

Design and Performance Specifications and the 'Approved Equal'



Specifications routinely request a particular product for construction. Commonly, a contractor bids the work based on the price of the specified product and is awarded the contract. Later, the contractor may find it cannot obtain the product, and an alternate product costs more and delays the schedule.

The contractor then claims the specification is a “design specification” and requests additional compensation, while the architect, engineer or owner states the specification is a “performance specification” and denies the claim for additional compensation.

Which party is right, and does the answer change if, in addition to calling for a specific product, the specification allows substitution with an “approved equal” product?

DESIGN VERSUS PERFORMANCE SPECIFICATIONS

Design specifications describe in precise detail the products to be used and the manner in which the work must be performed. The contractor has no discretion to deviate from the specifications, and most follow them like a road map. Specifications are considered “design” when only one product or a certain composition of materials meets the performance standards set forth by the owner in the specifications.

Performance specifications, by contrast, specify the results to be obtained and allow the contractor to determine how to achieve these results. With a performance specification, the successful bidder is expected to exercise ingenuity in selecting the products, materials and methods.

If the specification allows only one specified product, then it is most likely a design specification. If that is the case and the product is unavailable, then the contractor has a colorable claim for additional compensation from the owner to cover any additional costs.

Under these circumstances, the specification is considered to be defective and the owner is considered to be in breach of the implied warranty of adequate specifications. As such, the owner bears the cost.

THE APPROVED EQUAL

However, if the specification calls for a specified product, but permits substitution of an approved equal or “like equal,” most courts will hold that this converts the specification from a design specification into a performance specification and no implied warranty of adequate specifications exists.

Consequently, the contractor bears any additional costs of procuring the substituted, but equal, product.

Owners, engineers and architects recognize that including the approved equal substitution process in the specification generally converts the specification from a design specification into a performance specification and squarely places the risk of increased costs on the contractor if the product is unavailable and an alternate product proves more costly.

Under procurement laws for public work in most states, this usually is not an issue, as many state laws place strict restrictions against sole source or so-called proprietary specifications.

But on private work, where such laws generally do not apply, specifications should be tailored to allow substitution except in the most particular of circumstances.

If the specified product is unavailable and an approved equal is permitted, the contractor is responsible for quickly locating an alternate supplier, within its bid cost, and making a detailed submittal to the owner or its representative demonstrating that the substitute product conforms to the standards of the specification.

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