

Proprietary Specifications – In the Client’s Interest, a Critical Need for a Set of Protocols

Whitepaper

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Statement of Need

Equipment substitution has long been an issue of concern in the foodservice consulting industry. Often a custom-designed kitchen is finished and operational, but the operator is very frustrated because the equipment specified was substituted without regard to its intended function/purpose. Too often the consultant and/or product representatives (reps) are blamed for changes of which they weren't aware or were beyond their control. Some examples of this include:

- Foodservice operators who complain that some of the equipment installed won't perform to expectation.
- Manufacturer's reps, whose proposals were passed over in favor of lower bids, view the time spent supporting the client with detailed documentation/education, designing and bidding on those projects as wasted.
- The consultant hired to represent the client's interest has been left out of the substitution submittal and approval process, yet he is held responsible for any or all design, installation and/or performance failures.

Equipment substitutions occur for many reasons, but most commonly their aim is to maintain or reduce a project's capital cost. Problems arise, however, when substitutions are made without regard for potential short- or long-term negative operational impact.

This paper seeks to explore the primary causes and perspectives of those involved, and to provide a plausible solution that, in the best interest of the client and/or foodservice operator can be supported by the Foodservice Consultants Society International (FCSI), North American Food Equipment Manufacturers (NAFEM), Manufacturers Agents Association for the Foodservice Industry (MAFSI), Food Equipment Dealers Association (FEDA) and the foodservice and construction industries. Ultimately, the goal is to seek support for adopting a set of protocols that will prescribe an unbiased process for submitting and evaluating legitimate substitution requests and define an appeals process to protect the client's operational and financial performance objectives.

Current Condition

In the U.S., federal, state and most local governments have established competitive bid laws for public projects in an effort to maintain an equitable business climate. The intent is to eliminate price fixing/gouging by equalizing the competition at the level of the prime contractor (the firm directly contracted by the government or client) by requiring bids from a minimum of three prime contractors.

Correspondingly, most business and not-for-profit organizations have mandated similar competitive bid procedures.

The term "competitive bid," however, often is misinterpreted and applied to erroneously *everything* in the furniture, fixtures and equipment purchase and installation package of a foodservice facility. Thus, a common practice is to solicit three competitive bids for the entire package as opposed to bids from three different manufacturers for *each* piece of equipment/product within it. For example:

A government client was building a new cook-chill kitchen with a programmatic need to prepare and serve up to 15,000 meals per day (105,000 meals per week) over a maximum 12-hour period, five-days-a-week. A menu review and explosion supported the intent to produce more than 75 percent of the menu items from scratch. This client was currently operating a smaller cook-serve kitchen and had extensive experience working with a variety of food preparation and storage equipment (to include refrigeration). The client had ample documentation to support the relative strengths and weaknesses of the primary manufacturers, as well as their ability to provide timely and reliable repair and maintenance support. In this instance, the client was adamant that food mixers, slicers and ice machines specified would come from designated manufacturers only.

In the end, however, the client was shocked to discover those very items were substituted with other manufacturers' equipment, and without the consultant's knowledge. The reasons why were varied and complex:

- The general contractor had severely underbid portions of the construction project and was desperate to cut costs in any legal way possible.
- The kitchen equipment subcontractor was equally motivated to cut costs as it had low-balled the estimate anticipating that lower costs substitutions would be acceptable.
- The client's project manager retained a third-party value-engineer to cut costs without sacrificing project integrity. This process was perceived to be a relative bargain as the value engineer's compensation was a pre-specified percentage of the savings generated.

No one thought it necessary to involve either the consultant or the end-user client in these decisions. In less than two years, the so-called savings evaporated as a result of high repair and maintenance costs and, in one case, having to replace a completely ineffective floor mixer.

Common Causes for Substitutions

Some common reasons for substitutions:

Specifications

Some project specifications list multiple manufacturers along with equipment/product performance specs—a strategy that *should* limit opportunities for substitutions. Some theorize that many manufacturers of like equipment are equally acceptable to both the client and the consultant and allow the substitution.

