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# **Office of the Inspector General**

Commonwealth of Massachusetts

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## **Proprietary Specifications in Public Construction Projects**

July 2003

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## **Introduction**

This advisory provides guidance to public officials on the use of proprietary specifications for contracts awarded pursuant to the construction bidding laws, M.G.L. c.30, §39M and M.G.L. c.149, §§44A-M. This advisory also discusses a Massachusetts Appeals Court decision and provides several examples of misuse of proprietary specifications for roofing projects. In general, proprietary specifications are descriptions of materials that either cite a specific brand name or are written so restrictively that only one vendor or manufacturer can supply the desired items. Such specifications are generally disadvantageous in public construction contracts because restricting competition increases prices to public owners. Efforts to assure open competition can assist governmental bodies in controlling the costs of construction projects while still maintaining high-quality standards.

## **Background**

### **Competitive Specifications**

Contract materials specifications prepared by a governmental body or its project designer should be written to promote competition. For every item specified, the specifications should either name a minimum of three brands or provide a description that can be met by at least three vendors or manufacturers. Alternatively, the specifications could detail the functions to be performed or the results to be achieved, so that any manufacturer whose products meet the functionality requirements can provide the necessary materials. Performance specifications should be used whenever it is possible to measure the performance of a product or method of application accurately. In an example from the roofing industry, a governmental body's designer could specify that minimum insulation characteristics for a membrane roof have a

comprehensive strength of 25 psi minimum when tested in accordance with ASTM<sup>1</sup> D-1621.” Any manufacturer of membrane roof systems that can meet this standard can compete for the contract. Of course, if a standard is identified too specifically, it could actually result in a specification that limits products to one vendor or manufacturer. At a minimum, competitive specifications should be written so that at least three vendors or manufacturers can meet them.

### **Proprietary Specifications**

M.G.L. c.30, §39M(b) requires that proprietary specifications for public construction projects, including buildings,<sup>2</sup> shall only be used “... for sound reasons in the public interest stated in writing in the public records of the awarding authority ... such writing to be prepared after reasonable investigation.” A governmental body must document the reasons and provide them in writing to anyone making a written request for the information.

The governmental body therefore has the responsibility for ensuring that a reasonable investigation is conducted before proprietary specifications can be used in an invitation for bids (IFB) for a public construction project. For example, a reasonable investigation of roofing materials might involve researching commercially available roofing products, including costs, the expected useful life of the installed materials, available warranties, and results experienced by other owners who had purchased and installed various types of roofs. If, after obtaining this information, a governmental body determines that it cannot obtain the desired quality through open, competitive specifications, the decision to use the proprietary specifications is based on full information.

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<sup>1</sup> American Society for Testing and Materials (ASTM) is a non-profit private organization that sets testing standards for thousands of commercially available products.

<sup>2</sup> M.G.L. c.30, §39M(b) expressly applies to construction contracts procured under M.G.L. c.149, §§44A-M as well as to construction contracts procured under M.G.L. c. 30, §39M.

Thus, a governmental body must be able to document the basis for a decision to specify a proprietary product or a restrictive technical requirement. This documentation should be kept on file and made available promptly upon request.

If after a reasonable investigation, the governmental body determines that the project requires use of proprietary specifications, the specifications must include an “or equal” clause. An “or equal” clause is a provision allowing bidders to furnish items that are equal to the specified items. Under the law, an item is considered equal if it:

- Is at least equal in quality, durability, appearance, strength, and design;
- Will perform the intended function at least equally; and
- Conforms substantially, even with deviations, to the detailed requirements contained in the specifications.<sup>3</sup>

The governmental body, through its designer, determines whether a bid item is equal to the item specified.

### **Massachusetts Appeals Court Interpretation of Law**

A recent Massachusetts Appeals Court decision<sup>4</sup> interpreted M.G.L. c.30, §39M(b). The case involved specifications for an emergency vehicle exhaust system written by a town for construction of a new fire station. The town’s specification required bidders to submit a PlymoVent exhaust system or equal. Submission of an exhaust system other than a PlymoVent would be reviewed by the town’s fire department to determine if the substitute system was “equal” to PlymoVent’s.

The fire department’s architect disapproved the low heating-ventilation-air conditioning (HVAC) subbidder’s proposed exhaust system,<sup>5</sup> finding that the alternative system did

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<sup>3</sup> M.G.L. c.30, §39M(b).

<sup>4</sup> *E. Amanti & Sons, Inc. v. R. C. Griffin, Inc.*, 53 Mass.App.Ct. 245 (2001).

