., ASBCA No. 29020, 84-2 B.C.A. (CCH) ¶ 17,427, at 86,799-800 (1984).

28. *See* Sherwin v. United States, 436 F.2d 992, 998, 1000 (Ct. Cl. 1971).

ding.[29] When a dispute arises after an award about whether a particular specification is proprietary, however, the boards and courts focus exclusively on that specification. As a consequence, a board or court may proceed on the unstated assumption that because *it* methodically examines the specification, [30] the meticulous bidding misconception described earlier is the norm among all parties involved in the solicitation. How a board or court feels a reasonable contractor should bid may largely explain the apparent conflict between many of the decisions.

Given the hectic bidding atmosphere, it becomes evident why there are so many disputes concerning proprietary specifications during both the bidding and performance stage of the procurement. Just as with any other defective or ambiguous specification, determining exactly what the bidder reasonably should have known and bid upon is the key to determining his right to recover. As will be discussed below, it is upon this determination that the decision rests as to whether the government should have clarified what it wanted and, conversely, whether the bidder had a duty to seek clarification.

Defective specification claims may relate to proprietary specifications or other performance problems which arise from a failure to draft or interpret specifications in a manner so as to achieve full and open competition. These claims fall into several categories and raise several interrelated issues. The following discussion will attempt to explain this complex area and present several proposals to simplify and more clearly focus the inquiries which should be made to help insure that competition requirements are honored during contract performance.

III. Strict Performance

There is a long-established principle that the government is entitled to require the contractor to supply precisely what the contract specifies. The proper application of this principle, when noncompetitive specifications or an "or equal" clause is involved, has presented great difficulties.

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29. *E.g.*, Bromley Contracting Co., ASBCA No. 14884, 71-2 B.C.A. (CCH) ¶ 9252, at 42,902 (1971).

30. *See* Arnold M. Diamond, Inc., ASBCA No. 22733, 78-2 B.C.A. (CCH) ¶ 13,447 (1978) (bidder must determine whether oil collection pans worth $16,000.00 are patented before bidding on $4.5 million contract).

Perhaps the seminal case in this area regarding the government's right to strict performance is *Farwell Co. v. United States.*[31] In *Farwell*, the contractor based his bid on the use of copper tubing instead of the copper pipe specified. The government issued a change order which allowed the contractor to install copper *tubing* in lieu of copper or brass *pipe*. The contract contained no "or equal" clause. The government thereafter imposed a deductive change order for approximately $35,000 which the Court of Claims upheld.

The government did not even contend that the tubing was unsatisfactory. The court found the contractor's contention that tubing was equivalent to pipe irrelevant:

> It is of no concern to plaintiff why the Government specified brass or copper "pipe" instead of "tubing," and it was not within plaintiff's province to substitute its judgment for that of the Government by deciding that tubing was satisfactory when pipe was specified. The Government may have had many reasons for requiring pipe instead of tubing, but in any event the specifications called for pipe and the Government had a right to expect that pipe would be used.[32]

The same predilection demonstrated by the *Farwell* court is often demonstrated by boards or courts hearing claims for wrongful rejection of a product even with the presence of a "brand name or equal" clause—regardless of the noncompetitiveness of the specifications. Such cases hold the government is entitled to what it has specified, even to the point of rejecting a proposed substitute because it lacks a nonessential feature.[33]

The two most important distinctions between a claim based on a proprietary specification and the government's claim in *Farwell* are that the contract did not contain an "or equal" clause and the *Farwell* specification was not proprietary. Copper pipe could have been supplied by numerous sources so competition existed whether or not copper tubing was also allowed to be used. Thus, *Farwell*

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31. 148 F. Supp. 947 (Ct. Cl. 1957); *see also, accord,* RAM Constr., Inc., ASBCA No. 22370, 79-1 B.C.A. (CCH) ¶ 13,646 (1978).

32. *Farwell*, 148 F.Supp. at 949.

33. *See, e.g.*, Danis Indus. Corp., VACAB No. 1456, 81-2 B.C.A. (CCH) ¶ 15,210 (1981); Henry C. Beck Co., VACAB No. 523, 66-1 B.C.A. (CCH) ¶ 5323 (1966); *see also* Central Mechanical, Inc., ASBCA No. 29360, 84-3 B.C.A. (CCH) ¶ 17,674 (1984).

was not a proprietary specification case.[34]

One basis for the *Farwell* court's finding was that to uphold the contractor's position would put that contractor in a better position than other bidders who bid in strict accord with the specifications.[35] If an "or equal" clause had applied to the pipe specification, this basis for the *Farwell* decision would have been negated since all the bidders could have based their bid on equivalent, less expensive products. Determining whether an "or equal" clause would apply to the pipe specification to allow the submission of tubing raises the question of whether an "or equal" clause applies when the government has not named a particular brand and the specification allows *some* competition for the specified item. While application of the clause in those situations is more consistent with the congressional policy of obtaining full and open competition, strong countervailing arguments have been made which have produced a split in the authority.

IV. The Duty to Question Patent Ambiguities

A second established principle is that a contractor cannot make a claim for errors or defects in the contract, specifications, or plans which are patent at the time of bidding; he must question the agency about any such ambiguities at that time.[36] This ensures that the government has the opportunity to correct errors or defects before the time of bidding, thereby allowing all bidders to compete equally.[37] It also allows the correction to be made without the necessity of paying a costly claim for such defects.[38] If the board or court determines (with 20/20 hindsight) that the error or defect upon which the contractor based his claim *should have been known* to the contractor at the time of bidding or that the contrac-

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34. *Farwell* has also been distinguished on the basis that piping was a material as opposed to a product covered by the "or equal" clause. *See* Algernon Blair, Inc., ASBCA No. 26148, 82-1 B.C.A. (CCH) ¶ 15,504 (1981); *see also* Braude & Patin, *Use of "Equal" Products*, 80-4 Constr. Briefings 9 (1980). Because the distinction between a material, something used to make a product, and a product itself, is difficult to make at best, it seems better to focus on the distinction made in the text, particularly since the standard material and workmanship clause applies to any equipment, material, article or patented process. *See* FAR § 52.236-5, 48 C.F.R. § 52.236-5 (1985).

35. *Farwell*, 148 F. Supp. at 949-50.

36. *See, e.g.*, Algernon Blair, Inc., ASBCA No. 26148, 82-1 B.C.A. (CCH) ¶ 15,504 (1981).

37. *E.g.*, Allied Contractors, Inc. v. United States, 381 F.2d 995 (Ct. Cl. 1967).

38. *See, e.g.*, S.O.G. of Ark. v. United States, 546 F.2d 367 (Ct. Cl. 1976).

tor *actually knew* of the defect, the claim will be denied.[39]

The essence of a defective specification case is that the defect misled the contractor in his bidding on the project. The contractor cannot be misled, however, if he knows of the defect at the time of bidding. The cases go further to hold that a contractor cannot recover for misleading and allegedly defective specifications if the contractor *should have known* of the defect at the time of bidding.

A. *When the Duty Arises*

Determination of when a contractor should have known of the defective specification is quite difficult, but it is fair to say that the boards and courts generally resolve doubts in favor of the government to deny the claims. *T.H. Taylor, Inc.*[40] demonstrates the boards' inclination in this regard. Dismissing the contractor's claim for improperly using a proprietary specification, the Board stated that a bidder is obligated to object to proprietary specifications prior to award of the contract.[41] It did not even discuss whether the bidder reasonably should have known the particular specification was proprietary at the time of bidding.

In so holding, the Board stated that "[b]idders are responsible for determining the sources and cost of the items specified, including those that are proprietary. The time for objecting to a proprietary specification is before the submission of bids, and not after award."[42]

The anomalous nature of this decision is demonstrated by the remainder of the holding, which granted the contractor relief because certain items it was to supply had to be customized when the government warranted they would be standard commercial items.[43]

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39. *See, e.g., Allied Contractors*, 381 F.2d 995; Machinery Assocs., Inc., ASBCA No. 14510, 72-2 B.C.A. (CCH) ¶ 9476 (1972).

40. ASBCA No. 26494, 82-2 B.C.A. (CCH) ¶ 15,877 (1982). *But cf.* RESTATEMENT (SECOND) OF CONTRACTS § 172 (1981).

41. T.H. Taylor, Inc., ASBCA No. 26494, 82-2 B.C.A. (CCH) ¶ 15,877, at 78,753 (1982).

42. *Id.* (citations and footnote omitted) (citing WRB Corp. v. United States, 183 Ct. Cl. 409, 510-12 n.25 (1968)); Algernon Blair, Inc., ASBCA No. 25277, 83-2 B.C.A. (CCH) ¶ 16,737 (1981)). In a footnote, the court noted that "[a]ppellant's citation of Elrich Construction Co., GSBCA No. 3657, 73-2 BCA (CCH) ¶ 10,187 to the contrary is inapposite. In *Elrich*, the Government's insistence upon a specified detail that happened to be proprietary was inconsistent with a specification provision that 'details are typical but not restrictive.' " T.H. Taylor, Inc., ASBCA No. 26494, 82-2 B.C.A. (CCH) ¶ 15,877, at 78,754 n.1 (1982) (citing Elrich Constr. Co., GSBCA No. 3657 B.C.A (CCH) ¶ 10,187 (1973)).

43. T. H. Taylor, Inc. ASBCA No. 26494, 82-2 B.C.A. (CCH) ¶ 15,877, at 78,754 (1982).

If a contractor is strictly liable for determining sources and costs prior to bid, the contractor should likewise have discovered and, for purposes of contesting a specification defect, raised the problem of no commercial products being available.

An intention to propose a substitute under an "or equal" clause does not have to be disclosed prior to bid. In *Jack Stone Co. v. United States*,[44] the Court of Claims found there was no patent ambiguity that the bidder had to bring to the government's attention, even when the bidder at the time of bidding intended to make a substitution under an "or equal" clause. The government may, however, impose a duty upon the bidder to give the government notice prior to bidding by appropriate instructions in the solicitation.[45]

It is difficult to reconcile the holdings in the various cases in regard to duty to raise proprietary specification issues before bidding. Some cases, such as *Taylor*, simply state that it is the contractor's obligation to determine the availability of materials prior to bidding and his failure to do so denies him the right to obtain any recovery.[46] Such overly broad statements of a contractor's duty probably obscure the underlying finding that the contractor's bid preparation was not reasonably careful, and, if it had been, the contractor would have become aware of the error or defect of which it now complains.[47]

In many other cases the boards have recognized that

> [c]ontractors are businessmen usually pressed for time and consciously seeking to underbid competitors. Consequently they estimate only those costs which they feel the contract terms will permit the Government to insist upon in the way of performance. They are not expected to ferret out hidden ambiguities or errors in the bid documents and are protected if they innocently construe in their own favor an ambiguity equally susceptible to another construction or overlook an error. In the case before us the ambiguity was subtle, not blatant; the appellant genuinely misled and not deliberately

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44. 170 Ct. Cl. 281 (1965).

45. *See, e.g.*, Algernon Blair, Inc., GSBCA No. 2116, 67-2 B.C.A. (CCH) ¶ 6453 (1967), *aff'd on reconsideration*, 68-2 B.C.A. (CCH) ¶ 7343 (1968); Sorrels, Inc., ASBCA No. 13348, 70-2 B.C.A. (CCH) ¶ 8,515 (1970).

46. T.H. Taylor, Inc., ASBCA No. 26494, 82-2 B.C.A. (CCH) ¶ 15,877 (1982); *see also* WRB Corp. v. United States, 183 Ct. Cl. 409, 511-512 (1968).

47. *See* T.H. Taylor, Inc., ASBCA No. 26494, 82-2 B.C.A. (CCH) ¶ 15,877, at 78,751 (1982).

> seeking to profit from a recognized error by the Government. Under these circumstances the contractor falls within the scope of the recognized formula.[48]

Generally, the contractor is only charged with knowledge of those errors or ambiguities that are reasonably apparent given the circumstances at the time of bidding.[49] His duty to find such defects is certainly no higher than the government's duty to prepare accurate specifications. Thus, where the government argues in response to a superior knowledge claim that it did not recognize that some item of equipment was not easily available, then the contractor should also be entitled to a similar belief.[50]

Valley Construction Co.[51] presented circumstances in which it is readily understandable why the Board found a patent ambiguity which the bidder was required to question prior to bidding. In that case, the contract specified ellipsoid ducts, and the specifications made clear *why* the ducts were to be ellipsoid. The contract contained an "or equal" clause, and the contractor bid on nonellipsoid ducts. The Board found that, before doing so, the contractor should have asked the government whether this contract requirement was waivable. Accordingly, some cases have held against the government for its failure to inform bidders in the solicitation of why criteria are important in evaluating proposed equals.[52]

In *Blount Brothers Construction Co. v. United States*,[53] the government contended a certain characteristic was essential because of an unstated intention in regard to the stress to be placed on the item. The court rejected this argument, since the government's intention is of no importance unless the bidders are made aware of

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48. Bromley Contracting Co., ASBCA No. 14884, 72-1 B.C.A. (CCH) ¶ 9252 at 42,902 (1971) (citation omitted).

49. *See, e.g.*, Ithaca Gun Co. v. United States, 176 Ct. Cl. 437, 443 (1967) Worsham Constr. Co., GSBCA No. 5469, 80-2 B.C.A. (CCH) ¶ 14,644, at 72,242 (1980); Seven Sciences, Inc., ASBCA No. 21079, 77-2 B.C.A. (CCH) ¶ 12,730 at 61,878 (1977).

50. Yukon Serv., Inc., ASBCA No. 12697, 68-1 B.C.A. (CCH) ¶ 7039 (1968); *see also* Algernon Blair, Inc., GSBCA No. 2116, 67-2 B.C.A. (CCH) ¶ 6453 (1967), *aff'd on reconsideration*, 68-2 B.C.A. (CCH) ¶ 7343 (1968); R.C. Hedreen Co., ASBCA No. 20599, 77-1 68-2 B.C.A. (CCH) ¶ 12,328 at 59,555 (1977). Superior knowledge claims are discussed *infra* text accompanying notes 160-71.

51. ASBCA No. 18404, 74-1 B.C.A. (CCH) ¶ 10,606 (1974).

52. *See, e g.*, Forsberg & Gregory, ASBCA No. 16489, 74-2 B.C.A. (CCH) ¶ 10,920 at 51,957-59 (1974).