The process can break down, however, if the consultant has a reputation for allowing substitutions; some bidders may assume it's safe to substitute whatever they choose. Also, within the product lines of any given manufacturer, differing product features and/or manufacturing quality levels exist. Therefore, when

listing only the manufacturer for a piece of equipment rather than the exact model number, the risk for substitution increases. In some cases, there are significant product quality variances among manufacturers. Listing multiple manufacturers for a particular piece of equipment rather than an exact spec increases the likelihood for substitution. If necessary, the client and/or consultant should provide additional documentation as to why a particular manufacturer's brand is being specified.

Consultant/Specifier Not Responsible for Supervision/Construction Management

This scenario is common in federal government projects, where supervision is not performed by the consultant/specifier. Therefore, the decision as to whether a substitution request is valid has been left up to someone who might not fully understand the intent of the specification, yet feel free to make the substitution.

An example of this occurred when a client's purchasing agent decided that heavy, reinforced floors for new walk-in refrigerators and freezers were unnecessary. The purchasing agent failed to appreciate that these units were designed to store fully loaded double-high pallets, and that the sheer weight of the pallet jack and products far exceeded the weight tolerance for the amended specification. Within two months, the originally specified reinforced floors had to be installed at three times the original cost. This was an all-too-obvious case of where one phone call to the consultant would have avoided a very expensive operational and financial blunder.

Value Engineering

Over the past decade, the term "value engineering" has taken on a negative connotation. This is most unfortunate for professional value engineers and value analyzers who do far more than seek out low-cost equipment product substitutions. In fact, a value engineer's overall goal for a project is "value improvement," which can mean choosing more expensive equipment or materials because they better meet the operational needs of the facilities operator in terms of longevity and service support.

Some of the negative feelings surrounding value engineering come from incentives offered those who can lower a project's cost. Such changes commonly are called a value-engineered change proposal (VECP). Under some contracts, the party presenting the VECP can receive upwards of 10 percent of the savings for the first year of the project—an incredible percentage in the current bidding environment.

This is a situation where the client (the people tasked to operate the kitchen on a day-to-day basis) is pushed unnecessarily to perform and incur higher costs due to one or more persons being either ill informed or shortsighted about the importance of specification integrity. The absence of a defined process for initiating, justifying and seeking approval for substitutions requires immediate corrective action!

An example of this involved the substitution of floor mixers. What the value engineer did not fully appreciate was that the original item had its grinder/grater head in front while the substituted item placed it to the side. Since this mixer had been placed next to a half-wall, grinder/grater attachments could not be used, and a separate piece of equipment had to be purchased in this case.

This situation demands better coordination and communication of the entire value engineering and substitution process! The client's long-term operational and financial interest must receive absolute priority.

Project Over Budget

For many reasons, it's not unusual for the final cost of a project to exceed its original estimate. This is particularly common on projects with a maximum allowable construction cost (MACC), such as school projects.

When a project has come in after bid beyond the MACC, it's in jeopardy of cancellation or redesign unless the overall cost can be reduced. Factors that push the bid beyond the MACC include, but are not limited to:

- Budgets being set before the project is adequately defined, much less designed;
- Budgets set not on the true project cost, but on the hope that a bond issue or full financing can be approved;
- Inadequate cost estimation;
- Inadequate pre-design programming; and
- Change in the bidding climate.

These conditions create an environment in which the design team, the owner and the apparent low-cost general contractor must scramble to reduce the cost to meet the MACC and "save" the project. When these situations occur, there should be a coordinated effort to determine how and why the savings in the kitchen/foodservice portion of the project will be generated.

General/Prime Contractors

General contractors can influence substitutions significantly in two ways:

1. Once a contract amount is approved, every dollar *not* spent may improve the prime's bottom line, when those savings should be passed on to the owner.
2. How general contractors manage their subcontractors affects their profits and overall project costs. A general contractor who looks for every opportunity for substitutions and/or change orders from the start of a project likely will cause subcontractors to shrink their costs as well.