<sup>5</sup> The protesting subbidder was the lowest responsible and eligible bidder, but had estimated its bid based upon use of its preferred system. Its system was lower in cost than the name brand specified in the town’s IFB.

not meet the performance requirements in the specifications. The HVAC subbidder challenged the fire department's architect to name two additional exhaust systems that he would consider equivalent to the named system. The architect identified three other manufacturers, but informed the subbidder that he did not know whether its product would be considered equal to the safety features specified in the town's IFB. In order to retain the contract, the subbidder supplied the named exhaust system, PlymoVent, under protest.

The court found that the town's specifications were proprietary and that "[p]roviding the name of a single vendor and placing the burden on the bidder to discover alternatives did not constitute competitive specifications. . . ."<sup>6</sup> In addition, although the town had included "or approved equal" wording, the court found that the town had not made a written report in the public record constituting a rationale for using the proprietary specifications. Due to its failure to adhere to the statutory requirements related to proprietary specifications, the town was liable to the contractor for its lost profits.

### **Roofing Specifications – New Jersey**

Use of brand-name (proprietary) specifications for public construction projects has been problematic in other states. The State of New Jersey Commission of Investigation issued a report in September 2000 entitled *Waste and Abuse: Public School Roofing Projects*. The statewide probe involved a review of 115 separate roofing projects in 39 of New Jersey's school districts. The roofing projects examined by the commission represented a total taxpayer investment of more than \$37.8 million dollars.

According to the report, the Commission found evidence of "widespread cost-gouging; unscrupulous bidding practices; contract manipulation; questionable design, installation and inspection procedures and other abuses."<sup>7</sup> The Commission found instances where design consultants, working in secret partnership with suppliers and manufacturers of

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<sup>6</sup> *Id.* at 159.

<sup>7</sup> *Waste and Abuse: Public School Roofing Projects*, New Jersey Commission of Investigation, September 2000, page 1.

roofing materials,<sup>8</sup> prepared proprietary specifications that favored a set of products that eliminated competition. Technical hurdles were placed throughout project specifications to “foreclose the possible substitution of less expensive materials of similar or equal quality.”<sup>9</sup>

### **Roofing Specifications – Massachusetts**

This Office has observed improper use of proprietary specifications for roofing projects in Massachusetts. For example, contrary to the *Amanti* decision, some governmental bodies have issued specifications that named a particular brand but purported to allow vendors to propose other products equal to the named brand. Simply adding the phrase “or equal” does not transform a brand-name, proprietary specification into a competitive specification. The specifications reviewed included technical requirements that effectively prohibited use of materials other than the named brand, thereby nullifying the “or equal” provision. In one recent example, the specifications for a school building roof stated that the roofing membrane had to be made through a certain process that only one manufacturer utilized. In another example, the municipality specified that the school building roof had to be a certain color that was available from only one manufacturer. Neither governmental body was able to produce written justifications for these technical requirements. By including technical requirements that only one manufacturer could meet, the specifications effectively eliminated competition; without written justification, the proprietary specifications were unlawful.

Another Massachusetts governmental body issued bid specifications to replace and/or repair two school roofs. The scope of work required installation of a proprietary roofing membrane, with other components to comprise a roofing system. The specifications required that any deviations from the proprietary specifications or shop drawings would require the roof manufacturer’s prior written approval:

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<sup>8</sup> In one instance the Commission found that a design consultant representing a school district received fraudulent payments (usually disguised as ‘roof inspection fees’) of more than \$361,000 from a leading supplier of premium-priced roofing materials.

<sup>9</sup> *Id.* at page 6.

The components of the [named manufacturer's roof] are to be products of the [named manufacturer] or approved equal as indicated on the Detail Drawings and specified in the Contract Documents. Components to be used that are other than those supplied or manufactured by [named manufacturer] may be submitted for review and acceptance by [named manufacturer]

Proponents of other roofing systems could request that their product be considered "equal" to the named brand, but according to the specifications, the approval for substitution would rest with the manufacturer of the proprietary roofing system named in the specifications, rather than the governmental body or its architect or engineer.

In addition, the governmental body did not prepare a written determination finding that use of the proprietary specifications was in the public interest, as required by M.G.L. c. 30, §39M(b). Most important of all, the specifications did not allow for any real possibility of substitution of equal products because they required approval by the manufacturer of the named product rather than by the governmental body. It is inconsistent with M.G.L. c.30, 39M(b) for an awarding authority to delegate to a private manufacturer its responsibility to make determinations of equivalency. It would clearly be unrealistic to expect the manufacturer of a product that has been identified as the only acceptable material (and therefore is essentially guaranteed sale of its product under the contract) to make an unbiased determination that one of its competitors offered an "equal" product.

Other Massachusetts governmental bodies have also issued proprietary roofing specifications that did not comply with either the requirement of a reasonable investigation or the "or equal" provision of M.G.L. c. 30, §39M(b). In some cases, the committee or board responsible for construction appears to believe that with an affirmative vote of its members, the governmental body could forgo the required investigation and "or equal" language and simply issue proprietary roofing specifications for every school or other building project in its jurisdiction. This belief was mistaken.

