

DELFOUR, INC.**CONTRACT NO. V523C-1050****VABCA-3803****VA MEDICAL CENTER
BOSTON, MASSACHUSETTS***Gaetano J. DeLuca, Esq.*, Hingham, Massachusetts, for the Appellant.*Paul A. Embroski, Esq.*, Office of General Counsel, Washington, D.C., for the Department of Veterans Affairs; *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel; and *William E. Thomas, Jr., Esq.*, Assistant General Counsel, of Counsel.**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY**

This appeal involves a dispute over the brand of resinous flooring to be provided by Appellant, Delfour, Inc. ("Delfour") under Contract No. V523C-1050 ("Contract") for renovation of the Animal Facility at the Department of Veterans Affairs Medical Center in Boston Massachusetts ("VAMC Boston"). Respondent, Department of Veterans Affairs ("VA" or "Government") has filed a Motion for Summary Judgment asserting that there are no material facts in dispute and that, as a matter of law, the Contract specifications required Delfour to provide resinous flooring manufactured by the Dex-O-Tex Division of Crossfield Industries. In the alternative, the VA asserts that it is entitled to summary judgment because this appeal was rendered moot when the Contract, for unrelated reasons, was terminated for default prior to Delfour's purchase or installation of resinous flooring.

Delfour contests the VA's Motion on several substantive grounds. Delfour first contends that the VA breached the Contract by improperly and unfairly restricting competition when it rejected Delfour's proposal to install a different brand of resinous flooring. In addition, Delfour asserts that the Contract specifications permitted use of the allegedly equal brand of resinous flooring proposed by Delfour; and, that, even though Delfour installed no resinous flooring, the "interests of justice and fundamental fairness" require that the Board determine whether the VA breached the Contract by insisting on the use of the DEX-O-Tex Flooring. Delfour also puts forth two procedural reasons for denial of the Motion: 1) Summary Judgment in favor of the VA can not be granted for the reason that the VA, by its failure to submit any supporting affidavits with its Motion, had not carried its burden of establishing that there are no material facts in dispute; and, 2) the Motion was not timely filed because Delfour did not receive its copy of the Motion on the date specified by the Board.

The Board consolidated this appeal with the following appeals arising out of the Contract for the purposes of case processing, hearing and decision:

<i>DOCKET NO.</i>	<i>DESCRIPTION</i>	<i>AMOUNT</i>
VABCA No. 3832	Default Termination	N/A
VABCA No. 3898	Work In Progress	\$45,000.00

VABCA No. 3899	Change Order Work	\$63,828.07
VABCA No. 3900	Cost of Delays	\$87,825.20
VABCA No. 3901	Breach of Contract Damages	\$2,000,000.00

The record before the Board consists of the Complaint and Answer (cited as "Cmplnt. ¶ ___" or "Answr. ¶ ___"); the Consolidated Appeal File (cited as "R4, tab ___") consisting of 282 exhibits submitted by the VA and Delfour pursuant to Rule 4; the VA's Motion for Summary Judgment (cited as "MSJ p. ___"); Delfour's Opposition to the Motion which is supported by the Affidavit of Gaetano P. Deluca, Delfour's President (cited as "MSJ Opp. p. ___", and "Deluca Afdvt., para. ___", respectively); and, the VA's Reply to Delfour's Opposition (cited as "MSJ Rply. p. ___"). In addition, when we reference, as necessary, Delfour's other appeals arising out of the Contract which were consolidated with this appeal by the Board, such references are based upon the existing records in those respective appeals.

FINDINGS OF FACT FOR THE PURPOSES OF RULING ON THE GOVERNMENT'S MOTION

The following findings of fact are made for the purposes of this decision only.

The VA issued Solicitation No. IFB 523-46-92 for Project No. 523-073, Renovation of the Animal Facility at VAMC Boston on July 24, 1992. Delfour was awarded the Contract on October 5, 1992 and the VA issued a Notice to proceed with the work on the Contract on October 23, 1992. (R4, tabs 2, 5-6)

The Instruction to Bidders Section (Section 00100) of the IFB (R4, tab 1) included the clause at FAR 52.214-6, EXPLANATION TO PROSPECTIVE BIDDERS (APR 1984).

The IFB scheduled a pre-bid conference on August 10, 1992; neither Delfour nor any other prospective bidder attended. In addition, no prospective bidder inquired about, or questioned, the Contract specification for resinous flooring. (R4, tabs 4, 8, 20)

Included in the Contract were the Federal Acquisition Regulation ("FAR") MATERIAL AND WORKMANSHIP (APR 1984), FAR 52.236-5, and CHANGES (AUG 1987), FAR 52.243-4 clauses. (R4, tab 21)

Paragraph 2.1(A) of Contract Specification Section 09700, "Resinous Flooring" states:

Resinous Flooring shall be trowel applied resin flooring, Dex-O-Tex Neotex, as manufactured by Dex-O-Tex Division of Crossfield Products Corporation. No substitutions will be accepted.

