

Brand Name or Equal, Hazardous Territory

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One of the basic tenets of public purchasing is that all purchases embrace free and open competition. Above all else, all comers are guaranteed a level playing field — no preference for any player, any product, any system, any region or any provider. That all bidders and providers get to show their wares in free and open competition is axiomatic. This concept is prevalent throughout the land — nothing shall infringe upon this incontrovertible maxim!

Well, not exactly.

Actually, there are a number of laws that infringe upon, indeed subvert, the concept of free and open competition. There are two legal concepts in particular which are not only in common use, but which the courts have consistently favored. They are:

Preferences, and
Brand Names.

I shall deal with the issue of preferences in a forthcoming article. This article deals with brand names only.

Essentially, a Brand Name Specification is a specification limited to one or more products, brand names, makes, manufacturer's names, catalog numbers or similar identifying characteristics. (ORS 279B.200 (2)). Sounds simple. Any writing that defines a purchase in terms of some manufacturer's mark or identifications is a brand name specification.

The use of brand names to call out a specific product within a set of purchasing specifications in the private sector is not only legitimate, but is a sign that the specifier knows exactly what he or she wants. In the public sector that same specification is viewed as a limitation on competition and is usually forbidden except under special circumstances.

In public projects, the use of a brand name to specify a product restricts the open field, and uncontrolled, inevitably leads to favoritism (and possibly to fraud, kickbacks, extortion and anti-trust violations). Thus, the use of brand names is most often reserved for special occasions in public specifications and when used, must be carefully justified.

Oregon's brand name law (ORS 279B.215) basically states that specifications for public contracts shall not expressly or implicitly require any product by any brand name or mark, nor the product of any particular manufacturer or seller unless the product is exempt under one of the rules for same.

Typical rules for permitting the use of a Brand name are;

- The Director or a local contract review board may permit the use of certain brand names:
- The agency or institution may find that it is unlikely that permission of a specific use will encourage favoritism in the awarding of public contracts;
- The specification of a product by brand name would result in substantial cost savings to the public agency or institution;
- There is only one manufacturer or seller of the product of the quality required; or,
- Efficient utilization of existing equipment or supplies requires the acquisition of compatible products.

Wisconsin, for example, states in its IPP-27, "...if brand names are needed, agent must include a memo which explains in detail why there was a critical need to use the name of a manufacturer or brand names. Bid processor shall place the memo in the bid jacket and forward a copy to the Department of Administration."

One might say that the exceptions to the exemption leave a wide swath for specifying brand names, but it isn't so. The exceptions are legitimate and specifically tailored to those circumstances, which require the use of brand names.

Or Equal Problems

There is, of course, a loophole — a sword, which cuts both ways — and it is used in every state, every province, and almost every set of specifications which contains a brand name. It is, of course, the "or equal" clause.

Wisconsin, for example, requires that, under certain circumstances, when a brand name is used, it be used with an "or equal."

Oregon's Administrative Rules state that an Agency may identify products by brand names so long as "approved equal," "or equal," "approved equivalent," "equivalent," or similar language is included in the solicitation document. Then the specifying agency has the unenviable task of determining, in its sole discretion, whether an offeror's alternate product is equivalent to that specified or, perhaps not. In every case, there is no appeal. Well, there is, actually. There's the statutory angle which we've just looked at, and then there's the political angle, which has no rules at all.

When used, the "or equal" language basically says, "We want to use Brand X, but if you think Brand Y is-as-good-as-if-not-better-than Brand X, you may propose Brand Y. We, the public agency, will deliberate on your proposal. If we approve, we will publish an addendum to the specifications permitting all offerors to use Brand Y in their bids. If not, we decline and there is no appeal."

Do you see the dilemmas? There are several.

One is that there is no process for appeal.

It is common for architects to specify well-known products and "others on approval only." This is the same as "or equal," meaning, "We decide and there is no appeal."

Here's a great example.