53. 346 F.2d 962 (Ct. Cl. 1965).

such intention,[54] as they were in *Valley Construction Co.*[55] In *Valley Construction*, the Board clearly distinguished the difference between what a bidder should have done in hindsight and what a bidder could reasonably be expected to do at bid time.

A claim before the National Aeronautics and Space Administration (NASA) Board of Contract Appeals arose because NASA was seeking to have a special sixty-six inch ring fabricated of a very unique metal alloy for use in a vacuum pump.[56] The manufacturer of the alloy, prior to bidding, informed the government that it did not produce the alloy in the width called for in the specification. Nevertheless, the government proceeded to accept bids without changing the specification. The subcontractor who ultimately contracted to supply the ring, prior to entering its subcontract, but after it had started work, was also informed that the metal alloy had not been fabricated in the specified width. The prime contractor was not informed of any of these developments prior to submitting its bid, and the Board found that the knowledge of the subcontractor was not to be imputed to the prime contractor because there was no incipient contract relationship between the prime and subcontractor during bid time.[57] Further, the Board recognized that during the bid time of ninety days it was not possible to secure quotations from all suppliers which may have informed the subcontractor of the potential problems. The Board recognized that it is necessary during bidding for the bidders to assume some facts. In this case, the Board found that, while the government did not have "superior technical knowledge," it did have more knowledge and the contractor was entitled to recovery.

B. *How to Satisfy the Duty to Raise Questions Before Bidding*

Assuming that the proprietary or restrictive nature of the specification is apparent prior to bidding, must the contractor file a formal protest with the Comptroller General or is it sufficient that he make the government officials who are handling the procurement aware of the problem? No case concerning a proprietary specification claim directly addresses this point,[58] but other cases concern-

54. *Id.* at 971.

55. Valley Constr. Co., ASBCA No. 18404, 74-1 B.C.A. (CCH) ¶ 10,606 (1974).

56. Blount Bros. Corp., NASA No. 1266-53, 72-2 B.C.A. (CCH) ¶ 9511 (1972).

57. *Id.* at 44,324.

58. Numerous cases have indicated the contractor should have "protested," but none have addressed the issue when the contractor has made inquiry of the contracting activity

ing the duty to seek clarification of other types of ambiguous specifications should be applicable.

It is clear that if the contractor finds such an ambiguity he must inquire, and his inquiries must be clear enough and persistent enough to put the government on notice of the specific problem and its continuing nature.[59] The government has a corresponding duty to respond in a timely manner.[60] Oral notice, untimely notice, or both have been found insufficient.[61] But in one instance where the government stated it would not respond to a clarification request received less than ten days before bid opening and the contractor did not discover the ambiguity until six days before opening, the government was bound to the contractor's reasonable interpretation.[62] Likewise, the government can waive the requirement to seek clarification.[63]

Based on this precedent, a contractor who puts the government on notice about an apparently proprietary specification or a nonessential specification feature and about his reasonable interpretation of the feature as nonessential, has satisfied his duty to make a prebid inquiry. If the government clarifies the specification so that all bidders must bid on products with the nonessential feature, the contractor then must bid accordingly or protest with the Comptroller General. Simple silence or stock responses by the government, such as "bid it like you see it," should be found insufficient to require the contractor to file such a protest. Likewise, while this is a closer question, the clarification to be effective should be made to all bidders so that the inquiring bidder is not at a disadvantage as compared to the less diligent bidders.

To hold that a bidder who discovers such a defect must protest or not bid puts the government in the position of contracting only with those bidders who are not sophisticated enough to discover

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and failed to receive an adequate response.

59. *See* Southside Plumbing Co., Inc., ASBCA No. 8120, 1963 B.C.A. (CCH) ¶ 3982 (1963), *aff'd on reconsideration*, 1964 B.C.A. (CCH) ¶ 4314 (1964).

60. *See, e.g.*, Edgmont Constr. Co., ASBCA No. 16759, 73-2 B.C.A. (CCH) ¶ 10,234 (1973); Avco Corp., NASA BCA No. 869-18, 76-1 B.C.A. (CCH) ¶ 11,736, at 55,983-89 (1975); 1 J. McBRIDE & J. WACHTEL, *supra* note 7, at § 2.170[3] (1981).

61. *E.g*, William F. Klingensmith, Inc., GSBCA No. 3147, 71-2 B.C.A. (CCH) ¶ 9051 (1971), *aff'd*, 505 F.2d 1257 (Ct. Cl. 1974); Benj. Zelonky Constr. Co., GSBCA No. 2930, 70-2 B.C.A. (CCH) ¶ 8476 (1970).

62. Wright Assoc. Inc., ASBCA No. 22942, 79-2 B.C.A. (CCH) ¶ 14102 (1979); *see also* Townsco Contracting Co., ASBCA No. 28104, 83-2 B.C.A. (CCH) ¶ 16,775 (1983).

63. Comgeneral Corp., ASBCA No. 21268, 77-2 B.C.A. (CCH) ¶ 12,754, at 61,975 (1977).

the discrepancy or who are not hesitant to litigate—neither seems as desirable as the bidder who discovers the error and seeks its informal resolution.

V. Rejection of Equivalent Products

"Or equal" clauses provide one express contractual basis of recovery for the government's use of proprietary specifications. The contractor is entitled to recover from the government when the government fails to strictly perform its contractual obligation to accept equivalent products. In order to recover under this theory, however, the contractor must demonstrate: (1) that the "or equal" clause applies to the specification either expressly, because the specification uses a brand name, or implicitly, because, even though not using a brand name, the specification can only be met by a single brand name product; and (2) that the contractor proposed to use a product functionally equivalent to the product specified which the government rejected or only accepted after taking a deduction from the contract price for granting a deviation from the specification.

The seminal case construing a contractor's rights under a clause allowing submission of equal products is *Jack Stone Co. v. United States*.[64] In *Jack Stone*, the contractor filed a claim because the government required the contractor to install an expensive brand name fire alarm system which the specifications set forth.[65] The contractor got a quotation from the brand name manufacturer, but based its bid on a lower quotation from a competing manufacturer. Despite the fact that the contract contained an "or equal" clause, the government prohibited the contractor from using the alternate equipment. The Board rejected the contractor's claim for increased costs because it found that the government had specifically intended to use the name brand equipment. Yet it did not find that the proposed substitute was not equal or inadequate when compared to the name brand.[66]

The Court of Claims, however, reversed the Board and granted the contractor's claim. It explained the purpose of the "or equal" clause:

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64. 344 F.2d 370 (Ct. Cl. 1965).
65. *Id.* at 371.
66. *Id.* at 373-74.

> It [the "or equal" clause] 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 . . . . To advance this long-accepted end of freer competition, the paragraph expressly declared, in the broadest terms, that a reference by the specification writer to "*any* article, device, product, materials, fixture, form or type of construction by name, make, or catalogue number *shall* be interpreted as establishing a *standard of quality* and *not* as limiting competition."[67]

The court went on to find that the clause applied to the product in question and further found that there was not an affirmative showing in the record that the "or equal" clause should have been excluded from the contract. Significantly, it was also noted that (as often happens)[68] representatives of the brand name manufacturer apparently consulted and participated in the drafting of the proprietary specifications.

A. *Functionally Equivalent Products Must Be Accepted Under an "Or Equal" Clause*

Since *Jack Stone*, the articulated test of product equivalency, for purposes of the "or equal" clause, has been whether the proposed product and the specified product are functionally equivalent.[69] The contractor has the burden of showing that the proposed substitute is equal and that the contracting officer unreasonably rejected it.[70]

In *J.B. Williams Co. v. United States*,[71] the court reversed a

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67. *Id.* (emphasis in original).

68. *See, e.g.*, George R. Whitten, Inc. v. Paddock Pool Bldgs., Inc., 424 F.2d 25, 28 (lst Cir.), *cert. denied*, 400 U.S. 850 (1970), *on remand*, 376 F. Supp. 125, 130, *aff'd*, 508 F.2d 547 (lst Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

69. *See, e.g.*, Urban Plumbing & Heating Co. v. United States, 408 F.2d 382, 386 n.3 (Ct. Cl. 1960); J.B. Williams Co. v. United States, 450 F.2d 1379 (Ct. Cl. 1971); E.C. Ernst, Inc., ASBCA No. 14495, 71-1 B.C.A. (CCH) ¶ 8863 (1971).

70. *See, e.g.*, Davho Co., GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 13,564, at 66,440 (1978), *aff'd on reconsideration*, 80-1 B.C.A. (CCH) ¶ 14,317 (1980); R&M Mechanical Contractors, Inc., DOTCAB No. 75-51, 76-2 B.C.A. (CCH) ¶ 12,084 (1976). The contractor can meet this burden by demonstrating that, on the project in question, any features which make the desired product better cannot be used. Whitesell-Green, Inc., ASBCA No. 26159, 84-2 B.C.A. (CCH) ¶ 17,400, at 86,666 (1984).

71. 196 Ct. Cl. 491 (1971).

Board decision in which the Board had based its analysis on whether a substitute functioned *exactly* the same as the specified product. The court noted that the test for functional equivalency is whether the proposed substitute "performs *substantially* the same function in *substantially* the same way and for *substantially* the same purpose."[72]

E.C. Ernst, Inc.[73] also demonstrates how the Board evaluates whether a proposed substitute is functionally equivalent to the product accepted by the government. In its analysis, the *Ernst* Board relied upon Armed Services Procurement Regulation section 1-1206.4(a), which explicitly prohibits rejection of bids for minor differences in design, construction, or features. Although that section does not apply to post-award submissions, it is indicative of how such submissions should be evaluated.[74]

In *Ernst*, a Lockheed plug was the named brand with no salient characteristics set forth. The contractor proposed submission of Crouse-Hinds plugs and receptacles. Each difference between the two was judged against the government's needs on the particular project. The Board examined the functional differences between the plugs' ease of engagement/disengagement (the Crouse-Hinds plug needed a special tool but the Lockheed plug did not), repair and maintenance (Crouse-Hinds contacts could only be serviced in the shop whereas Lockheed contacts were field replaceable), plug covers (Crouse-Hinds had no cover, whereas Lockheed's cover would protect it from salt build up and corrosion), and plug housing (Crouse-Hinds was easily damaged whereas Lockheed had molded rubber housing). The Board determined that these differences were substantial and justified the rejection of Crouse-Hinds in the particular application.[75]

Judge Becker of the General Services Board, in a dissenting opinion, has artfully stated the rationale for the use of such a functional analysis:

> To allow the Government to require compliance with one of the

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72. *Id.* at 511 (emphasis in original).

73. ASBCA No. 14495, 71-1 B.C.A. (CCH) ¶ 8863, at 41,198-99 (1971).

74. The *Ernst* Board found that the regulation provided helpful guidance. *Id.* at 41,200-01.

75. While the functional analysis done by the Board and the contracting officer was exemplary, the bidder should have been apprised of these differences by listing these factors as salient characteristics rather than simply calling for a Lockheed weather proof plug.

> originally stated salient characteristics, without a thorough consideration and objective analysis as to the functional equivalency of the offered equal, would permit the circumvention of the "brand name or equal" clause. Further, it would present to bidders a solicitation for bids which appears to allow substitutions under the "brand name or equal" provisions, but which would in reality be a latently restrictive specification permitting the Government at its whim or caprice to either insist on an exact duplicate of the specified brand name, or to eclectically and unilaterally waive individual requirements.
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> The contractor has the contractual right to expect that the Government will honor the flexibility inherent in the brand-name or equal clause, and interpret the specifications in a fair and objective manner which emphasizes the performance aspect of the specifications over those details which do not directly affect functional utility. Additionally, such an approach assures to the Government the advantages of securing competitive bids which meet the minimum needs of the Government.[76]

Acceptability of the product under an applicable guide specification can demonstrate its equivalence. In *Forsberg & Gregory, Inc.*,[77] the government had reproduced almost verbatim the Department of Defense (DOD) guide specifications for kitchen cabinets. The contractor's proposed substitute had been certified as satisfying the requirements of the National Kitchen Cabinet Association guide specification and was noted as satisfactory in a revision to the DOD guide. The Board thus found the government's rejection of a proposed substitute unreasonable.[78]

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76. Davho Co., GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 13,564, at 66,443 (1978) (Becker, A.L.J., dissenting) (footnotes omitted).

77. ASBCA No. 16489, 74-2 B.C.A. (CCH) ¶ 10,920 (1974).

78. The *Forsberg* decision also suggested that if the characteristic which the proposed substitute fails to meet is not proprietary, then the government is free to reject the proposed substitute, perhaps regardless of the functional necessity of that requirement. Forsberg & Gregory, Inc., ASBCA No. 16489, 74-2 B.C.A. (CCH) ¶ 10,920, at 51,961-62. It would be more consistent with the regulations requiring full and open competition, however, to hold that a showing of functional importance is necessary to justify rejection based on any characteristic. Moreover, such a holding would be more consistent with the "or equal" clause which states that covered specifications only establish a standard of quality. Whether a characteristic is available in more than one product hardly seems relevant to determining whether the lack of such characteristic makes the proposed substitute substandard.

The exercise of the government's discretion under the "or equal" clause must be reasonable. Rejection is not reasonable where the differences between the substitute and the named source merely represent alternate methods of accomplishing the same purposes.[79] Summary rejection of the proposed substitute simply because it was not manufactured by the named source, without regard to functional equivalency, is unreasonable.[80]

In one instance, the Board effectively shifted the burden of proving inequality to the government once the contractor introduced evidence sufficient to make a prima facie case of equality.[81] Where the government carefully and repeatedly gives consideration to an offered substitute, however, the burden on the contractor may become even higher.[82]

B. *Wrongful Rejection of an Equivalent Product Should Be Analyzed as a Defective Specification Claim*

The government's failure to name the product around which it has drafted a specification, or its use of specified design features which are not necessary to achieve its minimum needs, can be viewed as creating a latent ambiguity that is solely the government's responsibility. In other contexts, a bidder's reasonable interpretation of an ambiguous specification entitles it to recover increased costs caused by the government's differing interpretation.[83] In order for the contractor to recover, a board examining the specification language need not reach the same conclusion as the contractor;[84] nor must it conclude that the contractor's interpretation

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79. S.L. Haehn, Inc., ASBCA No. 20164, 76-2 B.C.A. (CCH) ¶ 12,036 (1976).