(R4, tabs 8, 21)

Between October 1992, and January 1993, Delfour twice submitted for the VA's approval, pursuant to the Contract's submittal procedures, and the VA twice rejected, resinous flooring manufactured by the Arnel Company. In December 1992 and January 1993, the VA's Contracting Officer ("CO"), responding to Delfour's letters demanding

approval of the Arnel flooring by citing statutory competition requirements for Federal contracts and the equality of the Arnel Flooring with the Dex-O-Tex flooring, directed Delfour, by letter, to install Dex-O-Tex Neotex resinous flooring. (R4, tabs 9, 11-14, 16)

On January 30, 1993, Delfour requested a CO's final decision on its change proposal for providing Dex-O-Tex Flooring in lieu of the Arnel Flooring, in the amount of \$14,422.00 which it had submitted on January 29, 1993. (R4, tabs 17, 19)

On March 1, 1993, the CO issued a final decision denying Delfour's request for an equitable adjustment on the basis that: 1) the Contract required the use of Dex-O-Tex flooring; and, 2) if Delfour believed that the specification restricted competition, Delfour should have raised the issue with the CO prior to bid.

Delfour appealed the final decision on March 3, 1993. In its Complaint, filed on March 22, 1993, Delfour states, in pertinent part:

Because of Respondent's actions , the Appellant will realize a \$15,109 loss for having to use the Dex-O-Tex system in lieu of the Arnel System.

(Cmplnt., ¶ 18.)

In the prayer for relief in its Complaint, Delfour asked the Board to either approve the use of the Arnel flooring or to award it a \$15,109 equitable adjustment if Delfour was required to install Dex-O-Tex flooring.

By letter dated May 18, 1993, the VA terminated the Contract for Default. (R4, tab 203)

On May 21, 1993, Delfour appealed the termination for default which was docketed by the Board as VABCA No. 3832, and, on September 21, 1993, Delfour appealed the CO's deemed denial of its monetary claims for breach of contract which appeals were docketed as VABCA Nos. 3897-3901.

The VA's Motion for Summary Judgment was dated December 30, 1993, and was received by the Board, by facsimile transmission, on that date. December 31, 1993 was a Federal holiday and January 1 and 2 were a Saturday and Sunday, respectively. Delfour received its copy of the Government's Motion on January 7, 1994.

DISCUSSION

We will first deal with Delfour's two procedural bases for denial of the Motion. Delfour urges denial of the Motion because it did not receive its copy of the Motion on or before December 31, 1994, as required by the Board's Prehearing Order, dated November 24, 1993. The Prehearing Order stated, in this regard, as follows: "Any dispositive Motion pertaining to these appeals will not be considered unless such Motion is filed with the Board and the other party on or before December 31, 1993." The effect of this Order, since December 31 was a Saturday, was to require the filing of any dispositive motion by January 3, 1994.

Subsequent to the Board's receipt of the Motion on December 30, 1994, by a Memorandum to the Parties, dated January 3, 1994, the Board set the schedule for Delfour's Response to the Motion and the VA's reply. Delfour did not indicate to the Board, until the filing of its response to the Motion, that it had not received the Motion on or before January 3, 1994; Delfour's response was filed with the Board on February 2, 1994, the date specified in the Memorandum to the parties.

The VA has provided no explanation of why Delfour's copy of the Motion was not received by Delfour until January 7, 1994. However, the Motion was timely filed with Board and Delfour has not alleged that it was prejudiced in any way by its receipt of the Motion on January 7. If Delfour was so prejudiced, the Board would have expected Delfour's request for an enlargement of time to respond when the Board set the schedule for response in its Memorandum to the parties. Thus, we find no basis to deny the Motion because of Delfour's late receipt of the Motion.

