

DEALING WITH THE “OR EQUAL” ISSUE

This a very simple issue from a legal standpoint. *Specifiers are allowed to single source.* It is their responsibility to ensure that their client gets a product with appropriate performance. The key reference document is the article from “The Decsipher” published October 1975 (*reprinted on the following page*). The court ruling is still in effect today.

Now for reality...people don't like to be single-sourced. They want to feel that they have gotten a fair price and service, and they need to see multiple bids to feel comfortable. Here's how to meet that need:

1. Replace spec wording of “manufacturer and product” with “supplier and product.”
2. Specify “sheet material to be Corian® Surfacing.”
3. Specify “provide fabricated products as identified on approved drawings.”
4. List three or more suppliers (fabricators) in Part 2 of the specification.

This ensures that the desired performance will be provided for the client and that competitive bids will be available.

Once the specifier is comfortable with this concept, they can include performance specs to further strengthen their position (with the client and General Contractor) that they are responsible for the performance of the installed project and can specify specific materials and products. The GC still has the freedom to request substitution, but the GC must prove “equal” performance.

THE FEDERAL COURT VERIFIES THE PROPRIETARY SPEC IS LEGAL — A PRECEDENT!

THE SPECIFYING ENGINEER'S RESPONSIBILITY AND ACCOUNTABILITY ALSO CLARIFIED

On December 14, 1974, the Federal 1st Circuit Court affirmed a very important decision handed down by the United States District Court, Massachusetts in the case of Whitten Corp. vs. Paddock, Inc. (4/12/74). The U.S. Supreme Court several weeks ago rejected further appeal and further review, thus supporting the final decision of the Federal Circuit Court. The decision is unique in that it defines the Specifying Engineer's clear authority at the federal level where relevant previous decisions have been at lower court levels.

Four major judgements regarding specifications develop from this landmark decision:

1. The court ruled that a proprietary specification (one brand only) is not a violation of antitrust law. Further, the court stated that trained professionals—specifiers—make informed judgements on the systems which best serve their clients' needs.

Comment: Technically, few brands of M/E equipment are exactly alike...if the engineer decides to limit his specification to one source, he has the responsibility to do so and to enforce it.

2. The court ruled that other suppliers can qualify as "or equal" only when the specifier chooses to waive specifications or permits the supplier to also bid.

Comment: It is clearly stated here that the contractor cannot decide that another supplier is "equal" to the brand specified—that the specifier is charged with this responsibility and judgement. Where "or equal" is stated in the specification it is the engineer's and not the contractor's decision as to what brands or suppliers qualify as equal or don't qualify as equal.

3. The court stated that the specifier... "will waive specifications in order to obtain a better product for his client...."

Comment: The implication is that the contractor cannot make a specification substitution judgement. It states that only the specifier (from start to finish—in the construction process) can ultimately decide that a better product is available and change the brand originally specified in his client's best interests.

4. The court concluded... "The burden is on the supplier (manufacturer) who has not been specified to convince (the specifier) that his product is equal for the purposes of a particular project...THIS REDUCES ITSELF TO A MATTER OF SALESMANSHIP...."

This is one of the most powerful court judgements in engineering construction law history. It should be a very important consideration in every marketing plan today and tomorrow nationwide. The judgements passed down most certainly reinforce the editorial position of our publication and greatly enhance the Specifying Engineer's legal brand selection authority.

Reprinted from "The Decsipher" October, 1975, the official publication of the Detroit Chapter—CSI (The Construction Specifications Institute).

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