In our latest new building the architects specified the acceptable gypsum board (drywall) manufacturers; Bestwall, Celotex, Johns-Manville, National Gypsum, and Flintkote. Other perfectly acceptable drywall manufacturers are Domtar, Kaiser, Pabco and US Gypsum. Why weren't they included? No reason other than tradition and the standardization of architectural specs. Architects don't know one hunk of gypsum board from another — they are certainly not specialists in drywall. So when a contractor proposes a different drywall, the answer usually comes back in the negative because the architect doesn't want to take a chance on something he or she knows nothing about. This is bad news for drywall manufacturers, and door manufacturers, and window manufacturers. Another example; almost everyone will agree that Marvin windows are as good as Anderson's and that they are in the same price range. Invariably however, one or the other is specified as a design preference and there is not one good reason for utilizing one over the other.

Another dilemma is the possibility of favoritism. Who's to say that a particular specifier isn't getting a kickback, like, perhaps, a free cruise or a complimentary airline ticket, for specifying a particular brand of tires, asphalt, computers or roofing? We'd all like to think that these things don't happen in our profession but I can tell you that they most certainly do. In the private sector, quid pro quos in the form of a case of whisky or a sparkling new shotgun under the Christmas tree are commonplace presents from appreciative salespersons, delivered quietly to home addresses, of course. In the private sector, such gifts are only unethical; in public purchasing, those gifts are highly illegal and receivers can not only lose their jobs as a result of such complimentary offerings, but can be fined and jailed in some states for receiving gifts in return for specification favoritism.

Mia Culpa

I have permitted brand names to be used in specifications on numerous occasions, the most recent being about a quarter of a million dollars worth of microscopes on the absolute certification of our science lab coordinator (14 labs scattered around the eight campuses) that the Leica brand was the only microscope design which fully suited the learning purposes for certain types of dissections and networked slides.

Another was about half a million dollars worth of Sony TV studio equipment on the basis that our Media Arts Department was best served by equipment which had interchangeable parts with the existing equipment in our TV studios. Yet another use of

brand names was in the specification of only three brands of computer video projectors, In-Focus, Panasonic and Sharp, because we service our own projectors and those were the only three (of perhaps ten brands) on which our technicians were certified. And then there is an untold number of construction brands which our architects specify regularly in their standard specifications — all told, about \$30,000,000 worth of construction over the past three years.

You get the picture. It's not pretty. Each and every one of those decisions was based on a legitimate application of Oregon law and a certifiable position requiring the specific use of one product or another (except for the architectural specs which are beyond my purview).

Each and every one of those decisions may well have frozen out a better product or a less expensive product than that specified. In each case, the purveyors of those unspecified products simply went away. They knew they were beaten from the start. Occasionally, a supplier will make an effort to have his or her special product accepted but it happens rarely and almost invariably, the decision comes back, "No."

One Major Incident

During the last twenty years, I have had one protest on the issue of a brand name and it was a bitter one that was not resolved to anyone's satisfaction. Indeed, it is probably more typical of the types of protests we endure — because it was not fought in the courts, it was unveiled in the political arena of public board meetings, meetings in which the board members rarely know of or care about the prevailing law. Public bodies, consisting of elected members, rarely know anything about anything — but they are elected and they are the public's choice to make ultimate decisions.

In that case, I specified a specific brand name and color of carpet tile to enable our Facilities Department to replace existing carpet tile throughout the institution (91 buildings and approximately 1,000,000 square feet of carpet tile). One bidder claimed that his brand, not the one specified, could match any color and thus, should be permitted. Having had numerous unsatisfactory experiences with color matching, especially with carpeting, I rejected the substitution. He bid it anyway and I ruled the bid non-responsive. He then protested and I rejected the protest.

In my view, you don't just pick up one square foot of spaghetti-stained carpet tile from the cafeteria floor, replace it with another brand and expect it to be invisible. Virtually every carpet manufacturer will support that decision no matter how good the computerized color-matching software may be. This is carpeting we're talking about here, not paint.

Not to be vanquished, the aggrieved bidder then protested in front of our Board of Education in public session. At this point, of course, the issue moved from the scientific to the political arena.

