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PABCO KAYLO CONTRACT

At your request I have reviewed our 'Agreement for Manufacture and Sale of Private Brand 'Kaylo' Insulation Products', dated March 1, 1960, including amendments dated April 7, 1960 and December 5, 1960, with Fibreboard Paper Products Corporation. The following are my comments and interpretations.

MINIMUM PURCHASE REQUIREMENT

By a letter dated December 5, 1960, the original Paragraph 8 was amended to read as follows:

"8. Minimum Purchase Requirement

If in any period of six consecutive calendar months during the term of this agreement the invoice value of the products purchased by you (OCF) shall aggregate less than $200,000 then we (Fibreboard) shall have the right to terminate this agreement by notice given to you (OCF) at any time during the calendar month next succeeding said 6-month period, effective upon the date specified therein which shall not be earlier than 60 days after the date such notice is given."

The sole effect of the amendment was to increase the minimum purchase requirement from $150,000 to $200,000.

TERMINATION OF AGREEMENT BY EITHER PARTY

However, Paragraph 1 provides:

"1. Termination

The term of this agreement shall commence on August 15, 1960, and shall continue in effect until terminated by either party at any time upon at least six months' prior written notice to the other."

Therefore, even if OCF should continue to buy the minimum purchase quantities, Fibreboard could still terminate the Agreement without any reason upon six months' written notice.

PURCHASE OF INVENTORY ON TERMINATION

Paragraph 10 provides :

> "10. Purchase of Inventory on Termination
>
> Upon any termination of this agreement, you (OCF) shall be obligated forthwith to purchase and pay for "Kaylo" calcium-silicate products (at the price in effect hereunder at termination) and "Kaylo" printed cartons (at our regular price in effect at termination) in our (Fibreboard's) inventory upon the effective date of the termination, up to but not exceeding an aggregate value of $100,000. You shall take delivery of the same within sixty days after such effective date. (Emphasis added)

It would appear that this provision could have been more clearly drawn as it is subject to several possible interpretations.

OCF could argue that a purchase of "up to but not exceeding an aggregate of $100,000" means that a purchase of any amount of inventory from $1.00 to $100,000 would fulfill its obligations thereunder. If it was intended to require an OCF purchase in the amount of $100,000, the words "up to but not exceeding" should not have been used. The counter argument would probably be that it contemplates OCF's purchase of either all of the described inventory or $100,000 worth, whichever is less.

If the provision is interpreted as requiring an OCF purchase of $100,000 of inventory, it can still be argued that OCF has the right to select which items will be included in its purchase. Of course, this right of selection would be of little value if the inventory did not contain at least $100,000 of items desired by OCF.

REQUIREMENTS CONTRACT

As originally drawn in the March 1, 1960, Agreement, Paragraph 3 provided :

> "3. Quantities
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> The quantities of the products to be manufactured and sold hereunder shall be your (OCF's) requirements thereof for sale and/or installation in the thirteen Western States, including Hawaii and Alaska (but not including, except at your (OCF's) option, direct Government and other sales), subject to the limitation hereinafter set forth." (Emphasis added)

A letter written by OCF dated March 21, 1960, to confirm the mutual understanding with Fibreboard stated in part as follows:

> "1. Your interest is to supply us with the calcium silicate requirements of our Fiberglas Engineering & Supply Division. It is our option to sell or not to sell this product direct to Armstrong Contracting and Supply Company and/or other independent industrial distributing contracting firms." (Emphasis added.)

The original Agreement was amended on April 7, 1960, by the substitution of the following provision for the original Paragraph 3.

> "3. Quantities
>
> The quantities of the products to be manufactured and sold hereunder shall be the requirements thereof of your Fiberglas Engineering & Supply Division for sale and/or installation in the thirteen Western States, including Hawaii and Alaska (and also, at your option, direct Government sales, direct sales to Armstrong Contracting and Supply Company and Armstrong Cork Company, and sales to independent industrial distributing contracting firms) subject to the limitations hereinafter set forth."

Finally on December 5, 1960, Paragraph 3 was replaced by the following:

> "3. Territory
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> The area served by this agreement shall be the thirteen Western States, including Hawaii and Alaska."

This amendment eliminated the requirements provision from the Agreement. Therefore, under the agreement as it now exists, OCF need not buy all of its requirements from Fibreboard. However, if OCF fails to comply with the minimum purchase requirement found in Paragraph 8, as amended, Fibreboard has the option of terminating the Agreement upon sixty days notice. Upon such a termination, or upon termination by either party upon six months' notice, Paragraph 8's provisions concerning purchase of inventory upon termination would come into operation.

Paul

Paul B. Van Buren

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