



water heaters. However, the specifications are not presented as proprietary and appear to be competitive by listing several approved manufacturers. The Architect rejected the use of A.O. Smith water heaters, based on descriptive specifications only, and directed that PVI water heaters be installed. The cost of PVI water heaters was charged to Southern.

BCB's motion for reconsideration raises three issues: the Panel cannot substitute its judgment for the Architect's and the Panel incorrectly found that the A.O. Smith water heaters meet the storage as well as the warranty specifications. Also, the American Institute of Architects (AIA) South Carolina filed a letter expressing its concern about this case's impact on the traditional role of the Architect as the interpreter of the contract documents. The Panel notes that these issues are fully addressed in the Panel's Order on the merits.

The Panel agrees with BCB that the Architect clearly has the authority to interpret the contract documents to resolve contract controversies, as stated in the Order on the merits. However, S. C. Code Ann. section 11-35-4410 provides for a review of contract controversies, and necessarily a review of the Architect's decision concerning contract controversies, where the construction services are procured under the South Carolina Consolidated Procurement Code. This is not a new procedure as the Panel has previously conducted hearings involving construction contract controversies in which BCB has participated. This case is similar to previous cases as it is essentially a dispute over a change order. Southern did not frame its protest in terms of a change order dispute, but it does ask for the return of the difference in the cost of the comparable item (A. O. Smith water heater) and the item provided (PVI water heater). The cost of the PVI water heaters were deducted from Southern's subcontract amount by Change Order Number 8. [Record p. 36]. Thus, Change Order Number 8 is in dispute. The Panel has reviewed Change Order disputes in prior cases, and

believes the decision of the Architect to be properly under the Panel's authority to review contract controversies, as stated in S. C. Code Ann. section 11-35-4230. The Panel properly reviewed the Architect's interpretation of the contract controversy and found the Architect's decision to be arbitrary.

The Panel found the Architect's failure to consider the performance of the A. O. Smith water heater to be arbitrary, in light of the fact the specifications appear to be competitive but are proprietary because only PVI water heaters would be accepted as meeting the specifications. Because the specifications, especially the requirement of tank size and length of warranty, are the exact specifications of one brand item, PVI, the Architect must not look at only the descriptive specifications, but should consider and place more weight on the performance specifications. To present specifications as competitive, with several preapproved manufacturers, and then interpret the specifications to be limited to one manufacturer, restricts competition and is unfair to bidders.

The Panel affirms its ruling that an Architect must look to performance specifications and not just reject items based on descriptive specifications where the specifications appear to be competitive by including an approved manufacturer's list, but in fact, are proprietary in that only one manufacturer's product can meet the descriptive specifications. The Panel's ruling is based on the fact that the specifications were drafted using one manufacturer's specifications without confirming that other manufacturers could meet the specifications. The root of the problem is the poorly drafted specifications. The lesson to be learned is the need for more care in drafting nonrestrictive specifications to promote competition. Thus, the State is charged with 75% of the additional cost of the PVI water heaters over the cost of the A. O. Smith water heaters.

Southern requests reconsideration of the Panel's Order that Southern pay 25% of the additional cost of the PVI water heaters. The Panel found that Southern contributed to the contract controversy. Southern did not timely provide information requested. Southern first requested approval of the A.O. Smith water heaters in June, 1993, but it was almost a year later, in April, 1994, that further information was provided. Neither did Southern attempt to have the A.O. Smith water heaters substituted. Although the Panel finds that the A. O. Smith water heaters should have been evaluated on performance, and thus accepted as meeting the performance criteria of the specifications, the Panel notes that the water heater dispute may have been handled, in the alternative, as a request for substitution, because the Architect rejected the A. O. Smith water heater as not meeting the descriptive specifications. Southern failed to request substitution of the A.O. Smith water heaters based on the product meeting the performance specifications, if not the descriptive specifications. Thus, Southern contributed to the contract dispute and is charged with 25% of the additional cost of the PVI water heaters.

The Panel declines to alter its original Order on the merits of this case. Although the Panel believes the Order on the merits of this case is clear, the Panel issues this Order to provide guidance in interpreting the Order within the facts of this case. For the foregoing reasons, the Panel denies BCB's Motion to Reconsider, and Southern's Cross-Motion to Reconsider, in that it requests the Panel to alter or amend the Panel's Order on the merits of this case.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:



Gus J. Roberts, Chairman

Columbia, SC

March 13, 1996.