PRIOR APPROVAL

A Specification System

This specifications system provides for substitution of materials prior to bidding, equal to the "or-equal" specification system, but with reduced bidding risks.

by H. Maynard Blumer
The prior approval specification form was conceived to combine the best features of open competition with the ease of administration of a closed brand name specification. The intended results are threefold: (1) To encourage the bidder to reduce the contingency funds included in the proposed contract amount by reducing the risk elements associated with approvals of products rendered after the contract is awarded; (2) To discover all suitable products being marketed in the project area; and (3) To allow wide-open competition among all which, in the opinion of the submitter, may be a suitable substitution for the specified product.

And third, after evaluation of the submitted products on the basis of data submitted, add to the specification those products submitted which, in the opinion of the specifier, meet the project requirements. This allows the newly discovered product to be included in the bidding as if it had been in the specification from the beginning.

Why Prior Approval?
The construction industry has known suitable products.

The process is simple. First, write a clear, short specification that says in terms of the marketplace the manufacturer name, the model selected, and features desired so that a purchaser can pick up a catalog and place a precise order for a known amount.

Second, advertise to the world that until a certain day and hour you will be pleased to receive submittals from any interested party for any product that may be available recognized for some time that a brand name specification is more easily understood, and therefore, costs may be more accurately estimated than for other forms of specifications. Opposition to brand name specifications comes from the manufacturers and suppliers of products which might be suitable for the project but not included in the specification. In public works, the opposition becomes so great that public officials often will not allow brand name specifications or, if allowed, they will insist on the inclusion of more than one name. The latter practice can reduce the clarity of the specification, since no two products are ever entirely equal.

Federal courts have ruled that the brand name specification is acceptable in public works under certain conditions. The court has written that requirements for competition have been met when the specifier has given adequate attention to what products are available in the market and has limited the specification on the basis of his professional judgment of the needs of the project and the knowledge and information available to him.

Government agencies wishing to avoid criticism often create a regulation requiring the inclusion of an "or-equal" condition in the specification. This places a tremendous burden upon those administering the construction contract, who must rule whether or not a product submitted during construction is equal to the specification requirement.

The burden on the contract administrator is compounded by the
pressure of the contractor, who has based the contract price on speculation that a product will be accepted. If that product is rejected, the contractor or supplier may have to purchase the required product on a retail basis from a competitor.

To cover this risk, the contractor can be expected to include a certain amount of contingency money in the contract price. This contingency can effectively wipe out any savings that the owner had hoped to achieve through adding competition to the bid with the “or-equal” clause, or even with a so-called performance specification which may have an even higher risk since sometimes the bidder knows of no products to meet the specification.

If the contract administrator approves a substitute material during the construction period and a problem arises concerning the product’s suitability of value, the contract administrator may be suspected of unethical practices. This ever-present threat may cause the administrator to demand more of the contractor than reasonable interpretation of the contract documents would otherwise require. The possibility of this over-conservative enforcement is probably one of the major causes of higher costs of government projects.

With the prior approval concept properly formalized to avoid all potential claims of favoritism and to make the process manageable, the system is truly equal to the “or-equal” system, and has maximized competition by allowing all in the marketplace to be considered if they choose to submit while telling the bidder and the contract administrator precisely what may be provided to meet the contract.

**Formalizing the Process**

By formalizing the prior approval process of discovering what is available in the marketplace into a complete specifications writing system, the specifier and the owner achieve several highly desirable qualities in their bidding and contract documents:

- They avoid claims of favoritism.
- They make the process manageable.
- They invite, encourage, and maximize competition by advertising to all in the marketplace.
- They eliminate much of the bidder’s contingency funds by telling the bidder precisely what may be provided.
- They reduce the pressure on the contract administrator for making specification decisions for which he may not be properly equipped.
- They have provided a greatly simplified specification system which has been proven by over 20 years of experience as equal to the “or-equal” system.

**Rules for Processing**

The following rules for processing prior approval submittals were first set down by this author in 1964. They have been in continuous use since that time on hundreds of projects of all types and sizes, and for all classes of clients, both public and private.

I believe that the tremendous success of the prior approval system lies in the consistency of the implementation of these rules. Others have made variations and modifications of their processing procedures with varying degrees of success and dissatisfaction. I do not recommend the use of prior approval specifications without strict adherence to these rules.