80. *See, e.g.*, John K. Kirlin, Inc., ASBCA No. 22522, 80-1 B.C.A. (CCH) ¶ 14,367 (1980); *see also* J.W. Bateson Co., ASBCA No. 19823, 76-2 B.C.A. (CCH) ¶ 12,032, at 57,752 (1976). An example of summary rejection without regard to functional equivalency occurred in *J.W. Bateson*, where the board determined that the contractor had shown that its proposed substitute was unreasonably rejected when the government performed no engineering analysis of whether the proposed substitute was equal to or better than the specified system. *Id.* The government insisted on the "literal application of the specifications," which did not permit the analysis of functional equality required by the clause. *Id.* at 57,757.

81. *See* Melrose Waterproofing Co., ASBCA No. 9058, 1964 B.C.A. (CCH) ¶ 4119 (1969).

82. *See, e.g.*, Henry C. Beck Co., VACAB No. 523, 66-1 B.C.A. (CCH) ¶ 5323 (1966). Repeated careful consideration, however, should not increase the contractor's burden if the wrong standard is consistently applied.

83. *See, e.g.*, United States v. Seckinger, 397 U.S. 203, 216 (1970); Delphi Constr. Inc., ASBCA No. 28914, 84-3 B.C.A. (CCH) ¶ 17,522 (1984); *see also* Melrose Waterproofing Co., ASBCA No. 9058, 1964 B.C.A. (CCH) ¶ 4119 (1964).

84. *See Melrose Waterproofing*, ASBCA No. 9058, 1964 B.C.A. (CCH) ¶ 4119, at 20,081 (1964).

is the *most* reasonable.[85] The board need only find that the contractor's interpretation is a reasonable one.

Additionally, the bidder is entitled to rely on express representations in the specifications even though boilerplate language in the contract seeks to absolve the government of its responsibilities for such representations.[86] However, government actions during performance, such as changing the specifications, can make irrelevant the contractor's expectations at the time of bidding.[87]

C. *The Costs That are Recoverable for Wrongful Rejection of Equivalent Product and the Necessity of Using a Proposed Alternate when Bidding*

When determining the amount of recovery available, the contractor's bid can only be used as a basis if it can be shown that the substitute offered was utilized in the preparation of the bid.[88] Attempts to comply with the defective specification are also compensable.[89]

If the bidder did not base his bid on the proposed substitute but he demonstrates that the proposed substitute is equal, a question arises: if the government accepts the equal, is it entitled to a deductive change; conversely, if it rejects the substitute is the contractor entitled to recover? Two cases have addressed this issue and denied recovery to the contractor.[90] Another case allowed recovery for the difference in cost between the equal product proposed and the product the government insisted upon even though the contractor based its bid on a third product.[91] Other cases, how-

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85. *See, e.g.*, Crescent Communications Corp., DOTCAB No. 73-12, 74-1 B.C.A. (CCH) ¶ 10,531 (1974).

86. *See, e.g.*, J.B. Williams Co. v. United States, 450 F.2d 1379, 1390 (Ct. Cl. 1971).

87. *See, e.g.*, R.C. Hedreen Co., ASBCA No. 20599, 77-1 B.C.A. (CCH) ¶ 12,328 (1977).

88. Melrose Waterproofing Co., ASBCA No. 9058, 1964 B.C.A. (CCH) ¶ 4119, at 20,083 (1964); *see also* Impresa Pizzarotti & C.S.p.A., ASBCA No. 24708, 80-2 B.C.A. (CCH) ¶ 14,814 (1980).

89. R.C. Hedreen Co., ASBCA No. 20599, 77-1 B.C.A. (CCH) ¶ 12,328 (1977).

90. Ryan Elec. Co., PSBCA No. 1020, 82-2 B.C.A. (CCH) ¶ 16,042 (1982) and Solis Enters. Inc., VACAB No. 1576, 84-3 B.C.A. (CCH) ¶ 17,606, at 87,721 (1984) (although in each case the Board found the contractor had failed to prove equality); *see also* Atlantic States Constr. Inc., ASBCA No. 27681, 85-3 B.C.A. (CCH) ¶ 18,501 (1985) (which held the Board did not have to consider whether the proposed product was equal when it found the contractor did not contemplate using the proposed or equal in its bid, but went on to find that the proposed substitute was not equal).

91. Impresa Pizzarotti & C.S.P.A., ASBCA No. 24708, 80-2 B.C.A. (CCH) ¶ 14,814 (1980); *see also* Melrose Waterproofing Co., ASBCA No. 9058, 1964 B.C.A. (CCH) ¶ 4119, at 20,083

ever, suggest that a denial is appropriate.[92]

Denial of recovery may be correct although open to question in several respects. The standard Material and Workmanship clause does not limit the contractor's choice of proposed substitutes to those upon which he based his bid.[93] Thus, there often is no contractual underpinning for such a denial when a construction contract is at issue. Also, a bidder may reduce his bid in the expectation of making some substitutes or otherwise realizing cost savings during performance. It is questionable whether the bidder should be penalized for reducing costs after bidding. However, the lack of specific harm to the bidder (i.e., no detrimental reliance) may justify denial of the claim.

VI. The Proper Analysis of Claims for Wrongful Rejection of a Proposed "Equal"

A. *Failure to Meet Exact Terms of the Specification May Preclude Finding of Equality*

There are a number of holdings that are not easily reconciled with the general rule of functional equality, but either explicitly or implicitly rely on the strict performance doctrine. In *R & M Mechanical Contractors, Inc.*,[94] a contractor claimed an amount equal to the difference between the price of boilers, which formed the basis of his bid but which were unavailable at the time of performance, and the actual costs of boilers he supplied. Since, at the time of bidding, two manufacturers made boilers which met the specification, the Board denied the claim, finding that the government's specifications were not proprietary.[95] The Board noted that a proposed substitute did not have to be identical, but did have to be equal in performance quality and other significant aspects, and that the contractor had failed to carry his burden of showing equality.[96] Giving no weight to the fact the agency involved had

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(1964).

92. *See, e.g.*, T. H. Taylor, Inc., ASBCA No. 26494, 82-2 B.C.A. (CCH) ¶ 26,494 (1982); *see also* Dale Ingram, Inc. v. United States, 475 F.2d 1177, 1185-86 (Ct. Cl. 1973); Scott Buttner Communications, GSBCA No. 5306, 80-2 B.C.A. (CCH) ¶ 14,640 (1980); Solano Aircraft Serv., Inc., ASBCA No. 18053, 74-2 B.C.A. (CCH) ¶ 10,874 (1974).

93. FAR § 52.236-5, 48 C.F.R. § 52.236-5 (1985).

94. DOTCAB No. 75-51, 76-2 B.C.A. (CCH) ¶ 12,084 (1976).

95. R & M Mechanical Contractors, Inc., DOTCAB No. 75-51, 76-2 B.C.A. (CCH) ¶ 12, 084, at 58,033 (1976).

96. *Id.* at 58,034.

accepted similar boilers in a subsequent procurement, the Board reasoned that the government was entitled to strict performance in accord with the specifications.[97] The Board failed to explain, however, why this subsequent conduct did not demonstrate the insignificance of the differences between the proposed boiler and the one specified. The decision instead turned on the proposed boiler's failure to exactly conform to the specifications, the Board noting the differences and explaining how most of them affected maintenance.[98]

In *Valk Manufacturing Co.*,[99] a contractor was to supply snow plow moldboard shoes. The specification provided that alternate materials might be supplied, but the blade shoes had to be chill-cast. The contractor, however, offered welded or fabricated shoes which the government rejected. The Board rejected the contractor's claim for an equitable adjustment, stating that the specifications provided for alternate material but not an alternate method of manufacture.[100] The contract apparently did not contain a clause allowing equivalent products to be submitted. The Board consequently stated that the specification, even if restrictive, was clear and unambiguous and had to be followed.[101] The contractor's evidence demonstrated that the government, in four prior procurements, had accepted shoes that had been welded or fabricated. Yet, the Board again gave this evidence no weight because it concluded that the government is entitled to strict compliance, and any waiver of specification requirements is discretionary and not reviewable.[102]

B. *The Consequences of Failure to Identify Proper Salient Characteristics*

Sometimes the government will argue that, if no brand name is listed in the specification, the "or equal" clause does not apply.

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97. *Id.* at 58,034-35.

98. Other boiler cases include: Central Mechanical Inc., ASBCA No. 29360, 84-3 B.C.A. (CCH) ¶ 17,674 (1984); Davho Co, GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 13,564 (1978), *aff'd on reconsideration*, 80-1 B.C.A. (CCH) ¶ 14,317 (1980); Algernon Blair, Inc., GSBCA No. 2116, 67-2 B.C.A. (CCH) ¶ 6453 (1967), *aff'd on reconsideration*, 68-2 B.C.A. ¶ 7343 (1968).

99. ASBCA No. 16547, 72-1 B.C.A. ¶ 9465 (1972).

100. Valk Mfg. Co., ASBCA No. 16547, 72-1 B.C.A. ¶ 9465, at 44,085 (1972).

101. *Id.* at 44,087.

102. *Id.* at 44,086.

This position has repeatedly been rejected.[103] In some of the cases, however, the clause does appear to be more broadly written than the usual "or equal" clause (i.e., the material and workmanship clause used in construction contracts).[104]

The failure to name a brand in the specification often means that the government will not clearly identify salient characteristics, and instead, will indiscriminately list design and performance characteristics of the product it wants. This violates the statutes and regulations already discussed, which require full and open competition, and those that require the naming of salient characteristics only as is necessary to meet government minimum needs. Where the government has thus neglected to follow statutory and regulatory mandates by unnecessarily naming salient features, it should only have the right to reject a proposed "or equal" when it demonstrates that the "or equal" fails to meet what would have been a salient characteristic.

Whitesell-Green, Inc.[105] succinctly stated the problem that the government's failure to properly identify salient characteristics presents:

> Under this clause, the brand name (the specifications in this case) only establishes a standard of quality. Thus, the alternative product need not have all of the requirements of the specification, only the essential ones. This places the Board in the difficult position of determining the essential requirements of the Government. This problem could have been avoided had the specifications stated what the essential requirements were and why they were essential.[106]

C. *The Veterans Administration Board View of the Government's Duty to Accept Equal Substitutions*

With deference to the Board of Contract Appeals of the Veterans Administration (V.A. Board), both boards have taken an overly restrictive view of when a contractor is entitled to recover for

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103. *See* 48 COMP. GEN. 345, 348-49 (1968); *see, e g.*, Danis Industr. Corp., VACAB No. 1456, 81-2 B.C.A. (CCH) ¶ 15,210 (1981); Davho Co., GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 13,564, at 66,440-41 (Takahashi, A.L.J., concurring); Algernon Blair, Inc., DOTCAB No. 75-51, 76-2 B.C.A. (CCH) ¶ 12,084, at 34,149 (1976).

104. *See* Melrose Waterproofing Co., ASBCA No. 9058, 1964 B.C.A. (CCH) ¶ 4119 (1964).

105. ASBCA No. 26159, 84-2 B.C.A. (CCH) ¶ 17,400 (1984).

106. Whitesell-Green, Inc. ASBCA No. 26159, 84-2 B.C.A. (CCH) ¶ 17,400, at 86,666 (1984) (citations omited); *see also* J.B. Williams Co. v. United States, 450 F.2d 1379, 1391 (Ct. Cl. 1971).

wrongful rejection of proposed substitutes under an "or equal" clause. These decisions rely heavily upon *Farwell Co. v. United States*[107] and upon bid protest decisions of the Comptroller General. They effectively establish a per se rule that if a proposed substitute deviates from a design requirement set forth in the specification, it cannot be equal to the specified product.

Henry C. Beck Co.[108] presents one of the longest explanations of the V.A. Board's rationale. There, a contractor was to build various refrigerated storage rooms. The technical specifications had very detailed design requirements for the insulated panels that the contractor was to use to line these rooms and required commercial products "unless otherwise required by drawings or specifications."[109] The contractor based his bid on using readily available standard commercial products that were used in other similar projects. When the contractor tried to install these panels, however, the government rejected them as not meeting the design requirements of the specifications. The contract's "or equal" clause had a more restrictive slant than the standard clauses in that it allowed use of products "differing slightly."[110] In its decision, the Board noted that the contract in the present case did not specify a brand name or equal.[111] Thus, apparently the V.A. Board questioned whether the "or equal" clause applied at all.

The Board stated the issue as follows:

> The parties have agreed by the plain language of the clause that the questions of slightness of difference and equality are to be governed by the opinion of the Contracting Officer and *it is clear that neither the contractor nor this Board may subvert their agreement by substituting their own opinion for that of the Contracting Officer in*

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107. 148 F. Supp. 947 (Ct. Cl. 1957).

108. VACAB No. 523, 66-1 B.C.A. (CCH) ¶ 5323 (1966).

109. Henry C. Beck Co., VACAB No. 523, 66-1 B.C.A. (CCH) ¶ 5323, at 25,012 (1966).

110. The *Beck* "or equal" clause stated:

> The listing of article or material, operation or method, throughout the entire specification, requires that the contractor shall provide each item listed, of quality, or subject to qualification, noted; and the contractor shall perform each operation prescribed, according to conditions stated, providing therefor all necessary labor, equipment and incidentals. HOWEVER, CONSIDERATION WILL BE GIVEN MANUFACTURER'S STOCK DESIGN, MATERIALS AND CONSTRUCTION, DIFFERING SLIGHTLY FROM, BUT EQUAL, IN THE OPINION OF THE CONSTRUCTION CONTRACTING OFFICER, TO THE MATERIAL AND EQUIPMENT SHOWN OR SPECIFIED.

Id. (emphasis supplied by the Board).

111. *Id.* at 25,016.

> *this regard.* It is equally plain, however, that the contract contemplates that the substitution be allowed where the differences are so slight as to be clearly inconsequential and it is necessarily implied that the exercise of the Contracting Officer's judgment and discretion must not be unreasonable, arbitrary or capricious if it is to validly control allowance of the deviating material or product. Appellant has the burden of showing that the Contracting Officer's refusal to allow use of the stock item was an abuse of the discretion allowed him by the language of the clause.[112]

The Board, upholding the rejection of the panels, noted that there were a number of design features different from those specified. In respect to almost all these features, the government's witnesses failed to state why the designer had inserted the requirements but asserted various after-the-fact rationales.[113]

The *Beck* Board began its legal discussion by reiterating the government's right to get what it specified, citing *Farwell* and ignoring *Jack Stone Co. v. United States.*[114] It then referred to two Comptroller General decisions.[115] The Board concluded that when the technical specification at issue sets forth design features as opposed to performance features, a contractor has less latitude regarding a substitute, and a proposed substitute not having such design features is not equal.[116] Therefore, the government did not unreasonably reject the proposed substitution. The Board concluded as follows:

> In view of the evidence we can have no doubt that they [the proposed substitutes] were functionally adequate by *normal standards* and would meet *ordinary requirements* of refrigerated storage. But it is equally plain that they were substantially different from the kind of panels that the Government had determined were necessary to its needs in this particular hospital and that the Government had specified in this instance a panel having a special type of construction which was in fact a special and out of the ordinary design. The Government had obviously specified not what would be thought to

112. *Id.* at 25,012-13. (footnote omitted) (emphasis supplied).

