WHAT TO DO WHEN SPECIFICATIONS REQUIRE SPECIFIC MANUFACTURER’S PRODUCT

With increasing frequency, roofing contractors working on public projects are encountering roofing specifications that call for particular products or roof systems. Specified roof systems may be more expensive than alternatives that contractors believe would be just as effective and far more economical, and contractors may be tempted to propose or install such alternative systems in an effort to lower their prices and win projects.

When a specification requires a particular product, the specification is referred to as “proprietary,” “closed” or “restrictive.” Regulations applicable to most federal agencies define a proprietary specification as one identified by brand name or by details that describe a particular brand name product; however, for some federal agencies, a specification may be considered proprietary if the specified product or system is only available from a limited number of responsible sources. A specification may be proprietary even if it does not name any product or states that “equal” products will be accepted when, in fact, only one product meets the criteria set forth in the specifications. State and local agencies typically follow the same or similar rules.

PRIVATE VS. PUBLIC

Proprietary specifications are not always unlawful. For private projects, an owner can require the use of a specific product and can reject competitive products for any reason or no reason, even though alternative products may be better or more economical. The fact that a private
project may be competitively bid does not infringe on the owner’s right to require a specific product. The contractor has no right to furnish a substitute product without the owner’s express consent, and in the absence of a contractual provision to the contrary, the owner is entitled to insist on strict conformance to its proprietary specification.

On the other hand, when public monies are utilized, public policy strongly favors open competition and proprietary specifications are considered suspect. Depending on the entity promulgating the specification, competitive bid statutes, ordinances or regulations may limit the agency’s ability to issue or enforce a proprietary specification. Public agencies typically are required to avoid even the appearance of favoritism toward particular manufacturers or suppliers because the taxpaying public benefits from promotion of competition.

Public policy favoring open competition for government procurements is so well established that public agencies issuing proprietary specifications may be subject to challenge even when there is no specific statute. However, though open competition is very much favored, closed specifications applicable to public projects are not necessarily unlawful. If the government agency can demonstrate its legitimate needs are such that only a specific product can satisfy those needs, the agency can proceed with the closed specification. Typically, the agency must not only demonstrate there are particular characteristics of the specified product that are essential to the agency’s needs but must also identify and describe those characteristics in the specifications. For roofing construction projects, it is unusual for only one particular manufacturer’s roof system to satisfy the agency’s needs, justifying issuance of a closed specification.
“BRAND NAME OR EQUAL” SPECIFICATIONS

To use a particular product or system without running afoul of policies against proprietary specifications, government agencies sometimes expressly allow for consideration of substitutes but establish procedures that minimize the likelihood that a substitute product will be used. For instance, a contractor may be required to submit a substitute product for approval well in advance of the day bids are due, certify that the proposed product is equal in all respects to the specified product and accept full liability if there are any problems. “Brand name or equal” specifications are intended to describe the characteristics and level of quality that will satisfy the government agency’s needs. The contractor is then entitled to use products that meet the salient physical, functional or performance characteristics of the brand name product.

If there are other products that meet the necessary characteristics, the agency should consider those products. Substitute products are equal when they are functionally equivalent to the stated requirements. However, contract terms and conditions frequently require the contractor to certify or warrant that a substitute product will be equal in all material respects and to accept full liability if it is not. Roofing contractors should assume that such language will be enforceable, and review or approval of shop drawings or submittals by the awarding agency and designer should not be expected to counteract such language. In addition, a substitution clause may also require the contractor to explain in detail how the substituted product will affect the project’s completion; the difference in cost between the listed product and the proposed product; and the differences between the listed product and the proposed product. The contractor may also be required to provide product identification, manufacturer literature, samples, and names and addresses of similar projects where the substituted product has been used and to pay for the

– more –
design team to review the proposed substitution.

Even if the specifications do not contain the “brand name or equal” language and the solicitation has not been the subject of a protest, a contractor may be entitled to use a substitute product if the contract includes the standard government Material and Workmanship clause set forth in FAR 52.236-5. Most federal government construction contracts incorporate this clause, which provides in part that reference in specifications “to equipment, material, articles, or patented process 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 specification, unless otherwise specifically provided in the contract.”

Unfortunately, contractors who do not file pre-bid protests frequently find themselves unsuccessfully trying to obtain additional compensation under the Material and Workmanship clause when the contracting officer has not allowed the contractor’s proposed alternative product.

Unlike pre-bid protests where the government agency has the burden of justifying its specification, a post-contract claim raises a direct conflict between the principles of open and full competition and the government agency’s entitlement to strict compliance with its specifications. When a contractor who has been awarded a contract is seeking additional compensation, the board or court that is hearing the case will focus on whether the contractor’s proposed alternate satisfied the specification requirements, not whether the specification itself was unduly restrictive and more difficult undertaking for the contractor.
CHALLENGING PROPRIETARY SPECIFICATIONS

Even if a specification is unduly restrictive, the specification may be enforced if it is not challenged at an appropriate time and in an appropriate manner. A contractor cannot bid and be awarded a contract based on a proprietary specification and then expect to be permitted to use a different product because the specification was proprietary. The time for challenging a specification as being unduly restrictive is generally before the submittal of bids and awarding of a contract. The Government Accountability Office regularly hears bid protests applicable to federal government agencies, including bid protests based on unreasonably restrictive specifications.

If a contractor bases its bid on a nonconforming product, the contractor assumes the risk that the government agency will adhere to the published requirements and refuse to accept the proffered product. Prospective bidders should protest restrictive specifications before award of a contract or protest the award to a higher bidder if the contractor believes the substitute product he or she intended to use satisfied the specifications but was rejected by the government agency. If a contractor does not file a bid protest and instead relies on its intended use of a less costly product, which is subsequently rejected by the contracting officer who does not consider the less costly product to be functionally equivalent to the specified product, the contractor bears the risk of having to furnish the more expensive product.

CONCLUSION

Proprietary specifications applicable to public construction projects are inherently suspect. Unless there is a unique circumstance in which only one product would meet a
government agency’s needs, a contractor can submit products that are equal in all material respects to a specified product. However, the contractor must be prepared to prove equivalent products are available and act promptly to avoid being bound to a proprietary specification. Rather than waiting until the bid opening date or making a post-award submittal of materials, contractors should carefully review the specifications and submit for approval a proposed substitute well in advance of the day bids are due. By being alert to proprietary specifications, acting promptly after such specifications are issued for public projects and demonstrating that an agency’s legitimate needs can be satisfied by other products, a contractor can bid alternative products and win projects while serving public interest.

# # #