Architects

Architects can influence substitutions in multiple ways, such as not using foodservice consultants or adapting kitchen designs and specs from previous projects. In the latter example, the equipment and product specs might list outdated model numbers that may necessitate substitutions or simply be a misapplication of one client's program for another.

Not having a foodservice design professional craft a plan with current specs also creates openings for substitutions by unethical subcontractors. The subcontractor may convince the architect there's a problem getting the equipment specified before the project deadline ... but they could supply another item "just as good" as the original in time. Additionally, the current foodservice personnel is asked, "What they want," without being offered newer, more versatile or menu-specific equipment.

Architects also can create the substitution problems if they accept alternatives recommended by the general contractor before seeking input/approval from the foodservice consultant. They also may

jeopardize a project when they accept poor-quality bid documents. When documentation is clear and accurate, however, there is little room for any contractor to suggest alternatives.

Additionally, when the architectural project manager holds the general contractor to the design documents, substitutions that occur solely for the sake of profits will be minimized or greatly reduced.

Owners

In this discussion, the “owner” is not necessarily, the foodservice client. In large projects where foodservice is a relatively small part of the overall project; there can be just as large an internal disconnect begging for better communication and understanding.

The owner for a given project, either private or public, can invite unwise substitutions if he communicates directly with the contractor while bypassing the design team. While it is difficult for an owner not to jump at a chance to save \$1,000 on a piece of equipment, there are many types of equipment in which a reduction of \$1,000 dollars means a major quality difference.

Since it's likely the owner has no way of knowing the actual costs or quality level of the equipment he's buying, he may make an under-informed decision by accepting substitutions without consulting the design team first. The same products presented by the equipment dealer as \$1,000 apart in price may be considerably further apart in actual price. But if the owner relies on the design team to explain the potential quality variations, he might not be as quick to take the change.

Kitchen Equipment Contractors (Dealers)

The kitchen equipment contractor (KEC) can be a major source for substitutions. The reasons they may choose to substitute or attempt substitutions include, but are not limited to:

- Extremely tight bidding environment;
- Pressure from the general contractor to reduce costs;
- Pressure from manufacturers to substitute;
- Opportunity to improve rebate opportunities and/or buying-group incentives;
- Desire to move equipment left from previous projects or sitting in the warehouse; and
- Efforts to convince the client that substitutions are acceptable.

While some KEC's substitute often, it should be noted that the opportunity to do so must exist (i.e. a tight specification wasn't made by the consultant) or the substitution will not take place. When projects are held to specification, opportunities for random substitutions disappear.

In unofficial polling of equipment dealers, most indicate that they would prefer to bid projects as specified, but that they fear losing projects to other dealers who won't hold to specification.

Manufacturer/Factory Representatives

The manufacturer or factory representative also is a potential source for substitutions, particularly when presenting the potential substitution to a bidding KEC prior to bid, but not in line with the specified timeline for approval on substitution requests.

It also has been reported (claimed) that these substitutions are sometimes presented to the KEC as "accepted alternatives," when the specifier on the project likely would not have accepted the substitution. There also have been cases reported in which the bidding contractor said the representative told him the item was "pre-approved," when in fact the representative did not.

Representatives also influence substitution in projects where, prior to the bid, the KEC requests pricing on equipment not specified in the bid—but the representatives prepare the bid anyway. Here the two parties find themselves in a gray area in which they discuss the likelihood of whether a substitution will be allowed. Where the specifier has written a tight spec for the equipment, however, this exercise is futile.

Since sales representatives also present equipment options to end users (foodservice directors, etc.), there are times when those presentations fall directly in the timeline for a particular bid in which *their company's equipment may not be a part of the bid specifications*.

Ideally, sound, competitive relationships within their sales territories would lead those reps to speak directly to the project designer when they discover that a project is bidding and/or under design. Additionally, since one of the project designer's responsibilities is to help end-users evaluate each proposed piece of equipment, it's essential the designer is kept "in the loop" regarding any communication between sales reps and end-users.

Consultants

The consultant's role in substitutions boils down to two direct issues: equipment specifications written; and how they manage construction or supervise their projects.