1. When possible, the exact date and hour for closing of the invitation to submit proposals for substitutions should be given in the bidding documents.

2. Submissions will be received by the architect from any supplier provided they are addressed to the firm with reference to the specific project.

3. Submissions will be “received dated” immediately upon arrival.

4. Submissions will be placed by the receiving person (any one of staff) in a receiving basket designated for that purpose.

5. Submittals will not be reviewed for completeness or compliance until after the hour set for closing of receipt and submittals.

6. Submittals will be reviewed by a member of the staff or staff of the respective consultants. The reviewers will not be designated until after the closing of the period for receipt.

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of submittals.

7. The reviewer’s general attitude will be:
   a. The burden of proof is upon the submitter.
   b. The reviewer should not be required to complete the submittal, that is, select from options, or between models and lines of products.
   c. The reviewer should not be required to seek information from the manufacturer’s literature on file in the office or information in other locations.
   d. The product must be equal or better in those features and performance which the job requires and those which the specified product will provide.
   e. Review is complete when, in the reviewer’s opinion, significant deficiency(ies) are established. In such case, review of data covering other points of the specification is not required.

8. The reviewer will note action (approved or disapproved), the date, and his or her initials.

9. If a submittal is disapproved, the reviewer will make additional notations that will be adequate to guide a later reviewer to the same conclusion. Sample notations may be “vague,” “incomplete,” or “no sample.”

10. All submittals received after closing time will be “received dated,” marked “late,” initiated by the reviewer, and filed without review.

11. All submittals will be filed in the architect’s office until completion of the project, then destroyed.

Materials Substitution

Provisions for the substitution of materials should be available to the bidders and to the parties of the contract at appropriate times throughout the life of a project.

The provisions should be a coordinated system with controls for maintaining an enforceable specification. They should be in place from the time the first proposed contract documents are offered for proposal through completion of construction.

A good system should be relatively the same whether the project is public or private, negotiated or competitively bid, fixed sum or cost plus, conventional contract or construction management.

Model Provisions

The following provisions when included in the project manual’s “Invitation to Bid” (or “Advertisement for Bidders”), “Instructions to Bidders,” and “Supplementary General Conditions” will provide for coordinated system of controlled substitutions of materials; maintain an enforceable specification; allow the benefit of maximum competition; provide flexibility for handling various situations or problems of market and delivery; and deliver to the owner appropriate savings or improved project.

Provisions for inclusion in Invitation to Bid (or Advertisement for Bidders).

Requests for approval of alternative products as substitutions for materials which may appear to be specified as proprietary are requested and encouraged. Submittals will be received in the offices of the architects until (insert hour and date) and approved alternative products will be published in an addendum available at the office of the architects. (In the state of Arizona add following to last sentence: “at least five days prior to the bidding deadline in accordance with ARS 34-104.”)

Provisions for inclusion in Instructions to Bidders.

1. Substitution:
   1.1 Substitutions of materials, products, or equipment for those items specified (including changes of manufacturer, trade name, model, catalog number, patented article, etc.) will be considered only when written request has been submitted to architect in accordance with one of the following procedures:
   1.1.1 Prior Approval (procedure for substitution of materials, products, and equipment before submittal of bid proposal); substitutions may be requested by bidder, subcontractor, manufacturer, or other qualified party who wishes to propose use of particular material.
product, or equipment in lieu of that specified. Substitutions are subject to warranty as required by General Condition 4.5 (AIA document A 201) and Supplementary General Condition 12.

1.1.2 Time of Submittal: requests for Prior Approval addressed to architect and referenced to this project will be considered if received before (insert hour and date).

1.2 Form of Submittal:

1.2.1 Burden of proof of merit of requested substitution is upon submitter, and subject to provisions of General Condition 4.5. It is the sole responsibility of submitter to establish content of submittal data, samples, etc.

1.2.2 Request should include sufficient data so that direct comparison of proposed item to specified item can be made. Knowledge and experience of applicator and warranty may be integral part of specification, therefore, data concerning applicator (i.e., experience, organization, references, projects, dates, etc.) may be material.