113. *Id.* at 25,013.

114. 344 F.2d 370 (Ct. Cl. 1965).

115. 44 COMP. GEN. 302, 303 (1964); 38 COMP. GEN. 291, 294 (1958).

116. *But see* 45 COMP. GEN. 462, 468 (1966) (use of design characteristics of proprietary product is unduly restrictive); Evans, Inc., Comp. Gen. Dec. B-216260.2 (May 13, 1985), 85-1 CPD ¶ 535 (design characteristic in specification could be waived because it had no effect on system performance relying in part on the proposed product's successful use on past projects).

> be adequate by ordinary standards but what it believed would be better for its particular needs.
>
> . . . It is not enough to say that the latter [the proposed substitute] was adequate. It was certainly different and the record does not establish, in our opinion, that there was substantial equality in the two types of construction.[117]

The Board, by this language, effectively precludes a functional analysis of equality and rests instead on design differences as establishing the lack of equality. One must question what "differing slightly" means under the contract's "or equal" clause if it does not mean deviating in some design particulars yet functioning equally well. Moreover, it would seem that the government's specification should be judged, for purposes of determining equality, on the basis of "normal standards" and "ordinary requirements" until the government, in its bid package, has made bidders aware that more stringent standards will apply. To hold, as *Beck* does, that including the disputed design features in the specification at issue establishes this more stringent standard, is to create a tautological test that will always result in a finding of inequality if one of the design features is not met.

The result of this tautological reasoning can be seen in the *Beck* Board's examination of the differences between the proposed substitute and the specification. In each instance, the Board *assumed* the government had good reason for specifying each feature when, in reality, that should be the issue to be determined by the Board. Moreover, even when the Board found one of the different features (a gasket between the panels) equal or better than the government design, it found that the feature "adds, however, to the list of features deviating from the design specified and, again, was the substitution of something very, rather than slightly different."[118]

While *Beck* could have been limited to its facts based on the narrow "or equal" clause appearing in that contract, the V.A. Board later applied *Beck* in a case involving a standard "brand name or equal" clause.[119] That decision makes express the implicit holding in *Beck*: "Where an 'or equal' clause, in addition to naming

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117. Henry C. Beck Co., VACAB No. 523, 66-1 B.C.A. (CCH) ¶ 5323, at 25,016 (emphasis supplied).

118. *Id.* at 25,017.

119. Leonard Pevar Co., VACAB No. 1308, 78-2 B.C.A. (CCH) ¶ 13,468, at 65,807 (1978).

a brand, sets forth such explicit requirements, a substitute must not only be generally sufficient to serve the intended purpose, it must also conform to the specific requirements."[120]

In so holding, the V.A. Board relied upon Comptroller General decisions which found that to be responsive a bid must establish that its proposed "or equal" substitution has the design features specified.[121] As will be discussed later in this article, this is a misapplication of the Comptroller General decisions, but nonetheless this is the V.A. Board's consistent position. Additionally, the V.A. Board requires that when a brand name is not set forth in the specification, the contractor must show that only one brand name could meet all of the requirements of the specification for the "or equal" clause to apply.[122]

In *Solis Enterprises, Inc.*,[123] the V.A. Board upheld the government's rejection of pressed aluminum screens instead of the brand name Kool Shade screens which were more durable and resistant to accidental damage. The contractor had intended to use the Kool Shade screens and assumed their cost would be the same as pressed aluminum. He changed his mind after bidding because he found out Kool Shade cost $19,000 more than the $5,000 cost of the pressed aluminum screens the contractor had originally included in his bid.

As stated by the Board, the contractor presented two principle arguments: (1) his interpretation of the specification allowing submission of pressed aluminum screens was reasonable, and (2) the government failed to disclose its superior knowledge that only the Kool Shade screens would be acceptable. Regarding the first argument, the contractor claimed that since "construction" was an ambiguous term, his assertion that pressed aluminum was equal construction was reasonable and should prevail. In rejecting that argument, the Board effectively found that the term "construction" included durability, rigidity and impact resistance.[124]

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120. *Id.*

121. In *Pevar*, the contractor had not noted his proposed "equal" in his bid as required by the applicable clause, but the Board did not hold this precluded the claim. It did note the time to protest a restrictive specification is before, not after, award, relying upon Warrior Constructors, Inc., VACAB No. 645, 68-1 B.C.A. (CCH) ¶ 6844 (1968). *See also* Solis Enters. Inc., VACAB No. 1576, 84-3 B.C.A. (CCH) ¶ 17,606, at 87,719 (1984) (must protest inadequate identification of salient characteristics prior to bid).

122. Danis Indust. Corp., VACAB No. 1456, 81-2 B.C.A. (CCH) ¶ 15,210, at 75,325 (1981).

123. VACAB No. 1576, 84-3 B.C.A. (CCH) ¶ 17,606 (1984).

124. The decision literally states that these characteristics are presumed relevant to gov-

The Board also took the opportunity to hoist the contractor on his own petard because he argued that "construction" was "clearly insufficient" to describe a salient characteristic. The Board did agree that "the government should have been considerably more specific" in describing the pertinent salient characteristics,[125] because all the specifications said was that proposed substitutes had to be "equal in performance and construction."[126] But while agreeing that the government should have been more specific, the Board concluded that if the insufficiency was "clear," the contractor should have protested prior to award.

The Board also stated that the contractor had failed to demonstrate a nexus between any failure properly to identify the salient characteristics and the contractor's damage and found the contractor's bid had to be based on the proposed substitute to recover.[127] Ultimately, however, the Board rested on the contractor's failure to act reasonably and prudently in bidding the contract by his ignoring the term "construction." The Board rejected the contractor's superior knowledge theory because he never sought information on Kool Shade, he had not proven only Kool Shade would be acceptable, and the balance of fault for failure to discover the pertinent information lay with the contractor.[128]

D. *The Veterans Administration Board Misconstrues the Comptroller General Decisions*

The V.A. Board has overlooked the distinctions between the issues presented to the Comptroller General in a bid protest and those faced by a board when the contractor claims the government unreasonably rejected an "or equal" substitution. Stated most simply, the V.A. Board has equated the Comptroller General's finding of nonresponsiveness with a determination that the government's specification rather than the contractor's bid governs.[129]

The Comptroller General's relief is designed to assure that all bidders are competing on the same basis, that free and full competition is obtained, and that the bids will meet the government min-

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ernment needs. Solis Enterprises, Inc., VACAB No. 1576, 84-3 B.C.A. (CCH) ¶ 17,606, at 87,719 (1984).

125. *Id.*

126. *Id.* at 87,713.

127. *Id.* at 87,719-21.

128. *Id.* at 87,720.

129. *But see* 40 COMP. GEN. 279 (1960).

imum needs. These goals are distinctly different from those which a board should seek to achieve, i.e., that a bidder's reasonable interpretation of the specifications does not lead him to be responsible for government errors and that the contractual allocation of risks is honored—including that represented by the "or equal" clause. In contrast to the Comptroller General, a board must deal with an existing contract that arises from the government's acceptance of the bid. In order to appreciate this distinction, however, pertinent Comptroller General decisions must be reviewed.

The Comptroller General has recognized that the government does not have an unfettered right to utilize a proprietary specification. A simple desire for a superior product does not in itself justify an unduly restrictive specification.[130]The Comptroller General has long held that specifications which set forth more than the government's minimum needs are unduly restrictive and constitute a sufficient basis to sustain a protest against those specifications.[131]

In a 1964 decision which was relied upon in *Beck*,[132] the Comptroller General recommended the cancellation of a contract which the government had awarded to a contractor who based his bid on a substitute product. The Comptroller General recommended cancellation because the substitute did not meet design criteria set forth in the invitation for bids. In making the award, the government agency had found that such criteria were not essential. The Comptroller General first found that the government could not consider the substitute equal in all respects to the brand name product for the purposes of award since it lacked named design features.[133] In doing so he stated:

> [I]t must be *presumed* that the features stated were regarded as material and essential to the needs of the Government, *at least at the time the specifications were drawn* and bids solicited. Under such circumstances, even though it later appears that another product offered may be otherwise suitable for the intended use, it may not be considered "equal" to the brand name product unless it conforms to the particular design features specified.[134]

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130. *E.g.*, 48 COMP. GEN. 345, 348 (1968). *But cf.* Robert D. Farquhar & Ray F. Seeber Joint Venturers, ASBCA No. 6962, 61-2 B.C.A. (CCH) ¶ 3229 (1961).

131. *See* P. SHNITZER, *supra* note 4, at 190-98.

132. 44 COMP. GEN. 302 (1964) (quoted in Henry C. Beck Co.,VACAB No. 523, 66-1 B.C.A. (CCH) ¶ 5323, at 25,015 (1966)).

133. 44 COMP. GEN. 305.

134. *Id.* (emphasis supplied).

The Comptroller General then reasoned that the inclusion of such design criteria could mislead other bidders and deny the government effective competition. In fact, the protestor specifically alleged it would have submitted a different, lower priced bid if the restrictive requirements were not in the solicitation.[135] The Comptroller General effectively found the bid *nonresponsive* because it did not meet named design features. That finding only meant, however, that the item submitted may not be considered equal to the brand name product for *purposes of award.*

A finding of nonresponsiveness means that the bidder has not offered to perform exactly what the invitation for bids requires. Thus, the government is not required to purchase an item which does not meet its requirements because it may reject the bid as nonresponsive. In such cases, the Comptroller General refuses to make the judgment (which the Claims Court and boards must make to resolve claims under existing contracts once such a bid has been accepted) of whether the requirements set forth in the specification are essential to the government's needs. The Comptroller General assumes specified requirements are essential unless the government indicates otherwise by accepting a bid which does not contain those features. In such a case, the specification itself is defective for naming those features; the procurement should be cancelled and the specification revised to eliminate the unnecessary features.[136]

The Comptroller General routinely finds that the specifications written around the product of a single manufacturer are unduly restrictive unless the government has determined that the features of a particular product are essential to its needs.[137] Where competition is precluded because only one product will meet the government's essential needs, then sealed bidding is not appropriate.[138]

In a 1966 opinion,[139] the Comptroller General addressed an instance where an agency had listed salient characteristics in a "brand name or equal" specification that prescribed detailed design approaches that the brand name manufacturer used exclusively. The Comptroller General found that this unduly restricted competition and directed cancellation of the solicitation. The

135. *Id.* at 304.
136. *Id.* at 307.
137. *See, e.g.*, 48 COMP. GEN. 345 (1968).
138. *See, e.g.*, 54 COMP. GEN. 1114, 1115-16 (1975).
139. 45 COMP. GEN. 462 (1966).

Comptroller General's rationale was that:

> the overriding consideration in determining equality or similarity of another *commercial* product to a name brand commercial product is whether its performance capabilities can be *reasonably equated* to the brand name referenced. In other words, whether the equal product can do the same job in a like manner and with the desired results should be the determinative criteria rather than whether certain features of design of the brand name are also present in the "equal" product. We recognize, of course, that the Government is not required to purchase an "equal" product if it be determined that such product will not meet the Government's advertised requirements. However, we feel that a specification—such as is exemplified by the technical exhibit—which requires the use of certain brand name design characteristics is so restrictive as to prevent the competition required under advertised [competitive] procedures.[140]

Additionally, the Comptroller General noted that the brand name manufacturer was sole bidder,[141] and stated, "We think it reasonable to conclude from the record that no other manufacturer would design its commercial product so as to offer a 'Chinese' copy."[142] The inclusion of design features when the specifications call for commercial products is particularly detrimental to competition because commercial products are not designed for each project but are produced and often inventoried to meet general performance requirements of a variety of designs. Thus, when procuring commercial products, the touchstone in evaluating their equality should be "whether the equal product can do the same job in a like manner and with the desired results."[143]

In order for the specification of features that are nonessential to justify the Comptroller General's recommendation that the agency cancel a solicitation or terminate a contract, "it must be established that the improper salient characteristics had a prejudicial effect on the preservation of the integrity of the competitive bidding system."[144] That is, the specified but unnecessary characteristic must make a difference in price or prevent some potential bid-

140. *Id.* at 466 (emphasis supplied).

141. *Id.* at 467.

142. *Id.* at 468.

143. *Id.* at 466; *see* also J.B. Williams Co. v. United States, 450 F.2d at 1391 (Ct. Cl. 1970); Evans, Inc., Comp. Gen. Dec. B-216260.2 (May 13, 1985), 85-1 CPD ¶ 535.

144. 53 COMP. GEN. 586, 591 (1974); *see also* Evans, Inc., Comp. Gen. Dec. B-216260.2 (May 13, 1985), 85-1 CPD ¶ 535.

ders from submitting a bid.

Thus, if the brand name item set forth in the specification does not meet some of the salient characteristics also set forth in the specification, that may be insufficient reason to prevent the formation of a contract based on that bid, provided: (1) the bidders reasonably construed the identification of a particular brand as the government's acknowledgement that it met the government needs even though it did not meet the listed salient characteristics; and (2) no other bidders had been prejudiced. The Comptroller General, as distinguished from some board cases, presumes all bidders would bid on the same assumption—nonessential features would be waived.

In summary, the Comptroller General cases find as follows:

1. Bids submitting products that do not have listed design features are non-responsive, that is, no contract may be made based on that bid.

2. There is a presumption that named design features are government minimum needs, but design features should not generally be used when procuring commercial products.

3. If named features exceed minimum needs, then the solicitation for bids should be cancelled only if competition has been impaired.

4. If named features are the minimum needs, but make the specifications proprietary, sealed bidding is not an appropriate method and the solicitation should be cancelled to allow negotiation.

The Comptroller General does not address the issue of whether the government is entitled to strict compliance with the specifications. In some cases, the bids must be rejected because the specifications are defective. In others, the low bid must be rejected because it is nonresponsive, or finally, an improper method of procurement had been utilized so no contract could be formed. In no case is the bidder required to supply something he did not offer.