First, if consultants write very loose specifications that allow any manufacturer's product to meet project requirements, it is expected that all bidders will find the absolute lowest-cost item available, regardless of quality. One of the identified problems within the dealer/KEC community is those bidders who also assume that because an equipment specification lists multiple manufacturers (brands) on a given item, all brands are open to bidding. It's reasonable to assume that even an ethical dealer, when faced with concerns over how others will bid the project, will feel forced to consider lower-cost equipment alternatives.

By not writing very tight specifications, the idea that the consultant envisioned a particular piece of equipment as ideal winds up lost in the search for profits.

The second issue in which the consultant plays a direct role in substitutions involves management of the project. Even if the consultant writes a tight specification, proprietary or limited to three manufacturers, the consultant still can create problems if the specification is not "held." This leads to the development of a "bidding history," in which a KEC learns a particular consultant's specification has no real meaning. The result is multiple substitutions occur and the end product doesn't reflect the consultant's intention. Here it's not likely, even with a lower bid cost, that true value was achieved for the client.

Proposed Solution

The intent of this paper is to offer a workable solution to the problem of undesired substitutions, and that by examining those issues that trigger substitutions, a process or set of protocols will be developed that

provide real solutions. The consultant's obligation to protect the integrity of the original program and the foodservice client's best interest also must be respected.

The ultimate solution should be the adoption of an industry standard set of protocols that are endorsed and followed by everyone involved in the design, specification, bid and construction process. All participants would be expected to sign off on the protocols, which on a situation-by-situation basis could be standard or modified to fit a particular situation or set of circumstances. The owner, architect and kitchen consultant would handle this responsibility prior to the formal start-up of a project. Such an easy-to-implement process would provide the foodservice client with the assurance that the entire project team, with the guidance of the foodservice consultant, is pledged to protect the integrity of originally stated goals and objectives.

Specifically, What works?

The number-one method of operation that seems to greatly reduce or eliminate unwarranted substitutions is the use of a proprietary specification. This is a specification describing or requesting a single item by manufacturer and model number. This would include any accessories deemed necessary by the specifier for that product to work optimally.

It should be noted that performance specifications, particularly those that describe the product in complete detail as to size, utilities, operational capacities, etc., can in fact be considered a proprietary specification when the operation described can only be fulfilled by one item of equipment. The proprietary specification refers to those that list make and model of a given item.

To further the discussion, it is important to include the following assumptions that go along with the specification. When a properly documented, proprietary specification is written and held, it should mean:

- The item meets the need and quality level of the design and facility;
- The item was reviewed and accepted by the foodservice operator/owner;
- There are specific reasons for the selection. These could include, but are not limited to: menu requirements, production capacity issues, service issues, matching existing equipment, need for specific training, representation/follow-up in remote areas, strong factory support, ultra-unique benefits; and
- There are no ethical violations on the part of specifier (see Ethics section).

Why This Works (Benefits)

The proprietary specification has several benefits, which contribute to the project and to the industry in general. To the project, proprietary specifications should mean:

- The project was evaluated and the equipment selected best meets the program/design/budget criteria;
- The bid documents are easier to bid due to clarity and the reduced need for searches for alternatives;
- The utility requirements are thoroughly coordinated to meet the intended equipment;
- The equipment decision-making process for the project centers on the consultant, who by definition, has the client's best interest in mind;
- Training for the equipment is readily available;

- The equipment is well supported (parts, technical service, representation, etc.);
- The equipment is within the budget for the facility; and
- Change orders are reduced and/or eliminated as equipment matches specifications.