Delfour also contends that the Motion cannot be granted because the VA has not carried its burden to show that there are no genuine issues of material fact. This contention is based solely on the fact that the VA did not submit supporting affidavits with its Motion. The VA's Motion in this case asserts that there is no genuine issue of material fact, an assertion supported by citation to the existing evidentiary record, the Appeal File. There is nothing in the Board's Rules requiring a movant to submit affidavits in a motion for summary judgment. As we have often noted, we will look to the *Federal Rules of Civil Procedure* ("*FRCP*") for guidance in procedural matters. **Dawson Construction Company, Inc.**, VABCA No. 1967, 85-3 BCA ¶ 18,209. The applicable *FRCP* is Rule 56. There is nothing in *FRCP* Rule 56 requiring a movant to submit affidavits in a motion for summary judgment as a prerequisite to meeting its burden to show that there is no genuine issue of material fact. **Celotex Corp. v. Catrett**, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986); **Continental Collection & Disposal, Inc.**, 29 Fed.Cl. 644 (1993). Therefore, our determination of whether the VA has met its burden of establishing that no genuine issue of material fact exists will not rest upon whether or not the VA submitted affidavits supporting its Motion.

We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. **Saturn Construction Company**, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd. per curiam*, 991 F.2d 810 (Fed. Cir. 1993) (unpublished decision). The moving party carries the burden of showing that there is no genuine issue of material fact. **Celotex Corp. v. Catrett**, *supra.*, at 477 U.S. at 323, 106 S.Ct. at 2553.

As Delfour concedes in its response to the Motion, and as is indicated in the prayer for relief in the Complaint, it is undisputed that Delfour did not install resinous flooring prior to the termination of the Contract for default; nor, for that matter, is there any evidence or claim that Delfour actually incurred any additional costs as result of the VA's denial of its claim.

Were we to find that the Arnel Flooring was equal to the Dex-O-Tex flooring and that use of Dex-O-Tex flooring, in terms of the Contract MATERIAL AND WORKMANSHIP clause, was not "otherwise specifically provided" in the Contract, the VA's direction to install the Dex-O-Tex flooring would be a constructive change to the

Contract. *Jack Stone Co., Inc. v. United States*, 170 Ct.Cl. 281, 344 F.2d 370 (1965). Thus, Delfour's avenue of relief is through an appeal to determine its entitlement to an equitable adjustment for its increased costs under the Contract CHANGES clause. However, since it is undisputed that Delfour incurred no increased costs to install the Dex-O-Tex flooring, the issue of whether the VA had the Contractual right to order the use of a particular brand of flooring is moot.

Delfour argues that this appeal is not moot because, "in the interest of fundamental fairness and justice," it is incumbent upon the Board to determine whether the VA "improperly prohibited competition" in this appeal. The Board is obligated to make this determination, Delfour contends, because, if the VA unfairly restricted competition, the VA breached the Contract for which Delfour would be entitled to damages.

This rather novel argument fails for several reasons. In the first place, the scope of this appeal does not include any claim for breach of contract. Delfour's claim to the CO was solely for an equitable adjustment under the Contract; no claim of breach of contract was made. Second, as noted above, the Contract CHANGES clause, even if the VA's direction were construed to be a change to the Contract, gave the VA the right to direct use of the Dex-O-Tex flooring and also provided Delfour's avenue of relief. Since the VA had the Contractual right to order use of the Dex-O-Tex flooring and the Contract provided Delfour with a remedy if it believed such an order to constitute a Contract change, the VA's direction to install Dex-O-Tex flooring is not redressable under a breach of contract theory. *Triax-Pacific, A Joint Venture v. Stone*, 958 F.2d 351 (Fed.Cir. 1992). Finally, Delfour's claim that the Contract specifications for resinous flooring unfairly restricted competition because it is untimely. It is well settled that claims based on allegations that specifications are unduly restrictive must be made prior to award of a contract through a bid protest. *Sciaba Construction Corp.*, VABCA No. 2611, 89-3 BCA ¶ 22,031; *Harvey Construction Co., Inc.*, ASBCA No. 39310, 92-3 BCA ¶ 25,162.

Having reached the conclusion that this appeal is moot, it is unnecessary for us to explore whether the Contract flooring specifications required the installation of Dex-O-Tex flooring.

Accordingly, there being no genuine issue of material fact whether Delfour incurred costs which would entitle it to a recovery under the Contract CHANGES clause, the Government is entitled to judgment as matter of law since the termination of the Contract for default rendered this appeal moot.

We should note, however, that any issues relating to the VA's delay in reviewing, or returning Delfour's flooring submittals and the additional costs, if any, costs resulting from such delays are within the scope of the appeal in VABCA No. 3900.

DECISION

For the foregoing reasons, Department of Veterans' Affairs Motion for Summary Judgment in this appeal is **GRANTED**. Accordingly, the Appeal of Delfour, Inc., VABCA No. 3803, under Contract No. V523C-1050 is **DENIED**.

Date: **MARCH 11, 1994**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur.

DAN R. ANDERS
Administrative Judge

MORRIS PULLARA, Jr.
Administrative Judge