Right to substitute materials

The right to substitute materials can be used to alleviate the possible price instability on materials or equipment originally specified. If a contractor cannot substitute materials or equipment in order to complete the job on time, he may be stuck with added expenses and delays. Therefore, contractors should include provisions giving themselves a right to substitute materials and to be reimbursed for any additional expenses such substitution involves.

If the standard forms of the American Institute of Architects are being used, the contractor should be sure that the Supplementary Conditions of the Contract for Construction include Article 16.1 of the A201 Supplementary Conditions (August 1972 ed.) or equivalent language which provides for substitution of materials and equipment:

16.1 Whenever a material, article or piece of equipment is identified on the Drawings or in the Specifications by reference to manufacturers’ or vendors’ names, trade names, catalog numbers, or the like, it is so identified for the purpose of establishing a standard, and any material, article, or piece of equipment of other manufacturers or vendors which will perform adequately the duties imposed by the general design will be considered equally acceptable provided the material, article, or piece of equipment so proposed is, in the opinion of the Architect, of equal substance, appearance and function.

It shall not be purchased or installed by the Contractor without the Architect’s written approval.

Article 16.1.1 is merely a generalized substitution provision, allowing a substitution of equal material or equipment with the architect’s approval. It does not, strictly speaking, apply to the situation of forced substitution of more expensive materials or equipment due to unavailability and reimbursement for the added expense. However, it can be contract authority to which to contractor can look to convince the architect to approve the substitution of materials of equal quality that are cheaper than those originally specified.

In a policy statement of the board of directors of the American Institute of Architects approved on May 17, 1974, the following resolution encourages substitutions when materials or equipment are in short supply, with a corresponding adjustment of the contract prices:

Materials or equipment known to be in short supply should be avoided in design or specifications. If materials or equipment become unavailable during construction, or if delay in delivery will critically impede job progress, the designer should make every effort to find an acceptable substitute, with any contract adjustment—up or down—made accordingly.

The contractor may want to supplement Article 16.1.1 to provide for...
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the situation of forced substitution of more expensive materials and for reimbursement for the added expense he might face due to such substitution.

The Construction Industry Affairs Committee of Chicago lists the following as one of its several solutions to the shortage of materials:

*If materials or equipment which the contractor (prime or sub) is required to supply are not available, due to a shortage or unavailability, then an acceptable substitute must be found and an adjustment in the contract price made accordingly. A delay in obtaining delivery of the substitute item will be a legitimate reason for an extension of the contract time.*

This clause could be written into a construction contract in order to give the contractor the right of substitution and the right to adjustment in the contract price.

The following clause is another possible supplement to AIA Article 16.1.1; it could stand on its own in a contract to permit substitutions, an increase in the contract price, and an extension of the contract time if materials or equipment become unavailable:

*If materials or equipment which the contractor is required to furnish under the contract become unavailable either temporarily or permanently subsequent to the execution of the contract through causes beyond the control and without the fault of the contractor, then in the case of temporary unavailability, the contract time shall be extended by change order for such period of time as the contractor shall be delayed by such unavailability, and in the case of permanent unavailability, the contractor shall be excused from the requirement of furnishing such materials or equipment. The owner agrees to pay the contractor any increase in cost between the cost of the materials or equipment which have become permanently unavailable, and the cost of the closest substitute which is then reasonably available.*

Such substitution provisions are among the most beneficial provisions for future contracts that a contractor could obtain to protect himself from material price instability. A contractor should always be careful that the substituted materials meet the minimum standards called for in the contractual obligations.