1.2.3 Inadequate warranty, vague-ness of submittal, failure to meet project requirements, or insufficient data may be cause for disapproval or rejection of request. Architect’s decision for rejection of requested substitution is final, may be based upon his opinion, and does not require documentation or further justification. Architect’s approval is subject to later reconsideration at any time in life of contract.

1.3 Form of Approval: approved requests will be set forth in Addendum issued in accordance with these Instructions to Bidders under following conditions:

*(Note: The following paragraphs 1.3.1 through 1.3.4 should be included in full in the Prior Approval Addendum. That addendum should contain only prior approval information and should be issued to close the prior approval procedure even if it only states “No submittals received under these provisions have been approved.”)*

1.3.1 This Addendum is solely concerned with substitution of items of materials, products, and equipment before submittal of Bid Proposal as provided in Instructions to Bidders. (In the state of Arizona add following to last sentence: “and ARS 34-104.”) No other items shall be substituted or bid.

1.3.2 All items allowed by this Addendum are subject to full provisions of original contract documents including all modifications thereto, and shall be warranted as substitutions conforming with contract documents as provided by General Condition 4.

1.3.3 Approvals are based upon the opinion, knowledge, information, and belief of architect at time of issuance of this Addendum and reliance upon data submitted. Approvals are therefore interim in nature and subject to reconsideration as additional data, materials, workmanship, and coordination with other work are observed and reviewed. In proposing items allowed by this Addendum, bidder assumes all risk, costs, and responsibility for item’s final acceptance, integration into work, and performance.

1.3.4 This “Prior Approval” procedure has been offered and administered in manner to fulfill owner’s desire for bidding competition and ARS 34-104. Substitutions will next be considered after execution of contract in accordance with General Condition 12.

2. Proposed Substitutions (procedure for submitting Bid Proposal for substitution of materials, products, and equipment of contractor’s choice, other than those specified): substitutions may be offered by bidder and are invited and encouraged.

*(These provisions, 2. through 2.3, are not part of the prior approval system and are usually omitted from public works projects.)*

2.1 Time of Submittal: completed Proposed Substitutions Bid Form to accompany Bid Proposal when Bid Proposal is submitted.

2.2 Form of Submittal: use Proposed Substitutions to Base Bid Form. Supplementary substantiating data adequate for preliminary evaluation of proposed substitutes must accompany Bid Proposal in separate, adequately labeled envelope. Additional data may be requested.

2.3 Form of Acceptance: items accepted by owner will be incorporated in change order and executed simultaneously with construction contract. Proposed Substitution Bids are not binding after execution of initial contract.
3. Substitutions During Construction: procedure for substitution of materials, products, and equipment after execution of contract by change order only as outlined in General Condition 4, General Condition 12, and Supplementary General Condition 12.

Provisions for Inclusion in Supplementary General Conditions.

As a part of the substitutions system, AIA document A 201 General Conditions should have the following supplementary condition added:

Article 12—Changes in the Work

12.1 Refer General Condition 12 ADD:

12.1.1 Substitutions after execution of contract:

.1 Substitutions: substitutions of subcontractors, suppliers, manufacturers, and other data disclosed before execution of contract and specified materials or work constitute changes in the work and must be incorporated into contract by change order under General Condition 12.

.2 Contractor may propose substitutions only on condition that either:

.2.1 Previously disclosed data or specified material cannot be provided and incorporated into work in time allowed due to conditions beyond control of contractor, or

.2.2 Owner will benefit by reduced cost or improved project. Owner to receive full benefit of any cost reductions.

12.1.2 Request for substitution to include:

.1 Statement of cause for request with substantiating documents.

.2 Documentary proof of equal or superior quality, delivery time, and costs in form of certified quotations from supplier of both specified and proposed material.

12.1.3 When requesting Changes in Work, or when Changes in Work are caused by contractor, contractor agrees to: (1) bear costs of additional architectural services and related costs required for effecting change; (2) make acceptable adjustments in related construction at no additional cost to owner and without reduced quality in the project.

Specification Form

Every effort should be made to write the “Products” portion of a technical section (Part 2 in the CSI three-part section format) as briefly as possible. The concept of a brand name specification is that the specified product is the model which represents the specification intended. The objective of the project specification is to guide the reader to the proper manufacturer, product, model, and optional features of that product, if any, which are desired.