Any contract entered into based on a nonresponsive bid would be in accord with the bid, not the conflicting provisions of the invitation for bids.[145] The invitation for bids is only an invitation to submit offers. The contractor's bid is the offer which, upon the

145. *See* 40 COMP. GEN. 279 (1960).

government's acceptance, becomes the basis of the contract.[146] In all cases the government is technically only entitled to strict compliance *with the bid*, but where the bid is responsive it complies with all material terms of the invitation for bids. Thus, in most situations, where award is made to a responsive bidder, the government is effectively entitled to strict compliance with its specifications, i.e., performance will be in accord with the specifications. But by ignoring this distinction some board decisions, particularly those of the V.A. Board, commit fundamental error.

Specifically, boards have erroneously relied upon Comptroller General bid protest decisions to deny contractor claims for wrongful rejection of "or equal" proposals when the proposed substitute does not meet some of the specified design criteria. The rationale for the board decisions is that the government is entitled to receive precisely what it specified based on the foregoing Comptroller General precedent.[147] These decisions fail to recognize that the Comptroller General's finding a bid nonresponsive does not mean the bidder is bound by the government's specifications. Such a finding does mean, however, that the government is bound by the bidder's offer if it accepts it; but to do so is forbidden because the resulting contract would have been made without competition.

The Comptroller General precedent properly translated into the performance arena should lead to contractor recovery even if the proposed substitute does not meet some of the identified design criteria because, among other reasons, the contractor's nonresponsive bid, not the solicitation, is the offer. Also, if the contractor's assumptions at the time of bidding were reasonable, then it is likely that the higher bidders assumed likewise. Thus, although the bidders were bidding on something less than literal compliance with all the specification requirements (if the "or equal" clause is disregarded),[148] full and free competition was obtained since all the bidders were bidding on the same thing.

The continuing validity of the Comptroller General decisions relied upon, however, is open to question. In a recent protest involving a Veterans Administration (V.A.) procurement, the Comptroller General held the V.A. was justified in accepting a 118.5 inch

146. *See* P. SHNITZER, *supra* note 4, at 65.

147. *See, e.g.*, Henry C. Beck Co., VACAB No. 523, 66-1 B.C.A. (CCH) ¶ 5323 (1966).

148. If the "or equal" clause is considered, then by contemplating use of an equivalent product, the bidder has strictly complied with the specification.

ironer when a 120 inch ironer was specified. As stated by the Comptroller General:

> In our view, VA properly waived the deficiency as minor. We note that while the dimension is derived from Mil. Spec. 00-I-1874B, which is incorporated by reference in the solicitation, the solicitation also contains a provision, M-3, which indicates that in determining the responsiveness of bids, individual equipment items would be evaluated on the basis of advertised commercial unit ratings and actual use history. In this instance, the contracting officer determined that the unit had been successfully used in 20 other similar VA installations.
>
> Evans has not demonstrated, or even argued, that it was prejudiced because it could have offered a less expensive unit had it been able to use the slightly smaller dimension which VA accepted. In view of the circumstances, we find that the contracting officer had a reasonable basis to waive the deviation.[149]

Thus, the Comptroller General sanctioned the waiver of a design feature which it arguably prohibited in its 1964 opinion[150]—the precise holding upon which the V.A. Board has mistakenly relied.[151]

E. *Use of the "Or Equal" Clause to Achieve Free and Open Competition and Not Just to Ensure There Is More than One Competitor*

As noted previously, the cases agree that an "or equal" clause applies to give the contractor the right to substitute equivalent products, even if no brand name is used, if only one product meets the specifications. A difficult question, however, is whether the contractor should have the right to make a substitution under an "or equal" clause when the specification can be met by more than one product but not by the proposed substitute in some nonessential respect. When the specification limits competition to one product, or exact copies of it, the government must necessarily waive some nonessential feature of the specification to accept equivalent products. Thus, the mere fact that a waiver of some portion of the

149. Evans, Inc., Comp. Gen. Dec. B-216260.2 (May 13, 1985), 85-1 CPD ¶ 535.
150. 44 COMP. GEN. 302 (1964).
151. Evans, Inc., Comp. Gen. Dec. B-216260.2 (May 13, 1985), 85-1 CPD ¶ 535.

specification is necessary to accept an equivalent product, when more than one product meets the specification as drafted, should not bar the contractor's right to use equivalent products.

Decisions have held that the clause does not apply where the specification does not limit the contractor to the use of one supplier: "Government specifications need only be sufficiently broad to avoid potentially monopolistic practice and need not be so broad as to include all conceivable manufacturers of the product."[152]

A better reasoned case is *John J. Kirlin, Inc.*,[153] in which the Board stated as follows:

> [W]e recognize that the Sherwin case can be distinguished on the ground that it dealt with a situation where only one supplier could furnish the product described whereas the NIH specification was couched in terms which permitted two suppliers to compete for the advertised contract. We, however, are not convinced that such a slender distinction can support a denial of the appellant's claim. The thrust of the law is towards an expansion of the competitive frontier, not a contraction.[154]

Thus, the contractor was entitled to recover when the government rejected a functionally equivalent product even though it did not meet various nonessential requirements of the specifications and more than one product exactly met the specification. This holding is in accord with the statutory and regulatory policy of obtaining full and open competition.[155] Moreover, the standard "or equal" clauses apply no matter how many brands are named in the clause and are not limited to instances when the specification sets forth only a single brand name.[156]

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152. Danis Industr. Corp., VACAB No. 1456, 81-2 B.C.A. (CCH) ¶ 15,210, at 75,326 (1981); *accord* Davho Co., GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 13,564 (1978), *aff'd on reconsideration*, 80-1 B.C.A. (CCH) ¶ 14,317 (1980). In *Davho*, the Board's decision on reconsideration required the contractor to make "an exhaustive search for an equal before [it could] find one was unavailable." Davho Co., GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 14,317, at 70,579 (1978).

153. ASBCA No. 22522, 80-1 B.C.A. (CCH) ¶ 14,367 (1980).

154. John J. Kirlin, Inc., ASBCA No. 22522, 80-1 B.C.A. (CCH) ¶ 14,367, at 70,830 (1980).

155. *See generally* 10 U.S.C. § 2301(a)(1), (b)(1) (Supp. II 1984); 41 U.S.C. §§ 253(a), 401(1) (1982); Government Services Procurement Regulation (GSPR) § 5-1.307-1, 41 C.F.R. § 5-1.307-1 (1984); FAR § 10.002(a)(3)(ii), 48 C.F.R. § 10.002(a)(3)(ii) (1985); Federal Procurement Regulation (FPR) § 1-1.307-4, 41 C.F.R. § 1-1.307-1 (1984). *Contra* Danis Indus., VACAB No. 1456, 81-2 B.C.A. (CCH) ¶ 15,210 (1981).

156. FAR § 52.236-5, 48 C.F.R. § 52.236-5 (1985); DFAR § 52.210-7000, 48 C.F.R. §

The difficulties with this broad application of the "or equal" clause, however, are significant. First, in these instances the government has not generally named a brand name but has only unduly restrictively drafted the specification. If the specification restricts the variety of products so that only one brand or exact copies of that brand, can meet the specification, then it is equivalent to naming the brand and clearly the "or equal" clause should apply. On the other hand, if several brands with differing features can meet the specification, one can argue the specification should not be treated as a brand name specification and the "or equal" clause should be inapplicable. The fact that the "or equal" clause applies no matter how many brand names are listed, however, strongly suggests the clause is intended to broaden competition wherever consistent with government needs and not just to prevent use of a proprietary specification.

The most fundamental objection to such a broad application is that if one does not draw the line at applying the "or equal" clause to proprietary specifications, then the boards and courts may be called upon to second guess the designer's judgment for each specification provision.[157] This may occur because every specification must exclude products the designer believes do not meet the client's needs and must include features he feels are essential. If the "or equal" clause is not limited to proprietary specifications or those that set forth brand names, then the court could be called upon to judge the necessity of each feature of the specifications.

The answer to this objection is not to limit the applicability of the clause, but to recognize that the rejection of a proposed substitute is an exercise of discretion. It should only be reversed when the contractor proves an abuse of discretion.[158]

Moreover, as recognized in numerous cases,[159] the government often waives specification requirements. Judicial recognition that

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252.210-7000 (1985); GSAR § 552.210-74, 48 C.F.R. § 552.210-74 (1985).

157. Davho Co., GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 13,564, at 66,441 (1978) (Takahashi, A.L.J., concurring).

158. The Claims Court and the boards are no less competent to review these sorts of issues than the Comptroller General. The Comptroller General, when reviewing minimum needs, decides if the government has adequately justified itself, but does not substitute his own judgment for the government's. Comp. Gen. Dec. B-174775 (June 5, 1972) (unpublished); J. CIBINIC, JR., & R. NASH, JR., *supra* note 7, at 207-08; R. NASH, JR., & J. CIBINIC, JR., *supra* note 7, at 236-37. The Claims Court and the boards would similarly limit their review.

159. *See, e.g.*, Davho Co., GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 13,564, at 66,441; 56 Comp. Gen. 497 (1977).

contractors base their bids on the reasonable expectation that the government will waive such requirements should go far to convince the boards and courts that a review of the government's specifications is necessary and proper to assure bid expectations are not unreasonably frustrated. For if reasonable bid expectations are being frustrated, the bidding process is simply a tool to dupe contractors into performing in a way they did not contemplate. This raises the question of what the contract, in the context of all the applicable laws and regulations, requires—an issue squarely within the jurisdiction of the courts and boards.

VII. Superior Knowledge Claims

The government cannot withhold technical information from the contractor which is pertinent to estimating the difficulty of contract performance.[160] A failure to disclose superior knowledge is excused when the knowledge is otherwise readily available to the contractor.[161]

When the government has specified a proprietary product without giving bidders notice, a valid claim based on the government's superior knowledge can, at times, be made. This may be the only theory a contractor can pursue effectively if the product upon which he based his bid is not equal to the specified product, or an "or equal" clause does not apply. The government's duty to disclose superior knowledge, however, "is narrow in application and rightfully should be limited to situations where the balance of knowledge is so clearly on the government's side that simple 'fair play' demands that the government make its knowledge available to the contractor."[162] But the duty to disclose superior knowledge does override a contractor's duty to inquire.[163]

While the cases generally are premised on the assumption that the government and the contractor have an equal opportunity to

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160. *See* J.F. Shea Co. v. United States, 4 Cl. Ct. 46, 52-54 (1983), *aff'd*, 754 F.2d 338 (Fed. Cir. 1985); Helene Curtis Indus. v. United States, 312 F.2d 774 (Ct. Cl. 1963); J. Cibinic, Jr., & R. Nash, Jr., Administration of Government Contracts 184-90 (2d ed. 1985); *see also* R. Nash, Jr., Government Contract Changes, ch. 13 (1981).

161. *See, e g.*, Bermite Div. of Whittaker Corp., ASBCA No. 19211, 77-2 B.C.A. (CCH) ¶ 12,675, at 61,504-09 (1977).

162. *Id.* at 61,509.

163. Hof Constr. Co., GSBCA No. 7012, 84-3 B.C.A. (CCH) ¶ 17,561 (1984); Commercial Mechanical Contractors, Inc., ASBCA No. 25695, 83-2 B.C.A. (CCH) ¶ 16,768, at 83,370-71 (1983); Record Elec., Inc., ASBCA No. 26385, 82-1 B.C.A. (CCH) ¶ 15,784, at 78,156 (1982).

discover potential suppliers, the government is responsible for drafting competitive specifications. This necessarily entails determining what products are available and drafting the specifications accordingly.[164] Given the higher level of pressure on bidders and the government's primary responsibility for drafting competitive specifications, the assumption should be that the government knew or should have known that its specification was proprietary. It follows, then, that unless the bidder had reason to know of the specification's proprietary nature, the government should be found liable if it failed to disclose its actual or constructive knowledge of the proprietary nature of the specifications.

Moreover, proving that the government had actual or constructive superior knowledge may not be as difficult as one might imagine. It is not uncommon for designers to essentially copy, sometimes verbatim, specifications supplied to them by the manufacturer of the product they want the contractor to supply on the project.[165] This saves the designer much time in drafting his own original specifications. Moreover, suppliers commonly try to "get specified" because of the competitive advantage it will give them.[166] Thus, the designer or the specified supplier may have in their files a copy of the supplier's guide specification. When a designer knowingly copies a specification given him by one supplier, he and his employer, the government, should be charged with the knowledge that it is proprietary.[167] This violation of the fundamental mandate of obtaining competition demonstrates a lack of fair play which raises a duty in the government to disclose the proprietary nature of its specifications.

In *Elrich Construction Co.*,[168] the failure to disclose the proprietary nature of a specification entitled the contractor to a recovery. In *Elrich* it was a patented feature that made the specification proprietary. Some other cases, though, have denied recovery because the information that an item is patented is equally available to

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164. George Washington University, Government Contracts Monograph No. 13, *Specifications* 34-38 (1980).

165. *See supra* note 12.

166. *See* George R. Whitten, Inc. v. Paddock Pool Bldgs., Inc., 424 F.2d 25, 28 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), *on remand*, 376 F. Supp. 125, *aff'd*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

167. Often, the designer uses such a specification intending during the bidding or performance of the contract to waive proprietary features that competing manufacturers point out. *Whitten*, 376 F. Supp. at 130-31.