When a brand name is used, its use and the supporting legal references are clearly laid out in the award recommendation memo; thus, all the board members had this information in front of them. And much to my amazement, the board ruled that we, Purchasing, should rebid the project with looser specifications.

I rebid the project permitting several brands and specifying that multiple awards would be considered. The very same bidder who had protested the award in the first solicitation came in low on all categories and I wrote the award recommendation memo accordingly. Then, once again in public session, that same bidder stood up and declined to accept the award on the basis that the college was undermining the use of his favorite brand by permitting multiple brands to be utilized.

The board accepted his declination and gave no further instructions. Thus, this bidder had managed to frustrate a clear and precise process in the political arena and at the cost of great wastage of staff time. The second-low bidder's prices were too high for award and the project, once again, fell short of a precise conclusion. I can tell you that I was something more than perplexed.

By this time my emotional involvement in bringing this project to a successful conclusion was quite high — it began to feel like this tenacious bidder and I were locked in mortal combat and our referee, the college Board of Education, knew nothing of the rules of engagement!

In the final analysis, we obtained what we had begun to specify through a state contract and never did rebid the project again. Even though that peculiar series of events is unlikely to recur, it was a powerful learning experience for me and the fact that it centered on the use of brand names in specifications certainly did not go unnoticed. I realized that I'd much rather be in front of a judge than a publicly elected body, which has absolutely no expertise in any field.

Moments of Reflection

All of these brand name decisions give me pause — and occasionally, a silent shudder. In each case, I ask myself if I could make the argument stick in a court room under stern cross examination or even in front of a lay group like a board of trustees. I don't truly know the answer to the courtroom scenario and I probably never will. And you, the reader, having committed all the same travesties that I have, will also probably never know if you could make your arguments stick in a court room before a jury of your peers.

In some ways, I'm thankful that I haven't had to go through that process but there is part of me that wonders whether or not I'm serving my constituents as well as I could or should.

Legal Support

The reason for our legal relief is a small case that wandered through the Massachusetts courts in 1968 and ended in the US Supreme Court in 1970. George R Whitten, a supplier of swimming pools, sued Paddock Pool Builders, general contractor for the State of Massachusetts, for use of a brand name in its specifications for a public project on the basis that it's specification limited competition and thus, was an anti-trust violation. The case went to the District Court, then the First Federal Circuit Court, both ruling in favor of the specifier. The US Supreme Court refused to hear an appeal, thus allowing the lower court ruling to stand. It was a landmark case in the specification profession and it is the reason why you and I will probably never have to defend our brand name specifications in court; that is, at least on federal projects. It is probably one of the most powerful decisions in construction law history; the decision establishes the specifier's legal authority to utilize brand names in public bidding documents.

The ruling that was finally permitted to stand stated that proprietary specifications are not a violation of the anti-trust laws and that trained professionals make informed judgments about products that best serve public needs. If the specifier wants to limit a product to one source, he or she has the responsibility to do so and to enforce that choice. Further, the court held that other suppliers and manufacturers can qualify a product as an "equal" only when the specifier chooses to waive the specifications or to permit specific substitutions to be utilized. It is the specifier's sole decision to qualify or disqualify products as equals. The court ruled that only the specifier, from beginning to end of the bidding process, can ultimately decide that another desirable product is available in lieu of the product originally specified. The court concluded, "The burden is on the supplier or manufacturer who has not been specified to convince the specifier that their product is equal for the purpose of a particular product."

Strong words. And those words have stood, essentially untouched, since 1970.

Of course, we still have our various state laws to contend with and in many cases, they are more severe on the use of brand names than are the feds. Even when a protest is filed under any state law prohibiting the use of brand names, it will take an exacting effort for the protestor to prevail while the shadow of Whitten v. Paddock supports the use of brand names in every juncture.

The Whitten v. Paddock decision stands as a milestone providing the public specifier with a great deal of power to choose among desirable and undesirable products based solely upon his or her own knowledge.

Let us hope that we use that knowledge wisely and in the best interest of our public agencies and our taxpayers.

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