

MEMORANDUM No. 5

TO: Kentucky School Architects

FROM: Timothy K. Lucas
Planning Branch Manager, Division of Facilities Management

DATE: March 20, 2009

RE: School Project Materials and Product Specification

In our administration of school projects we sometimes find situations with which we have not encountered or in which there is confusion. One of those situations is the requirement to specify at least (3) equal products for the construction of schools. This requirement comes from the Model Procurement portion of the Kentucky Revised Statutes (KRS) noted below;

1. KRS 45A.415 Specifications – Items considered equal may be furnished – Proprietary products.
 - (1) The local public agency shall use specifications which assure the maximum practicable competition to meet the agency's needs.
 - (2) Local public agencies shall ensure that every invitation for bids or request for proposals provides that an item equal to that named or described in the specification may be furnished. The specifications may identify a sole brand in cases where, in the written opinion of the chief procurement officer, documented unique and valid conditions require compatibility, continuity, or conformity with established standards. An item shall be considered equal to the items named or described if, in the opinion of the owner and design professional responsible for the specifications;
 - a. It is at least equal in quality, durability, strength, design, and other criteria deemed appropriate;
 - b. It will perform at least equally the function imposed by the general design for the public work being contacted for or the material being purchased; and
 - c. It conforms substantially to the detailed requirements for the item in the specifications.
 - (3) A specification which describes a product which is proprietary to one (1) company may be used only when no other kind of specification is reasonably available to describe requirements.

Historically, this office has administered to this Statute. We have required that at least (3) manufacturers be named as equal.

- If a district wishes to exercise Article 3 above for good cause KDE requires that manufacturer's products be bid as an alternate to provide a transparent method of delivery for local boards of education.
- In the rush at the end of a project, the specification is generally one of the last documents to be developed. At the eleventh hour it is sometimes difficult to have adequate time to research alternate products to the one or two envisioned by the designer for a project. The "or equal" is commonly used, thus putting the burden on the contractors to propose alternative manufacturers. This is fine as long there is adequate time to review the submittals. We have gotten numerous calls and letters complaining that products were submitted in plenty of time to review, but were not considered.
- Some Architects actually use vendors or sales representatives to write their specifications. Please be mindful that once these documents receive your professional seal they are viewed as the work product of the Architect and Engineer. Utilizing vendor expertise is a good practice when performance criteria are required by the Architect and deemed appropriate for the product. Please ensure that inappropriate vendor information including title blocks and proprietary criteria are edited and removed from the construction documents.
- We are aware of at least one vendor who develops specifications for many of the engineers in the State in which he is the sole supplier of the specified equipment. There may be equals, but the contractor would be forced to cobble together a package from many vendors. While this is possible, it is not practical and certainly violates KRS.45A.

- Finally, with the tremendous increase in new “green” or energy efficient products, in some cases there are no equals. This will continue to be a challenge to designers, building code officials and KDE administrators alike.

The design professionals in the Commonwealth provide the design leadership that is moving our building inventory to it best physical condition ever. We need for the profession to continue this leadership to address the challenges listed herein so that we don't have to address them. If you have any questions, please do not hesitate to contact me at 502-564-4326.