168. Elrich Constr. Co., GSBCA No. 3657, 73-2 B.C.A. (CCH) ¶ 10,187, at 47,967 (1973).

both the government and the contractor.[169]

In *Kaplan Contractors Co.*,[170] the Board held that the government had a superior opportunity to discover that the specifications it prepared described a sole-source product. Therefore, it was liable to the contractor when that sole-source supplier went out of business and the government had to relax the specifications to allow a different, but more expensive, product to be substituted.[171]

VIII. Proprietary Specification Claims—A Refusal to Consider the Merits

A. *Deferral to Bid Protest Relief*

Contractors have at various times attempted to make a claim simply because the government has specified a proprietary item without notifying bidders that only one source can meet the specification. The theory of such a claim is straightforward—if the government had indicated it wanted just a proprietary product, then that is the only product for which the bidder would have accepted quotations. Because the government failed to do this, the contractor relying on other quotations was damaged to the extent the proprietary product costs more. Decisions have often denied such claims on the basis that undue restrictiveness of government specifications is an issue which must be raised prior to bid opening.[172]

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169. *See, e.g.*, Meredith Constr. Co., DOTCAB No. 1549, 85-1 B.C.A. (CCH) ¶ 17,896 (1985); Arnold M. Diamond, Inc., ASBCA No. 22733, 78-2 B.C.A. (CCH) ¶ 13,447 (1978). When a construction contract is at issue or the contract otherwise contains a patent indemnity clause applying to the items in dispute like that in FAR § 52.227-4 (*see* 48 C.F.R. § 52.277-4 (1985)), the contractor has undertaken the risk of patent infringement, and thus it may be equitable to restrict his right to recover, accordingly, for proprietary specifications describing a patented product. However, the mere existence of a patent does not make a specification restrictive. *See, e.g.*, 1 R. Nash, Jr. & J. Cibinic, Jr., *supra* note 7, at 238. After all, there could be a number of patent licenses. Moreover, the contract also likely includes an authorization and consent clause such as that in FAR § 52.227-1 (*see* 48 C.F.R. § 52.227-1 (1985)), which authorizes the contractor's use of patented inventions when required to comply with "specifications or written provisions forming a part of this contract." These circumstances might negate any implication from the existence of a patent that a bidder should have been on notice of the restrictiveness of the specification or that he had undertaken that risk. No case examined has analyzed the effect of patent clauses on a proprietary specification-type claim.

170. GSBCA No. 2747, 70-2 B.C.A. (CCH) ¶ 8511 (1970).

171. *See also* Blount Bros. Corp., NASA BCA No. 1266-53, 72-2 B.C.A. (CCH) ¶ 9511, at 44,315 (1972).

172. These decisions seem to equate undue restrictiveness with a proprietary specification claim. This is not correct. A specification is unduly restrictive if it excludes one product that meets the government's minimum needs, even if there are a hundred products that meet the

Abright Electric Construction Co.[173] is representative of this line of cases. There, the contractor argued that the type of switch at issue was unique to one product and served no utilitarian purpose. Therefore, he argued, he was entitled to his increased costs when the government rejected his proposed product which lacked that type of switch. In reply, the Board stated as follows:

> While as a matter of interpretation there is a presumption against a restrictive interpretation when a specification is ambiguous, when as here a specification requirement is clear and unambiguous it must be followed even though it is restrictive. If a prospective bidder believes that a specification is unduly restrictive *it should either protest before bidding or not bid*; for once the contract is awarded, its specifications must be complied with whether or not they are restrictive.[174]

These cases pose several conceptual problems. Many preclude the contractor from raising a proprietary specification issue regardless of whether the bidder had reason to know the specification was proprietary before submitting its bid.[175] The Armed Services Board, however, commented in *J.W. Bateson Co.*[176] as follows:

> It has been held that where a contractor contends that a specification is unduly restrictive the time to object is prior to bidding and not after award. However, where the knowledge of the impossibility of compliance with its specification is not known and could not reasonably have been known, the contractor can scarcely be penalized

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specification as drawn. Only one product (or exact copies of it) can meet a proprietary specification. It may be that this distinction could serve as a basis for taking jurisdiction because a proprietary specification so flagrantly violates the fundamental procurement policy of free and open competition. Additionally, however, a cognizable claim could exist because refusing to accept a product that does not meet a requirement in excess of the government's minimum needs breaches an implied warranty of competitive specifications. Both theories will be discussed in this article.

173. ASBCA No. 12208, 67-1 B.C.A. (CCH) ¶ 6254 (1967).

174. Abright Elec. Constr. Co., ASBCA No. 12208, 67-1 B.C.A. ¶ 6254, at 28,962 (1967) (citing J.W. Bateson Co., ABSCA No. 10362, 66-1 B.C.A. (CCH) ¶ 5509 (1966)); Franchi Constr. Co., ASBCA No. 10157, 65-2 B.C.A. (CCH) ¶ 5584 (1965) (emphasis added) (citations omitted)).

175. *See, e.g.*, Central Mechanical, Inc., ASBCA No. 29360, 84-3 B.C.A. (CCH) ¶ 17,674 (1984); T. H. Taylor, Inc., ASBCA No. 26494, 82-2 B.C.A. (CCH) ¶ 15,877, at 78,753 (1982); Leonard Pevar Co., VACAB No. 1308, 78-2 B.C.A. (CCH) ¶ 13,468 (1978); Branz Mechanical Contractors, Inc., VACAB No. 1105, 74-2 B.C.A. (CCH) ¶ 10,854 (1974); Oakland Constr. Co., Inc., ASBCA No. 13912, 69-2 B.C.A. (CCH) ¶ 7943 (1969); Franchi Constr. Co., ASBCA No. 10157, 65-2 B.C.A. (CCH) ¶ 5184 (1965).

176. ASBCA No. 19823, 76-2 B.C.A. (CCH) ¶ 12,032 (1976).

> for a failure to protest the deficiencies in the bid specifications. In this appeal, Fidelity was not told and could not readily discover those features very special to only two products neither of which had the same special features. It reasonably interpreted the specification as establishing a standard of quality. Yet the Government, also purportedly viewing the specifications as establishing a standard of quality, was, in the case of the reviewing official, not allowing for the possibility of functional equality among different commercial products; none of which could literally comply with the specifications . . . . In application, the Government in fact looked to and accepted only the most closely complying product by literal application of the specifications.
>
> Assuming, *arguendo*, that appellant might have had a duty to inquire about the specifications it acted reasonably in not doing so. Any contention now that it should have done so has no merit when the Government itself viewed the specifications as satisfactory.[177]

One would have thought after this decision that a government showing that the contractor should have known about the proprietary nature of the specification during bidding would be required before he would be precluded from pressing a claim. Unfortunately, this has not been the result, even before the Armed Services Board.[178] When no one else has standing to challenge a violation of one of the most fundamental principles of public procurement—obtaining competition—it seems to be bad policy and manifestly unfair to preclude contractors from directly challenging proprietary specifications before the boards simply because the violation was not obvious enough to be protested prior to bid. This allows the same circumvention of government policy which the Court of Claims in *Sherwin v. United States*[179] condemned

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177. J. W. Bateson Co., ASBCA No. 19823, 76-2 B.C.A. (CCH) ¶ 12,032, at 57,757 (1976) (citations omitted); *see also* Algernon Blair, Inc., GSBCA No. 2116, 67-2 B.C.A. (CCH) ¶ 6453 (1967), *aff'd on reconsideration*, 68-2 B.C.A. (CCH) ¶ 7343 (1968) (citations omitted).

178. Central Mechanical, Inc., ASBCA No. 29360, 84-3 B.C.A. (CCH) ¶ 17,674 (1984); T.H. Taylor, Inc., ASBCA No. 26494, 82-2 B.C.A. (CCH) ¶ 15,877 (1982).

179. 436 F.2d 992, 1000 (Ct. Cl. 1971). In *Sherwin*, the contractor was obligated to supply a particular switching mechanism to deliver emergency power to a government hospital in the event of a power outage. The court reversed the Board's decision which had denied the contractor's claim because the proposed switch did not meet some of the proprietary characteristics of the specifications. The court held, in accord with the Comptroller General and Boards of Contract Appeals, that a "brand name or equal" clause applies to "the description of an item by proprietary characteristics, found in the product of only one manufacturer." *Id.* This result effectuated the government policy of obtaining competition and prevented

and sought to stop by holding that an "or equal" clause applied even though the specification identified no brand name.

B. *Assertion that the Boards Lack Jurisdiction*

Boards of contract appeals have also justified a refusal to consider a proprietary specification claim because, they assert, it is a matter to be raised and protested in other forums referring to bid protests. In other words, the boards lack jurisdiction to hear such a claim. Thus, under this assertion too, the question whether a bidder reasonably should have known of the proprietary nature of the specification is irrelevant.[180] A close examination of this reasoning reveals its fundamental flaws. One of the earliest decisions by the Armed Services Board, *Robert D. Farquhar & Roy F. Seeber Joint Venturers*,[181] was later quoted with approval as follows:

> [The contractor] argues that the specification was written around the proprietary features of the product of one manufacturer and was thus restrictive. [The government] argues that while it is true that two manufacturers used a proprietary item of one of the manufacturers their two systems were competitive and they regularly engaged in competition for contracts and thus the specification is not restrictive. We note that the Comptroller General of the United States has said:
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> ". . . It is well established that the Government does not violate either the letter or the spirit of the competitive bidding statutes merely because only one firm can supply its needs, *provided the specifications are reasonable and necessary for the purpose intended.*"
>
> We need not resolve this issue. If this specification was unduly restrictive, appellant should have protested before the bid opening

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the ready circumvention of such policy that could result if the court held otherwise.

180. *See* Ram Constr., Inc., ASBCA No. 22370, 79-1 B.C.A. (CCH) ¶ 13,646 (1978); Arnold M. Diamond, Inc., ASBCA No. 22733, 78-2 B.C.A. (CCH) ¶ 13,447 (1978); Baker & Co., ASBCA No. 21896, 78-1 B.C.A. (CCH) ¶ 13,116, at 64,109 (1977); Branz Mechanical Contractors, Inc., VACAB No. 1105, 74-2 B.C.A. (CCH) ¶ 10,854 (1974); Arnold M. Diamond, Inc., ASBCA No. 12335, 68-1 B.C.A. (CCH) ¶ 6872 (1968); Franchi Constr. Co., ASBCA No. 10157, 65-2 B.C.A. (CCH) ¶ 5184 (1965); Industrial Photographic Prods, Inc., ASBCA No. 11016, 65-1 B.C.A. (CCH) ¶ 4678 (1965); Keystone Eng'g Corp., VACAB 432 (Aug. 13, 1962) (unpublished); Robert D. Farquhar & Roy F. Seeber Joint Venturers, ASBCA No. 6962, 61-2 B.C.A. (CCH) ¶ 3229 (1961).

181. ASBCA No. 6962, 61-2 B.C.A. (CCH) ¶ 3229 (1961).

or have declined to bid . . . .

We said many years ago that:

". . . The administration and enforcement of the intra-Government regulations and procedures designed to prevent unduly restrictive specifications is not a function of this Board."[182]

Several other cases have relied on *Farquhar* to hold the Board lacked jurisdiction to review proprietary specification claims.[183] *Farquhar's* continuing vitality is highly suspect, however. It was decided before *G.L. Christian & Associates v. United States*[184] and held, contrary to *Christian*, that a clause required by the regulations would not be read into the contract.[185] Moreover, it held the government was entitled to literal compliance with the specifications even if the "or equal" clause were included.[186] This is precisely the issue upon which the Court of Claims later reversed this same Board in *Jack Stone*.[187]

Farquhar also held that the "or equal" clause only applied when a brand name was used—a position the Armed Services Board has since abandoned.[188] Thus, it is very likely that today the Board would uphold the claim denied in *Farquhar*, making this entire line of cases relying on *Farquhar* of doubtful authority. More important to its jurisdictional import, however, *Farquhar* and its progeny ignore the important proviso in the Comptroller General's reasoning—"provided the specifications are reasonable and neces-

182. Baker & Co., ASBCA No. 21896, 78-1 B.C.A. (CCH) ¶ 13,116, at 64,109 (1977) (emphasis supplied) (citations omitted) (quoting 45 COMP. GEN. 365, 368 (1965)); Robert D. Farquhar & Roy F. Seeber Joint Ventures, ASBCA No. 6962, 61-2 B.C.A. (CCH) ¶ 3229 (1961).

183. *See* Arnold M. Diamond, Inc., ASBCA No. 22733, 78-2 B.C.A. (CCH) ¶ 13,447 (1978); Franchi Constr. Co., ASBCA No. 10157, 65-2 B.C.A. (CCH) ¶ 5184 (1965); Industrial Photographic Prods., Inc., ASBCA No. 11016, 65-1 B.C.A. (CCH) ¶ 4678 (1965); Keystone Eng'g Corp., VACAB 432 (Aug. 13, 1962) (unpublished).

184. 312 F.2d 418, *reh'g denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

185. *See* Robert D. Farquhar & Roy F. Seeber Joint Venturers, ASBCA No. 6962, 61-2 B.C.A. (CCH) ¶ 3229, at 16,739 (1961).

186. *Id.*

187. Jack Stone Co., v. United States, 344 F.2d 370, 373-74 (1965).

188. *See* Whitesell-Green, Inc., ASBCA No. 26159, 84-2 B.C.A. (CCH) ¶ 17,400 (1984); J.W. Bateson Co., ASBCA No. 19823, 76-2 B.C.A. (CCH) ¶ 12,032 (1976); Melrose Waterproofing Co., ASBCA No. 9058, 1964 B.C.A. (CCH) ¶ 4119 (1964); *see also* Sherwin v. United States, 436 F.2d 992 (Ct. Cl. 1971) (reversing the Veteran's Board for holding that an or equal clause only applied when a brand name was used).

sary for the purpose intended."[189] If the restrictiveness was not apparent before bidding, a contract claim is the only vehicle by which the reasonableness and necessity of the specified requirements can be challenged.

C. *A Proposal to Recognize Claims for Undisclosed Use of Proprietary Specifications*

While it is easily seen that a specification's undue restrictiveness is a proper bid protest issue,[190] it is more difficult to see why it is *exclusively* a bid protest issue unless the contractor should have known of the proprietary issue before bidding. A proprietary specification claim raises an issue under the contract—whether the government has drafted or interpreted its specifications to require the contractor to use a particular product in violation of statutory and regulatory mandates. What the contractor is required to supply under the contract is manifestly related to the contract and should also be within the jurisdiction of the boards.[191]

The boards and the Claims Court have jurisdiction via the contract to consider proprietary specification claims. The substantive inquiry should focus on whether, when bidding, the bidder should have found the problem patent and, if not, whether the bidder otherwise acted reasonably in interpreting the specification. If patent, the bidder, under well established precedent, has a duty to seek clarification. While these issues may be more difficult to resolve than simply rejecting such a claim on jurisdictional grounds, such an approach would protect a contractor's reasonable expectations and prevent circumvention of the policy of competition. Nevertheless, these issues may present almost as difficult a barrier to a contractor's successful recovery as finding a lack of jurisdiction.

When the specification is drafted around one particular product and contains clear descriptions of that product's unique features,

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189. 34 COMP. GEN. 336 (1965). The Comptroller General has recently held that he will not hear protests concerning undue restrictiveness filed by potential suppliers or subcontractors who are not potential bidders. Evans, Inc., Comp. Gen. Dec. B-218178 (May 13, 1985), 85-1 CPD ¶ 467. This new prohibition on protests by the entities most likely to recognize a specification's undue restrictiveness should increase the boards' willingness to hear proprietary specification claims.

