

A/E RISK REVIEW

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Specifications and Substitutions: Choose Carefully

The following is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

For many architects and engineers, one of the most challenging responsibilities assumed during a project is specifying the materials, products and systems necessary to successfully execute their designs. Few designers consider themselves experts in the specifying field, yet they must maintain a general knowledge of what types of materials, products or systems are best suited to achieving the client's desired results.

Those designers who feel comfortable and confident specifying a specific brand of materials and products often list them specifically by their manufacturer and model number. Others will be more general in nature, recommending a particular type of material or technology. Regardless, any specification you make will burden you with some degree of liability. You are, in a sense, saying that the materials and systems you specify will successfully fulfill the needs of your client and the project.

That's why many designers stick to the tried-and-true materials, products and systems they are very familiar with when making their specifications. They are appropriately leery of specifying a material or product with which they are unfamiliar, particularly those that are new and cutting-edge. Such unfamiliar materials and systems are often associated with innovative techniques such as green design.

But sticking with the tried-and-true is not always a safe highway either. Design and construction is an ever-changing arena with a constant evolution of the standard of care. A designer who steadfastly sticks to familiar materials and systems she or he has used for years and refuses to specify state-of-the-art components may soon find herself or himself with an obsolete practice and disgruntled clients. Plus there is liability involved for not meeting the prevailing standard of care or complying with current codes when serving your clients.

Avoiding Liabilities

Fortunately, there are measures you can take to help avoid specification claims. Begin by asking yourself: what would other reasonable design professionals do in similar circumstances? That sets the basis for the current standard of care. Also ask yourself: how would my decision to specify the material product or system play out in a deposition or on the witness stand? Would a judge or jury consider my actions reasonable?

Whether you decide to specify a new, unproven material or stick with the tried and true, your goal is to be able to demonstrate that you made a reasonable, professional effort to confirm the suitability and reliability of the material. At a minimum:

- Collect brochures, product specification sheets, test results, warranties and guarantees from the material, product or system manufacturer and keep them for your records.
- Read all application instructions and label warnings carefully.
- Look for corroborating evidence to support the manufacturer's claims, such as test results of an independent laboratory.
- Document any conversations you have with the suppliers regarding the product and its application in the specific circumstances, including any reservations you might have raised.
- Require the manufacturers, suppliers and installers to give written assurances that the product is suitable for the intended application.
- Communicate your findings to your client and seek written agreement that your choice of materials is prudent.

You can also address these specification liability issues in your contract with your client with a provision that spells out and limits your responsibility for specifications. You and your attorney should consider contract language that has the client waive all claims and indemnify you from:

1. The specification and use of materials that are permissible under current building codes but that may, in the future, be discovered to be defective or harmful. Think of the litigation associated with materials such as asbestos that were once legal and widely used.

2. The use of any materials specified by the client. If a client insists on you using a particular material against your objections, they should be willing to accept 100% of the liability for its use and installation. Document such assurances.

"Or Equal"

Today, it is common for design firms to add the phrase "or equal" when providing specifications in their design documents. Essentially, this practice recognizes that the particular manufacturer, brand or model number specified in the design documents is the standard that the designer prefers, but that the contractor can ask the designer to consider an alternative that they feel is better than the material specified.

Some designers, however, forego the "or equal" language. They contend that such language encourages contractors to ask for substitutions, which increases the work for the design firm. It forces them, they say, to spend time investigating unfamiliar, alternative materials, products and systems and justify why the original specification is superior to the suggested substitution. Critics also feel that their liability may increase if their original specification does not perform to the client's satisfaction and the contractor's request for an or-equal substitute was denied.

Still, it is likely that the use of "or-equal" language in the design documents does not significantly increase liability since a failed specified material creates a liability whether the "or-equal" language exists or not. Also, it is up to the contractor to provide the necessary evidence to convince the designer that a substitute is indeed superior in some way, delivering either better performance than the originally specified material for the same cost or equal performance at a lower cost.

A third possible reason to justify an or-equal substitution is the unavailability of the specified material. If the contractor can show that a shortage of the specified material will result in added costs or time to the project, the designer would be compelled to consider a readily available substitute.