As an added service to those who may be considering substitution products and as a reminder to the person who may be evaluating those substitutions, the specifications writer may choose to include in the products specification those major features that were of greatest importance in selecting the product.

This extra description should not be misunderstood as in any way limiting the requirements of other features and characteristics of the specified product.

Additional brand names may be included in the product specification if the writer chooses. Although this is completely unnecessary, it will satisfy the client who believes three names make good competition, and it may reduce the number of prior approval submittals received.

If more than one brand name is included, it is essential that the writing be clear as to which brand name is the primary specification. This is important so that there will be no confusion in how substitutions will be evaluated and to make it clear other brands named are to provide their product with the features required of the primary product. When additional brand names are added by the Prior Approval Addendum, they will take a place in the product specifications similar to these additional brand names.

Contract Administration

The conditions of the acceptance of products under the prior approval provisions are stated in the Prior Approval Addendum and in the Instructions to Bidders. By being in the addendum, they have been included in a contract document.

A study of those conditions given earlier in this article gives understanding to the rules for administration of the specification require-
ments. The most significant condition is that "Approvals are based upon the opinion, knowledge, information, and belief of architect at time of issuance of this Addendum and reliance upon data submitted. Approvals are therefore interim in nature and subject to reconsideration as additional data, materials, workmanship, and coordination with other work are observed and reviewed."

This provision acknowledges that the approval of the brand name to bid the project is not a change in the specification intent and that the brand name allowed may still be rejected for non-compliance with the specification at any time it is discovered that the substitute product does not meet original specifications.

History of Prior Approval

In about 1960, Fred M. Guirey, FAIA, practicing as Guirey and Associates, Architects, in Phoenix, Arizona, was known locally for his innovative efforts to develop specifications which were clear, concise, and abbreviated. Guirey was dedicated to a strong conviction that the best bid was a bid based upon minimum risk to the bidder, with a resulting lowest construction cost for the owner.

On this premise, Guirey experimented with a variety of innovative approaches to specifications in the development of a master specification suitable for his total practice, which included private as well as governmental agencies. The "brand-name" specification produced the least risk to the bidder. The public agencies, however, plagued by the threats of disgruntled suppliers not included in the specifications, had come to require "or-equal" provisions in specifications which established quality and description of products by inclusion of manufacturers' names and product models.

Much has been written on the difficulty of bidding the "or-equal" specification and the near-impossible task of reasonable enforcement of such provisions after a fixed contract has been signed. Performance specifications, on the other hand, have become a sort of riddle. Bidders attempt to infer whose manufactured product has been described without naming it, and manufacturers try to influence the specifier to include an obscure provision that only their standard product offers. Fred Guirey recognized the fallacies of both the performance specification and the "or-equal" specification and conceived the prototype "prior approval" concept as an equal to the "or-equal" specification.

In 1962, I joined the Guirey firm and was given the assignment of administering projects with the prior approval system specifications. My first need was to formalize the processing of substitution submittals received under the system. To accomplish this I set down an 11-step procedure for setting up the system and processing the submittals, as listed above.

The procedures for processing prior approval submittals were distributed to prospective submitters beginning in 1964 in the belief that the burden of proof that the proposed product was suitable for the project rested solely upon the submitter and the submitter's understanding of the processing of submittals would reduce the number of unsuccessful submittals received.

In 1967, I prepared an article for the CSI Phoenix Chapter newsletter explaining the system of substitutions. It was then published in the Arizona Sheet Metal and Air Conditioning Trades Industry Programs' publication, and from there it found its way to the American Institute of Architects for inclusion in their Instructions to Bidders and to Architectural Record in 1974.

In 1982, the concept was enacted into Arizona Statutes (ARS 34-104) through an amendment to legislation in rebuttal to an attempt to legislate penalties to architects for using brand names in specifications for any public works in Arizona.

The system of substitutions described in this article has been used as stated in this article for over 20 years as part of every form of standard AIA and many government contracts, for every type of client and every type of project with no problems and no modifications.

Note

The author welcomes your thoughts. Please address comments to: H. Maynard Blumer, AIA FCSC CCS, Consulting Architect, 8517 North 49th Street, Paradise Valley, Arizona 85253.