190. *See* P. SHNITZER, *supra* note 4, at 190-98.

191. Agency boards have jurisdiction to decide "any appeal from a decision of a contracting officer . . . relative to a contract made by its agency . . . ." 41 U.S.C. § 607(d) (1982); *see also* Defense Acquisition Regulation (DAR) 7-103.12, 32 C.F.R. § 7-103.12 (1984); FPR 1-7.102-12, 41 C.F.R. § 1-7.102-12 (1984).

and some indication of their imporance to the project, the government may successfully argue that the contractor was unreasonable in supposing that he could utilize a product which did not meet all the specification requirements. The contractor cannot substitute its judgment for that of the government.[192] Moreover, assuming the specification names a brand product, it may be unreasonable for the bidder (or a subcontractor or supplier effectively acting as his agent) to make no efforts to contact the named manufacturer or to compare the named product to the one it proposes to use prior to bid.[193]

If the bidder discovers that his proposed substitute may not meet all of the salient characteristics listed in the specification, he may not be *required* to raise this issue prior to bidding when he has reasonable grounds to believe the particular features are not essential to the project. One such reasonable ground would be that the particular features would not be usable on the instant project.[194] Another basis for not questioning such a specification prior to bid would be that the same or a related government contracting activity has waived the restrictive features on other projects. The cases have been hostile to this last factor, however, stating that the government is not bound by past practices and may insist on strict compliance.[195]

Assuming the contractor proves that the government's insistence upon the disputed feature deviates from its actions on other similar projects, there appears no good reason for not charging the government with some corporate memory. Consistency is a virtue. Moreover, there is ample precedent in administrative law for requiring the government to give notice when it expects to change its policies and to explain these changes. In fact, the failure to do this is often found to be unlawful.[196] The need for notice and explana-

192. *See* Farwell Co. v. United States, 148 F.Supp. 947, 949 (Ct. Cl. 1957).

193. *See* Solis Enters. Inc., VACAB No. 1576, 84-3 B.C.A. (CCH) ¶ 17,606, at 87,720 (1985).

194. *See, e.g.*, Whitesell-Green, Inc., ASBCA No. 26159, 84-2 B.C.A. (CCH) ¶ 17,400 (1984). *But see* Atlantic States Constr., Inc., ASBCA No. 27681, 85-3 B.C.A. (CCH) ¶ 18,501 (1985).

195. *E.g.*, R&M Mechanical Contractors, Inc., DOTCAB No. 75-51, 76-2 B.C.A. (CCH) ¶ 12,084, at 58,034-35 (1976). *But see* S.L. Haehn, Inc., ASBCA No. 16547, 72-1 B.C.A. (CCH) ¶ 9465 (1972); Forsberg & Gregory, Inc., ASBCA No. 16489, 74-2 B.C.A. (CCH) ¶ 10,920, at 51,951 (1974).

196. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1976); Frozen Food Express, Inc. v. United States, 535 F.2d 877 (5th Cir. 1976).

tions in the contracting area is just as evident as in other areas since the cost to the government and the contractors' economic well-being are dependent upon the contractors' reasonable expectations being fulfilled.

Government interpretations of other similar contracts have often been looked upon to assist in resolving ambiguous specification claims as opposed to proprietary specification claims. The cases limiting relief to a bid protest apparently assume that the proprietary specification is unambiguous without expressly deciding whether the bidder should have known about its proprietary nature before bidding. For the ambiguous specification precedent to apply, of course, there must be an ambiguity in the specification and a substantial similarity between the provision in dispute and the prior contracts.[197] The ambiguity is established by the fact the government has listed a feature as a salient characteristic which—based on the plans and specifications, the contractor's experience, or some combination of the two—does not appear to be essential to meet the government's minimum needs. If the contractor bases his belief on past government practices, he must prove what those practices were. The similarity between the past and disputed provisions is best shown by introduction of the appropriate contract provisions including specifications and drawings or other documentation that demonstrate the same type project application.[198]

Given proof of these conditions, the prior interpretations at least add weight to the contractor's contention that his interpretation is reasonable.[199] Past practices under similar prior contracts have been found to demonstrate the reasonableness of the contractor's interpretation of an ambiguous specification.[200] In *King-Hunter,*

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197. *See, e.g.*, Bass v. United States, 121 Ct. Cl. 436, 453-54 (1951), *cert. denied*, 343 U.S. 926 (1952); Westbury Steamship Corp., ASBCA No. 13840, 70-1 B.C.A. (CCH) ¶ 8348 (1970); Ralph T. Viola Co., ASBCA No. 8260, 1964 B.C.A. (CCH) ¶ 4121, at 20,089-90 (1964).

198. *See* Ithaca Gun Co. v. United States, 176 Ct. Cl. 437, 443-44 (1966); Danis Indus. Corp., VACAB No. 1456, 81-2 B.C.A. (CCH) ¶ 15,209, at 75,324 (1981); Limbach Co., GSBCA No. 4966, 79-2 B.C.A. (CCH) ¶ 14,010 (1979); Todd Shipyards Corp., ASBCA No. 16455, 72-2 B.C.A. (CCH) ¶ 9654 (1972).

199. Somerset Constr. Co., ASBCA No. 12347, 69-2 B.C.A. (CCH) ¶ 7,937, at 36,906 (1967); Randall Mfg. Co., ASBCA No. 5653, 60-1 B.C.A. (CCH) ¶ 2660 (1960).

200. *See, e.g.*, Gen. Warehouse Two, Inc. v. United States, 389 F.2d 1016 (Ct. Cl. 1967); Abe L. Greenberg Co. v. United States, 300 F.2d 443 (Ct. Cl. 1962); King-Hunter, Inc., ASBCA No. 22376, 78-2 B.C.A. (CCH) ¶ 13,426 (1978); Anthony Co., ASBCA No. 18781, 75-1 B.C.A. (CCH) ¶ 11,090 (1975); Watkins-Johnson Co., ASBCA No. 15457, 74-1 B.C.A. (CCH) ¶ 10,395 (1973); Hollingsworth Co., DOTCAB No. 69-15, 71-1 B.C.A. (CCH) ¶ 8760 (1971).

Inc.,[201] the Board went so far as to hold that even a facially unambiguous contract can be made ambiguous by conduct under prior contracts. Changes in specifications of other contracts which were awarded after the disputed contract have often been found to be inadequate to show the previous language was in error or ambiguous,[202] although contrary cases do exist.[203]

It may also be shown that the contractor acted reasonably in bidding on a nonconforming item even if the proprietary feature was essential. If the essential nature of the feature could not be derived from the specifications, assuming that the simple identification of the feature is not all that is required, why should the contractor not recover? A proprietary specification claim requires an interpretation of the parties' contract. This should not be a question of how the contract should have been drafted (i.e., without nonessential restrictive features), but whether the contractor, given the circumstances, reasonably interpreted his obligations.

One must remember that if a contractor proves he bid reasonably, the assumption must be that most, if not all, other bidders did likewise. Thus, no bidder is being treated unfairly by allowing the contractor to recover. Moreover, the contractor's recovery is only going to be the difference between the price of the proprietary product and price of the product the bidder relied upon plus increased performance costs caused by the change. The government will only pay the fair price for the proprietary product, which it would have paid anyway if it had notified bidders of the proprietary nature of the product, plus the consequential costs. It is when the claim is denied that the government gets a windfall—a proprietary product for which it did not pay.

More careful analysis may be required when the contractor relied upon a supplier's quotation and did not know whether the product the supplier was quoting met the specification. Presumptively, the contractor acted reasonably in relying on the quotation because normally contractors must rely upon the quotations they

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201. ASBCA No. 22376, 78-2 B.C.A. (CCH) ¶ 13,426, at 65,622 (citing Gresham & Co., 470 F.2d 542, 555 (Ct. Ct.1972)).

202. *See, e.g.*, Branz Inc., VACAB No. 1105, 74-2 B.C.A. (CCH) ¶ 10,854, at 51,630 n.7 (1974).

203. *See, e.g.*, Ballenger Corp., DOTCAB No. 74-32, 84-1 B.C.A. (CCH) ¶ 16,973, at 84,468 (1984); Forsberg & Gregory, Inc., ASBCA No. 16489, 74-2 B.C.A. (CCH) ¶ 10,920, at 51,953 (1974); *see also* Department of the Treasury v. Federal Labor Relations Auth., 707 F.2d 574, 581 n.25 (D.C. Cir. 1983) (administrative determinations not involving contracts).

receive. Whether the examination should be limited to an assessment of the contractor's actions or the supplier's actions in quoting on the noncomplying material turns on whether the supplier's lack of reasonable care will be imputed to the contractor. The cases have generally found that the knowledge of a supplier or subcontractor that a specification is proprietary will not be imputed to the contractor.[204] The specific facts should determine when a contractor will be held responsible for a supplier's acts. Facts relevant to this inquiry include the supplier's reason for quoting on the nonconforming product (for example, the fact it was accepted under other contracts containing a similar specification) and trade practices.[205]

D. *Proving a Specification Proprietary*

In order to sustain a claim for use of proprietary specifications, the contractor must first prove that the specification is proprietary. In *Jet Construction Co. v. United States*,[206] the Court of Claims denied recovery where it was found that the item specified could be supplied by three suppliers as opposed to one. Thus, the item was not proprietary, and no duty to disclose was involved, even though the item specified was not an off-the-shelf item and entailed more cost to supply than the contractor had anticipated.[207] The court, however, did not preclude hearing a proprietary specification claim in the proper case.

In *Algernon Blair, Inc.*,[208] the Board found that the existence of a "brand name or equal" clause had led the bidder to expect a boiler not to be proprietary and sustained his claim.[209] However, in

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204. *See, e.g.*, Thurmont Const. Co., Inc., ASBCA No. 13417, 69-1 B.C.A. (CCH) ¶ 7602 (1969); Harris Corp., ASBCA No. 26548, 85-3 B.C.A. (CCH) ¶ 18,167 (1985); *see also* Parker's Mechanical Constructors, Inc., ASBCA No. 29020, 84-2 B.C.A. (CCH) ¶ 17,427 (1984); Blount Bros. Corp., NASA No. 1266-53, 72-2 B.C.A. (CCH) ¶ 9511 (1972). *But see* Wright Assocs., Inc., ASBCA No. 22492, 79-2 B.C.A. (CCH) ¶ 14,102, at 69,378 (1979). *See supra* notes 160-71 and accompanying text.

205. As to potential recourse against suppliers, see Blount Bros. Corp., NASA No. 1266-53, 72-2 B.C.A. (CCH) ¶ 9511, at 44,322 n.3 (1972).

206. 531 F.2d 538 (Ct. Cl. 1976).

207. *Id.* at 542-43. As discussed previously in the text, a demonstration that more than one supplier meets the specification may not preclude a claim for wrongful rejection under an "or equal" clause.

208. GSBCA No. 2116, 67-2 B.C.A. (CCH) ¶ 6453 (1967), *aff'd on reconsideration*, 68-2 B.C.A (CCH) ¶ 7343 (1968).

209. *Id.* at 29,940; *see also* Blount Bros. Corp., NASA No. 1266-53, 72-2 B.C.A. (CCH) ¶ 9511, at 44,315 (1972).

Meredith Construction Co.,[210] the Board rejected a similar claim because the contractor failed to prove that the specification was proprietary.

Meredith also stated that in order for a proprietary specification claim to be properly brought before the Board, the contractor must show "that the salient factors called out in the specification were beyond the material and essential needs of the government when the specifications were drawn and bids solicited."[211] Such a showing would go far toward demonstrating the contractor's reasonableness in basing its bid on a nonconforming product, but a lesser showing should also suffice.

IX. Implied Warranty of Competitive Specifications

A. *Unless Specifically Disavowed, the Government Should Be Found to Warrant the Competitivenes of Its Specifications*

"[W]hile the government is assuredly 'entitled to receive what it bargained for' so is the contractor."[212] The contractor, when bidding on a government contract, is required to know the contents of the federal regulations applicable to that contract and bid accordingly.[213] Federal law and regulations clearly require that government specifications provide for free and open competition.[214] This requirement of law, which bidders are required to know at their peril, should equally apply to protect contractors who reasonably believe that: (1) more than one product can meet a specification and (2) that the contracting officer will interpret the specification to allow the use of products which meet the government's minimum performance needs even though they do not meet the letter of the specifications. This argument applies with even more force when the product to be supplied must be a commercial product.[215]

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210. DOTCAB No. 1549, 85-1 B.C.A. (CCH) ¶ 17,896 (1985).

211. *Id.* at 89,619.

212. Davho Co., Inc., GSBCA No. 4414, 79-1 B.C.A. (CCH) ¶ 13,564, at 66,442 (1978) (Becker, A.L.J., dissenting); John J. Kirlin, Co., ASBCA No. 22522, 80-1 B.C.A. (CCH) ¶ 14,367 at 70,830 (1980).

213. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1974); G. L. Christian and Assocs. v. United States, 312 F.2d 418 (Ct. Cl.), *reh'g granted*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

214. *See* 10 U.S.C. § 2305(a)(1)(A)(iii) (Supp. II 1984); 41 U.S.C. §§ 253(a)(1),401 (1982 & Supp. II 1984); FAR § 10.002, 48 C.F.R. § 10.002 (1985); DAR § 1-1201(a), 32 C.F.R. § 1-1201(a) (1984); DAR § 18-107, 32 C.F.R. § 18-107 (1984); FPR § 1-1.307-1 to -9, 41 C.F.R. § 1-1.307-1 to -9 (1984).

215. *See* Parker's Mechanical Constructors, Inc., ASBCA No. 29020, 84-2 B.C.A. (CCH) ¶

Thus, in general, a contractor is reasonable in generally assuming that a variety of products meet the specifications. It should be recognized that the government impliedly warrants that its specifications are competitive.

A theory of recovery based on this implied warranty would not require a showing that the specification was proprietary, but would only require a showing that the specification contained requirements not necessary to meet the government's minimum needs on the particular project. It would follow much more closely the bid protest theory of undue restrictiveness and would not require a showing that only one product met the specifications.[216] The contractor would be precluded from bringing such a claim if he had reason to know of the defective specification prior to bid and the defect was not brought to the government's attention, or if the bidder lacked a reasonable basis to believe the restrictive feature would be waived.