Handling Requests for Substitutions

So what does a designer do when a contractor or a client suggests the use of a substitute rather than a specified material, product or system? First of all, don't reject suggestions for substitutions outright. It may be that the contractor actually knows of a substitute that is superior to your specification. It may have more experience with this particular project type or geographic local, and can educate you on the latest and greatest in materials and systems. Also, keep in mind that should a dispute regarding your specified materials arise, courts do not look kindly upon designers who fail to respond to or arbitrarily reject reasonable requests for substitutions.

With an open mind, consider these steps:

- Develop and regularly update your list of regularly specified materials. Clearly define performance characteristics and other project requirements. Rigorously review the latest manufacturer's literature on these materials at least once a year. Also make it a point to investigate new products as they gain popularity in the industry. Collect brochures, spec sheets, and other manufacturer's literature. Search the Web for news, reviews, etc., about the new products.
- Set forth the criteria you will use in reviewing the acceptability of substitutions. Clearly state that the burden is on the requesting contractor to prove that the substitute's performance is equal or superior to the originally specified material.
- Include in your contract steps that must be taken to request substitutions. Spell out your preferred submission and approval process. Set deadlines for when substitution requests must be submitted. (Some projects allow substitution requests to be submitted during bidding; others only accept such requests after the contractor is selected and the contract is in force.) Specify that you have the right to back charge the contractor for services related to the review of proposed substitutions. Have your attorney include contract language that limits your liabilities in regard to contractor or owner requested substitutions and confirms you are making no guarantees or warranties on any product's performance.
- Address the issues of specifications and substitutions in a pre-construction review of the construction documents. Include the client and all design professionals, contractors and major subcontractors. This will help identify those specified materials that may cause concerns among one or more parties. Calls for substitutions can then be addressed before construction begins.
- Require contractors to submit a "Substitution Request Form" for each proposed substitution. These forms are available through the Construction Specification Institute (CSI) as well as through select professional liability insurers who specialize in serving the design industry. The request forms will ask for information such as the reason for the substitution request, the proposed substitution, the manufacturer and installer of the substitution, features, performance scores or ratings, test data, the differences between the proposed substitution and the originally specified product, any deviations from specified requirements, the impact on costs and the construction schedule, and so on. It may also ask the submitter to verify that the substitution has been fully analyzed and determined to be equal to or superior to the specified material in all respects.
- Be responsive in a timely manner to any substitution requests received. Acknowledge receipt of the request and set a reasonable deadline by which you will reply to the requestor.

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- Before accepting a substitution, do your research and document the steps you took in your investigation. Your goal is to establish that you made a reasonable effort to verify the quality and suitability of the material or system recommended by the contractor. Consider contacting a manufacturer's representative to gain confirmation (in writing) that the product is indeed suitable for its intended application. Document your conversations. When warranted, ask that a manufacturer's representative be onsite for installation to ensure specifications are being met.
 - If you reject the proposed substitution, spell out, in general terms, your reasons why. Remember, you have full authority to approve or reject the request. You are not required to run extensive tests or take any other extraordinary measures to validate the appropriateness of the substitution. If the contractor has not convinced you that the substitute is in some way (e.g., performance, cost or availability) superior to your specification, that should be enough for you to justify sticking with your original selection.
 - Do not allow shop drawings to become quasi-substitution forms. Such attempted uses of shop drawings should be rejected and returned as not in compliance with the contract.

A Final Note of Caution

If you have any business association or financial interest with a supplier that could influence your judgment in specifying a material, it is always best to reveal that association or interest to your client. Otherwise, if a claim occurs, a conflict of interest can be alleged with the client claiming that you specified a material for your own interest, rather than in the interest of the client.

Alternately, if a client insists that you use a particular material, product or system on its project, be extremely cautious and wary. The client may be selecting these products based on backroom deals, deep discount prices and the like, rather than quality and performance. Thoroughly investigate the how's and why's of client specifications and, again, get strong contract language that frees you of liability for your client's selections.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.