A governmental body cannot vote to require that only a certain brand-name roofing product be used, without substitution, on every roofing project in its jurisdiction. Votes on whether to issue a proprietary roofing specification may be taken on a project-by-

project basis after a reasonable investigation concludes that each project is justified in the public interest. Furthermore, the law as currently written states that “equal” products must always be considered. The committees or boards had not conducted any investigation or prepared written justifications prior to voting for proprietary specifications. There is no provision in M.G.L. c.30, §39M (by vote or other means) that would allow elimination of the “or equal” requirement from even a justified proprietary specification.

In reviewing examples of proprietary specifications for school roofs in Massachusetts, this Office noted a disturbing pattern. A number of communities requiring name-brand roofing materials and application processes have issued specifications that appear identical in wording and paragraph structure, and require what is clearly a specific or named manufacturer’s warranty. The inescapable conclusion is that these specifications were obtained from a single manufacturer. This Office has consistently recommended against using manufacturer’s specifications because of the inhibiting effect that such restrictive documents have on competition. Further, a governmental body that pays a designer to draft specifications has a right to expect the designer to prepare specifications that will foster competition and that comply with statutory requirements for public construction projects. The use of “canned specifications” from manufacturers is rarely appropriate for public construction projects.

### **Recommendations**

Proprietary specifications, while permitted by Massachusetts construction law, may be used only after careful consideration and proper documentation that the use is justified by sound reasons in the public interest. Otherwise, such specifications may not withstand bid protests or litigation, and may necessitate rebidding construction projects with attendant costs. More importantly, use of proprietary specifications may adversely affect the cost and quality of public construction projects, and create an appearance of favoritism by public officials.

Governmental bodies or their designers should conduct research and document their findings before determining that proprietary specifications are necessary to the public

interest. Often such research, when conducted properly, will lead a governmental body to determine that instead of using proprietary specifications, the use of performance-based specifications will provide the needed quality at a competitive cost. Performance specifications detail the functions to be performed or the results to be achieved, so that any manufacturer whose products can meet the functionality requirements can provide the necessary materials. Performance specifications should be used whenever it is possible to measure the performance of a product or method of application accurately.

As learned from the *New Jersey* report, project designers should be independent, with no financial ties to material distributors or manufacturers. This Office recommends that governmental bodies require designers to sign a non-collusion form in the designer selection process to discourage improper financial relationships between designers and manufacturers. The non-collusion form should be added to the current form required by M.G.L. c. 7, §38H(e). For example, the form could state:

The Designer certifies under the penalties of perjury that it has not offered, given, or agreed to give, received, accepted, or agreed to accept, any gift, contribution, or any financial incentive whatsoever to or from any person in connection with the contract. As used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals. Furthermore, the Designer certifies under the penalties of perjury that throughout the duration of the contract, it will not have any financial relationship in connection with the performance of this contract with any materials manufacturer, distributor or vendor. The provisions of this section shall not apply to any stockholder of a corporation the stock of which is listed for sale to the general public with the securities and exchange commission, if such stockholder holds less than ten per cent of the outstanding stock entitled to vote at the annual meeting of such corporation.

_____ Signed	_____ Date
_____ Name of architect	

Specifications for public construction projects should not contain any unnecessary technical requirements that would unreasonably prohibit the use of more cost-effective materials of equal quality. Ideally, specifications for materials should be based on

generally accepted standards in the applicable industry (such as roofing materials), not on proprietary specifications. For example, the architect preparing the specifications could reference the ASTM standards for materials.

Finally, public officials responsible for construction projects and their designers should be familiar with the legal requirements governing public construction projects. Accordingly, this Office recommends training<sup>10</sup> for school officials, local administrators, and any other public officials responsible for public renovation, repair, and construction projects, especially when such projects are tasked to public officials who do not normally oversee design and construction projects.

### **Legislation Proposed by the Office of the Inspector General**

There are cases where, after a reasonable investigation, a governmental body concludes that only one acceptable brand of product exists, or that technology has advanced so rapidly that fewer than three brands or manufacturers of a particular material are available in the commercial marketplace. To clarify the requirements governing the use of proprietary specifications in public construction projects, this Office has proposed legislation that would amend M.G.L. c.30, §30M(b). The change proposed by this Office would clearly define competitive and proprietary specifications. *Competitive* specifications would be defined as specifications that can be met by at least three named brands of material, or describe material that can be met by a minimum of three manufacturers. A governmental body that requires a more restrictive (that is, proprietary) specification that could not meet this standard would then be required to document its investigation and consider “equal” products, as currently required by M.G.L. c. 30, §39M(b).

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<sup>10</sup> One source for such training is this Office’s Massachusetts Certified Public Purchasing Official program, which offers training and professional certification in design and construction contracting as well as other areas of public procurement.