The Problem with Sole-Source Specifications

By Jason Robinson and Jason Dutson

If you've been in the construction business for any time at all, chances are you've seen the recent uptick in the number of manufacturer-driven specifications — where manufacturers collaborate with designers and specification writers to incorporate their products into construction specifications.

This process, known as "sole-sourcing," is strictly forbidden in public contracts, except in narrow circumstances, and while legal in the realm of private contracts, should be avoided. Sole-sourcing stifles competition, drives up owners' costs, and exposes designers and specification writers to unnecessary liability.

The justification given for sole-sourcing products is often that the products themselves, or the vendors supplying the products are the only suitors capable of meeting the project requirements, technical or otherwise. Despite this, however, the impact of sole-sourcing is that owners, contractors, and suppliers are often faced with procuring products at higher costs due to lack of competition.

In recent years, municipal, state, and federal procurement laws have increased protections against sole-sourcing products in public contracts. The laws generally require public owners to follow competitive procurement procedures to promote competitive bidding practices and avoid mismanagement of public funds, collusion, and corruption. To accomplish this purpose, procurement laws require public entities and their design representatives to prepare bid specifications that identify specific product characteristics and technical requirements instead of brand names or manufacturers. These laws encourage healthy competition and promote economic development while still giving designers and spec writers freedom to specify products that achieve

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their design's intended purpose.

All too often, however, designers and spec writers lack specific knowledge about the products they're specifying. In these instances, they delegate the role of writing specifications to trusted manufacturers who welcome the opportunity to draft their customer's product specifications. Herein lies the problem.

Manufacturers don't draft specifications that encourage competition. Instead, they're motivated to specify their own products, leaving bidding contractors without other viable options from which to purchase or install the specified products. Although in some cases manufacturers unashamedly specify their own product names in specifications, they most often employ a more subtle approach, disguising a sole-source product specification as performance-based. Thus avoiding any appearance of bad behavior or impropriety. In either case, both approaches constitute sole-sourcing, and where open competition is eliminated, everyone else pays the price.

In the context of public contracts, if designers adopt manufacturer-driven sole-source specifications without verifying compliance with local and national procurement laws, they invite unnecessary legal exposure. If you're skeptical, spend a few minutes investigating on the internet and you'll find a host of legal disputes arising out of sole-source specifications. Although the legal outcome of these disputes differ, there's no refuting the liability imposed on public owners and their design representatives who incorporate—without adequate justification—sole-source specifications in their contracts.

An architecture firm in New York discovered this when it designed an athletic field for a public university. The architect drafted narrow specifications that favored one type of field turf material. During the project's bidding phase, the artificial turf supplier, Chenango, who was awarded the bid, sued the architect for requiring a very specific type of turf material that it could not furnish.

Chenango discovered the disguised sole-source specification when it delivered its turf product submittal to the architect for approval and was rejected because the product did not meet specifications. Although the specifications appeared »

at first glance to meet fair procurement requirements, Chenango discovered that the field turf material specified in the project documents could only be furnished by one supplier, Chenango's competitor.

Because Chenango was not an approved vendor and could not provide the specified product, the general contractor terminated Chenango's contract and ultimately hired Chenango's competitor. Chenango filed suit, complaining that the architecture firm colluded with Chenango's competitor when it drafted specifications that mirrored its competitor's proprietary turf product, thus eliminating all other potential turf suppliers—including Chenango—from furnishing the turf material. The trial court dismissed Chenango's case, but Chenango appealed and the appellate court reversed the trial court's decision, concluding that Chenango may be entitled to recover damages from the architect. The court expressed concern that the architect "narrowly drafted" specifications that favored Chenango's competitor. The court also expressed concern because Chenango's product was successfully used for identical purposes on numerous other professional and collegiate sports facilities.

With the recent uptick in manufacturer-driven specifications, the court's concern in Chenango is more real than ever. Contractors and suppliers submitting bids on public projects are increasingly discovering more and more manufacturer-driven specifications containing sole-source products. In many cases, contractors and suppliers don't even discover the lack of available alternatives until bidding is complete and their proposals are rejected. Or even worse, until their contracts are terminated because they failed to supply the specified product, or an "approved equal."

Whether a designer is preparing public or private bid specifications, caution should be taken to ensure that contracts promote healthy competition among contractors and suppliers. This approach not only promotes a robust construction economy where everyone benefits, but it also protects against liability.

To avoid liability in the public realm, design representatives should determine whether public owners require unique products that warrant the application of sole-source specifications. If so, designers should research whether less restrictive specifications will satisfy the owner's needs. If necessary, contact multiple vendors to determine whether there are other available products that meet the owner's needs. Finally, if a restrictive specification is warranted on a public project, document sole-source exceptions in writing and consider publishing them for public notice.

Chenango Construction v. Hughes Associates, 128 A.D.3d 1150, 8 N.Y.S 3d 724 (2015). Id. ■

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