In the analogous "or equal" situation, the government must either disclose in the particular specification that it will not accept equivalent commercial products when the contract contains an "or equal" clause or otherwise explicitly exclude the pertinent specification from the ambit of the "or equal" clause. In *Forsberg & Gregory, Inc.*,[217] the board stated:

> [The Government] may foreclose offering of other products if its needs dictate such an election. But the contract must place the bidder on warning that an "or equal" will not be accepted. The Government might have done so by explaining in the specifications the purpose for certain requirements satisfied uniquely by U.S. Plywood Doors. However, [the Government] may not in the contract mislead a bidder by clauses bearing the message of GP 25 and SC IC-22 when the Government in fact wishes no "or equal" submission.[218]

17,427 (1984). The Appendix contains a commercial product clause. For purposes of this article, a commercial product is a product that is not specifically designed for each particular procurement, but one that is sold to serve a particular function in a wide variety of contexts.

216. *But see, e.g.*, Buckner & Moore, Inc., ASBCA No. 25186, 83-1 B.C.A. (CCH) ¶ 16,332 (1983) (rejecting on jurisdictional grounds any claim questioning the government's minimum needs). When a decision determines the government's essential needs, to determine whether a rejected product was equal to that specified, it is effectively determining the government's minimum needs. *See, e.g.*, Whitesell-Green, Inc., ASBCA No. 26159, 84-2 B.C.A. (CCH) ¶ 17,400 (1984).

217. ASBCA No. 16489, 74-2 B.C.A. (CCH) ¶ 10,920 (1974).

218. Forsberg & Gregory, Inc., ASBCA No. 16489, 74-2 B.C.A. (CCH) ¶ 10,920, at 51,959 (1974) (citation omitted).

The *Forsberg* Board held the contractor had proven an unreasonable rejection of an equal substitution.[219] Likewise, the government should warn bidders when it is using an unduly restrictive specification.

The government, not the bidders and contractors, is responsible for specifications. "The Government is responsible for the correctness, adequacy and feasibility of the specifications and the other party has no other obligation to check and verify the work product of the party who assumes responsibility for the preparation of the specifications."[220] Contractors should not be penalized for failing to bring unknown restrictive features to the government's attention prior to bid.

B. *Judicial Support for Finding Such an Implied Warranty*

While no case has yet relied upon a theory of breach of implied warranty to hold the government liable for increased costs due to proprietary specifications, two decisions have held the government liable when both the government and contractor were equally ignorant of the proprietary nature of the specification at bid time because of the government's superior duty to know the nature of the specifications it has prepared. *Kaplan Contractors Co.*[221] presented a rather unique set of facts. The contractor had based its bid on utilizing the product of the supplier named in the specifications. During performance of the contract, the supplier failed to perform fully, and the contractor had to alter the product so that another supplier could meet the specification. The government relaxed its specification to allow this substitution. This substituted method of manufacture increased the cost of performance, which the contractor sought to recover. The Board, while failing to agree wholeheartedly with the government's or the contractor's arguments that the other party had assumed the risk of the supplier being unable to perform, allowed the contractor to recover because of the government's superior opportunity to know that the specifications described a sole-source product. The government was therefore under a duty to inform the contractor, and its failure to fulfill this duty constituted a constructive change.

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219. *Id.* at 51,960. It is important to note that *Forsberg* held that the proposed substitution did not have to meet every detail of the specification.

220. R.C. Hedreen Co., ASBCA No. 20599, 71-1 B.C.A. (CCH) ¶ 12,328, at 59,555 (1977) (citation omitted).

221. GSBCA No. 2747, 70-2 B.C.A. (CCH) ¶ 8511 (1970).

Similarly, in *Elrich Construction Co.*,[222] the contract called for wrap-around carpet on floor panels for a computer area. Both the contractor and the government discovered for the first time after the award of the contract that the wrap-around carpet panels were a patented product. In fact, the contractor faced a lawsuit if he utilized the design. The contractor proposed to use a substitute panel with vinyl trimmed edges, but the government rejected this as failing to meet its minimum needs. The use of similar panels in other installations had indicated that the vinyl edging substantially hindered adequate performance. Since the government had specified a proprietary item without informing bidders of its proprietary nature or of the reason it would not accept vinyl trimmed edges, the government had to pay the contractor's claim. The Board noted that the government should be charged with constructive knowledge of the proprietary nature of the specification and had a corresponding duty to disclose it.

Also pertinent is *Aerodex, Inc. v. United States*,[223] in which the government specified a brand name electronic device. The contractor submitted its bid, expecting to manufacture the item itself. Ultimately, however, the contractor had to procure the item from a manufacturer who was not in existence at the time of bidding because the government could not supply it with a set of plans from which it could manufacture the item. The court used a "balance of fault" test in determining that the government's reference to the catalogue number of the component and an approved substantial equal had implied either that the government had plans necessary to make an evaluation or that the component would be commercially available at a reasonable cost. Neither of these being the case, the court found that the contractor was entitled to an equitable adjustment for his increased costs of performance.

In *Algernon Blair, Inc.*,[224] the Board read an "or equal" clause together with technical requirements for a boiler and held that "[the contractor] had a right to believe that boilers meeting the specification . . . were substantially the same as boilers produced by more than one manufacturer and on the date of opening bids, had been in successful commercial use and operation for at least

222. GSBCA No. 3657, 73-2 B.C.A. (CCH) ¶ 10,187 (1973).

223. 417 F.2d 1361 (Ct. Cl. 1960).

224. GSBCA No. 2116, 67-2 B.C.A. (CCH) ¶ 6453 (1967), *aff'd on reconsideration*, GSBCA No. 2116, 68-2 B.C.A. (CCH) ¶ 7343 (1968).

one year in projects and units of comparable size."[225]

On reconsideration, the Board affirmed its prior decision, finding that the provisions of the specification which the proposed substitute failed to meet were nonessential details, and that the proposed substitute met the government's essential requirements. It rejected the argument that the government had a right to specify nonessential items and further held the fact that no brand name was mentioned in the specification did not defeat the operation of the "or equal" clause, stating:

> The laws and procurement regulations issued thereunder require that services and goods be obtained on the most competitive basis possible under the circumstances. If the Government's minimum needs require procurement of specific items it must bear the burden of establishing the need therefor and alert prospective bidders to the situations.[226]

All of these cases are based on the recognition that the primary responsibility for the specifications rests with the government. As with the superior knowledge area and the *Spearin* doctrine,[227] when the government knows or should know of the specification's noncompetitiveness, then the contractor, who has no reason to know the specification is not competitive, should be able to recover any resulting increased costs.

Cases have rejected proprietary specification claims and, implicitly, any implied warranty, because to recognize such a claim would be unfair to other bidders.[228] This is only true, however, if the other bidders interpreted the specifications differently than the low bidder. Generally, such cases assume they have, but, absent evidence to the contrary, it is much more likely that all bidders interpreted the specifications substantially the same as the low bidder. Thus, instead of furthering the goals of competitive bidding, such holdings, by interpreting the contract differently than did all bidders, create a trap for the low bidder.

Another likely reason the cases have yet to find explicitly that

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225. Algernon Blair Inc., GSBCA No. 2116, 67-2 B.C.A. (CCH) ¶ 6453, at 29,940 (1967).

226. Algernon Blair Inc., GSBCA No. 2116, 68-2 B.C.A. (CCH) ¶ 7344, at 34,149 (1968).

227. United States v. Spearin, 248 U.S. 132 (1918). *See generally* J. CIBINIC, JR. & R. NASH, JR., *supra* note 148, at 190-93.

228. *See, e.g.*, R&M Mechanical Contractors Inc., DOTCAB No. 75-51, 76-2 B.C.A. (CCH) ¶ 12,084, at 58,033 (1976).

the government impliedly warrants competitive specifications is that the courts fear opening the flood-gates. This fear is probably unfounded for a couple of reasons. First, even now both government and contractor personnel often conduct themselves as if such a warranty exists. It may be a fairly common belief among contractors,[229] and even some government personnel, that the government is obligated, upon request of the contractor, to name at least three suppliers who can meet the specifications. If this belief is widespread, the boards' and courts' recognition of an implied warranty of competitive specifications would not increase the government's liability significantly, nor the courts' or boards' workload. Second, claims for proprietary specifications and breach of this implied warranty are also cognizable under other theories of recovery which were discussed above, including failure to disclose superior knowledge and unreasonable rejection of a proposed equal under an "or equal" clause.

Another problem with the recognition of this implied warranty is that the boards, with some consistency, have asserted that they lack jurisdiction to hear challenges to the government's determination of its minimum needs.[230] This lack of jurisdiction again turns on a protest to the Comptroller General being the proper relief. The recognition of an implied warranty of competitive specifications, at least as formulated above, would require the boards to examine minimum needs issues. This examination, however, would essentially be identical to the analysis the boards now make in determining what the government's essential needs are when a claim is brought for wrongful rejection of an "or equal" proposal. Thus, there appears no substantive reason for not recognizing such claims. Moreover, the issue is manifestly one of what contract performance is required—thus being squarely within the board's jurisdiction.

The express recognition of a cause of action for breach of an implied warranty of competitive specifications could only serve to clarify the issues before the board or court and allow it to focus upon the crucial factors, i.e., whether the contractor relied upon this warranty, whether such reliance was reasonable, and whether

229. *See, e.g.*, Meredith Constr. Co., DOTCAB No. 1549, 85-1 B.C.A. (CCH) ¶ 17,896, at 89,615, 89,618 (1985)

230. *E.g.*, Buckner & Moore, Inc., ASBCA No. 25186, 83-1 B.C.A. (CCH) ¶ 16,332, at 81,186 (1983). *But see* Elrich Constr. Co., AGBCA No. 77-213-4, 81-1 B.C.A. (CCH) ¶ 14,922 (1981).

the government's specification unduly limits competition.

X. Conclusion

The preceding discussion demonstrates that the cases are hostile to claims based on proprietary specifications except when the contractor demonstrates a wrongful rejection of a proposed "or equal." In certain other instances, however, the facts have been persuasive enough that the decision found a way to protect the contractor's reasonable expectations even if this was simply the result of a balancing of fault.

From a policy viewpoint, the boards and courts must make a determination whether they are going to force government contractors to be strictly responsible for discovering proprietary and unduly restrictive specifications before award and alerting the government to that fact. The preceding discussion has shown that there is little legal or equitable basis for such holdings. Moreover, such a policy may run counter to the government's best interests.

Once contractors recognize they are strictly responsible for identifying such specifications, they will either: (1) increase their efforts to discover such specifications during bidding, thus increasing bid preparation costs; or (2) put contingencies in their bids to cover their risks. Both these efforts will increase costs to the government. Moreover, the supplier of the proprietary product will recognize he has a "lock" on the contract and raise his prices accordingly.

Additionally, denial of proprietary specification type claims will result in a government windfall because the bid price will be premised on the false assumption that the specifications are competitive and thus lower than it otherwise would be. The failure to protect the bidder's reasonable expectation results in the government obtaining a proprietary product for which it did not pay. To allow the contractor to recover merely means that the government will pay for what it gets (plus consequential costs caused by its untimely revelation of what it wants).

Ensuring that specifications are drafted to allow maximum competition is one of the most fundamental policies of government procurement. For this reason, and because the bid protest forum is simply not adequate to protect the contractor's and the public's interest when the proprietary or restrictive nature of the specification is not patent, the Claims Court and boards should recognize claims based upon proprietary specifications and breach of an im-

plied warranty of competitive specifications. Similar relief is often available through claims of superior knowledge and wrongful rejection of "or equals."

The problem with the current state of the law is its inconsistency and its apparent disregard for violations of competitive procurement policy which are detected only after award of a contract. Recognition that such causes of action exist will allow the courts to focus on issues more critical than the issue of whether the contractor has successfully made a proprietary specification issue into a more standard claim such as rejection of an "or equal" or failure to disclose superior knowledge. Moreover, it may ultimately reduce the number of litigated cases if the government recognizes it still bears responsibility for the competitiveness of its specifications even after award.

APPENDIX

* Or Equal Clauses

DOD FAR § 52.210-7000 Brand name or equal.

As prescribed at 10.004(b)(3)(ii)(B), insert the following provision:

BRAND NAME OR EQUAL (APR 1973)

(As used in this clause, the term "brand name" includes identification of products by make and model.)

(a) If 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 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 referenced in the Invitation for Bids.

(b) Unless the bidder clearly indicates in this bid that he is offering an "equal" product, his bid shall be considered as offering a brand name product referenced in the Invitation for Bids.

(c)(1) If the bidder proposes to furnish an"equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the Invitation for Bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid, as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirments [sic] of the Invitation for Bids and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase

by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the Invitation for Bids, he shall (i) include in his bid a clear description of such proposed modifications, and (ii) clearly mark any descriptive material to show the proposed modifications.

(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the Invitation for Bids will not be considered.

(End of provision)

GSA FAR § 552.210-74 Brand Name or Equal

As prescribed in GSAR 510.011(e) insert the following clause when a "brand name or equal" purchase description is used in solicitations and contracts.

Brand Name or Equal(April 1984)

(As used in this clause, the term "brand name" includes identification of products by make and model.)

(a) If 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 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 solicitation.

(b) Unless the bidder clearly indicates in his bid that he is offering an "equal" product, his bid shall be considered as offering a brand name product referenced in the solicitation.

(c)(1) If the bidder proposed to furnish an "equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the invitation for bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on

information furnished by the bidder or identified in his bid as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirements of the solicitation, and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the solicitation, he/she shall (i) include in their [sic] bid a clear description of such proposed modifications and (ii) clearly make any descriptive material to show the proposed modifications.

(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the solicitation will not be considered.

(End of Clause)

Quoted from FAR § 52.236-5:

MATERIAL AND WORKMANSHIP (APE 1984)[qc]

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. 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.

(b) The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor

shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so, the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.

(c) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

(End of clause)
(R 7-602.9 1964 JUN)

** Commercial Product Clause

Quoted from T.H. Taylor, Inc., ASBCA 26494, 82-2 BCA ¶ 15,877, at 78,751 (1982)

Materials and equipment shall be essentially the catalogued products of manufacturers regularly engaged in production of such materials or equipment and shall be manufacturer's latest design that complies with the specification requirements. Materials and equipment shall essentially duplicate items that have been in satisfactory commercial or industrial use at least two years prior to bid opening . . . .