Benefits for the overall industry include but are not limited to;

- Quality matters, even if it costs a little more. Manufacturers always will be tempted to keep their product cost as low as possible to compete with others'. The proprietary (or sole source) specification provides those manufacturers seeking to develop cutting-edge solutions the freedom to build in true value and improve their products. As long as the consultant can see the value, he may specify the product, even if it is the higher-priced unit, because "value" does not always equal lower prices.
- Proprietary specs allow consultants to specify new technology and true energy-saving equipment. This allows manufacturers to come to market with new products, knowing a consultant can specify them. Without proprietary specs, the efforts of being the "first" to market potentially are reduced because of the misunderstanding of multiple specification requirements. For example, if no competing product exists for comparison with a truly new product, some may reason that the new product cannot be specified at all because it's impossible to meet multiple specification requirements.
- Long-term relationships built between manufacturers reps and end-users result in effective sales relationships. For example, the effort leading up to the sale of a complex cook/chill facility for a hospital may take place over several years. Over that time, both the rep and the operator learn a great deal about each other and grow to understand the other's needs. When the hospital's job finally goes out to bid, the end-user may well specify that manufacturer's equipment because he knows the equipment and he trusts the manufacturer. Such effort invested by the rep into the client's project should be protected within that proprietary spec.

Challenges to the Proprietary Specification

The argument against the proprietary specification is the idea that it is somehow illegal for a consultant to write a sole-source specification. During the past three years, FCSI's legal counsel determined the consultant, when *having no monetary gain for his/her decision*, is allowed to specify as he/she wishes. This includes the use of sole-source specification.

There are some jurisdictions that require the specification to include at least three manufacturers unless the need for a sole-source specification is established. Whereas this is noted as a challenge, the issue may change in the future if the aforementioned set of protocols is adopted. It is hoped that through education, jurisdictions that don't accept a proprietary specification currently will realize the advantage to the spec process and accept it as beneficial.

Ethics

Ethical concerns over proprietary specifications are obvious, as the consultant's motives may weigh into the equation. In 1973, the U.S. Supreme Court ruled that the specification writer could not receive payment from a supplier based on the consultant's specification decision. There are guidelines to report those who fail to act in a responsible and fair business manner. In a pure sense, making proprietary specifications an industry standard should not create additional ethical challenges.

That being said however, there is a need for self-regulation along with FCSI's clearly defined ethics violation reporting and resultant investigation process. Should it be proved with documented evidence that an FCSI member received payments from factories or reps for specifying their equipment, that consultant would face the Society's Ethics Board. Hopefully, the parties involved will forestall a formal ethics complaint in favor of a previously agreed-upon appeals process defined as part of the protocols.

It should be noted that any consultant providing a proprietary specification must provide the rationale behind the spec, though as the high court also ruled in 1973, having a professional opinion does not constitute an unfair business practice. Ultimately, the consultant must be prepared to justify, with hard facts, the reasons for each project's tightly written specifications. In addition, the consultant should be able to demonstrate history of not favoring specific manufacturers, regardless of the type or size project.

Recommendation

It is the authors recommendation that FCSI, along with the food service industry work toward developing a practical and workable set of protocols for all new kitchen and remodeling projects. It is also recommended that once the client set their proprietary specifications that these be held through out the process. Where appropriate, the two organizations will identify jurisdictions/authorities that do not accept proprietary specifications and begin working on behalf of foodservice clients everywhere to educate the owners, whether government or private, as to the advantages and legal rights specific to proprietary specifications.

Next Steps

1. Formation of a joint task force to include members from FCSI North America and the food service industry
2. FCSI calls for up to two volunteers from industry organizations to sit on a task force to develop protocols and process for addressing substitution to proprietary specification. The NAD Board of Trustees will appoint two members to serve on this task force.
3. This task force will be formed and will first meet at the NRA Show, May 2004

Summary

Many consultants have long believed it is both their legal right and ethical responsibility to provide specifications indicating the exact make and model of equipment best suited for their clients' projects. Over the past decade, the issue has been debated and researched to conclude that legally, the consultant has the right to the proprietary specification. Those wishing to use this form of specification occasionally face governmental agencies or owners denying them that right.

Regardless of proprietary specifications being legal, it is FCSI's opinion that adoption of a standard or custom-designed set of proprietary specification protocols will eliminate major frustrations within the construction industry regarding foodservice, key among them equipment substitution. A joint industry effort to establish these protocols and proprietary specifications as the standard will result in providing significant validity to the process as well as a valuable quality assurance component for the client. Ultimately, it will allow consultants to better serve their clients in the most ethical, professional manner possible.