**Facility Planning & Control**

 **12. CLOSED SPECIFICATIONS**

*The use of closed specifications may be allowed in accordance with R.S. 38:2290-2296 and shall include the items listed in the rule promulgated in Title 34, Government Contracts, Procurement and Property Control, Part III, Facility Planning and Control, Chapter 9, Public Contracts, Section 901, Closed Specifications for Certain Products.*

* Project Managers must have approval from FP&C administration (through their Senior Managers) before allowing a closed specification to be included in a project. (Must be identified prior to advertising.) Under no circumstances shall a specification be closed on a sole source product except to “expand or extend an existing system.”
* The designer is solely responsible for the inclusion of any closed specification and must fully investigate whether or not a closed specification is justified. FP&C administration must approve and the User Agency must concur in writing prior to inclusion in the documents.
* The designer may consult with the vendor after the decision is made to include the closed specification to assist in the preparation of the specifications if necessary.
* By statute (R.S. 38:2291):

*“****Written notice to approving authority of inclusion of closed specification***

*Whenever an architect or engineer, either directly or indirectly, has included a closed specification in the specifications for a public building or project, he shall submit a written report to the building authority* *ten days prior to the final submission of specifications, which report shall include the following:*

*(1) Identification of each closed specification;*

*(2) A concise statement of the reasons for including a closed specification;*

*(3) Identification of other products which are apparently equal and a concise statement as to why they may be excluded under the provisions of R.S. 38:2290.”*

For practical purposes, a request for closed specifications must be submitted by the designer and considered by FP&C in the Design Development phase of the contract. The formal report is to be submitted 10 days prior to the final submission of specifications to satisfy the statute.

* FP&C must approve the closed specifications and notify the designer in writing. The closed specification must be rejected if another product is submitted and the designer determines it is equal.
* The closed specification item(s) must be priced separately per R.S. 38:2294. The specification shall be closed to only that which is absolutely necessary. Typically, this will not include installation. Cost(s) of the proprietary items shall be provided utilizing the Unit Price Form, as a lump sum, and checking the Base Bid box on the form. Rarely would a closed specification be considered as an alternate, since the reason for the closed specification should necessitate it as part of the base bid. The description on the Unit Price Form shall indicate it is for the proprietary portion of the specification only, with a detailed description in the body of the specifications. In the case of a closed specification to “expand or extend an existing system” the following method is required:
	+ The designer shall obtain from the supplier of the proprietary products an itemized list of all proprietary products. The designer shall review and approve the list of materials. The designer shall then provide the list to FP&C for review.
	+ After FP&C approval, the designer will include the list of materials for the proprietary part of the project in the project specifications. This information should be published in the documents prior to advertising, not in an addendum.
	+ The proprietary products listed shall not include overall installation. The proprietary products listed shall be limited to only those products required for the proper operation of the system, and which cannot be provided by any other party.
	+ The lump sum “fixed price” for the proprietary products will be provided by the Bidder on the Unit Price Form (see example) and included in his base bid (along with his price for the non-proprietary parts of the system).
	+ The designer shall specify in the documents exactly which products are proprietary, so the contractor can identify which products he must indicate on the Unit Price Form. The products that may be included as proprietary are as follows:
		- Parts, devices, etc. (including any required software)
		- Programming
		- Engineered drawings (control schemes, wiring diagrams, etc.)
		- Verification of installation and operation of the system (commissioning)
		- Other items required as a part of the system that cannot be supplied by others.

**Required Submittals to FP&C**

**for the Inclusion of a Closed Specification**

**(By the Designer)**

* Justification for the closed specification and User Agency concurrence for same.
* Designer’s certification that the closed specification is required for the project.

(1) Identification of each closed specification;

(2) A concise statement of the reasons for including a closed specification (this should also include an estimated cost of the closed specification including the proprietary items vs. replacing the entire system, in order to obtain certification of the system or to present a uniform appearance, i.e., reason for the closed specification and how it’s justified to the Louisiana taxpayer);

(3) Identification of other products which are apparently equal and a concise statement as to why they may be excluded under the provisions of R.S. 38:2290.

* Itemized breakdown of all proprietary items. Include part name, and part number. This breakdown must have some designation that the list has been reviewed and approved by the designer in regard to the proper parts, devices, labor, etc., and that the proposed proprietary items will meet the intent of the specifications.
* Cut sheet of each listed proprietary item.

**NOTICE**

The following references are included for information only. Designer shall always check for latest versions. **No plans or specifications issued for bid shall contain a closed specification unless it has the written approval of Facility Planning and Control.** This Office has very strict procedures governing this matter.

**Taken from Title 38 Public Bid Statutes**

**as amended through the 2020 Legislative Session**

***Designer to always check latest version of statutes, which can be accessed at*** [**http://www.legis.la.gov/Legis/Law.aspx?d=94984**](http://www.legis.la.gov/Legis/Law.aspx?d=94984)

**PART V. REGULATIONS OF CLOSED SPECIFICATIONS AND EXCLUSIVE DISTRIBUTION OF MATERIALS**

**§2290. Closed specification prohibited; exception**

A. No architect or engineer, either directly or indirectly, shall submit a closed specification of a product to be used in the construction of a public building or project, unless all products other than the one specified would detract from the utility of the building, or except in those cases where a particular material is required to preserve the historical integrity of the building or the uniform appearance of an existing structure, or is required as part of an integrated coastal protection project, as defined in R.S. 49:214.2, for the evaluation of new and improved integrated coastal protection technologies.

B. A closed specification shall not be submitted or authorized when any person or group of persons possess the right to exclusive distribution of the specified product, unless the product is required to expand or extend an existing system presently operating at the facility or site, or if a specified product is required as part of an integrated coastal protection project, as defined in R.S. 49:214.2, for the evaluation of new and improved integrated coastal protection technologies. However, no such closed specifications shall be allowed until rules have been promulgated by the division of administration after oversight by the Senate and House Committees on Transportation, Highways and Public Works and other appropriate legislative committees.

*Added by Acts 1965, No. 40, §1. Amended by Acts 1982, No. 596, §1, eff. July 22, 1982; Acts 1997, No. 678, §1; Acts 2016, No. 373, §1.*

**§2291. Written notice to approving authority of inclusion of closed specification**

Whenever an architect or engineer, either directly or indirectly, has included a closed specification in the specifications for a public building or project, he shall submit a written report to the building authority, ten days prior to the final submission of specifications, which report shall include the following:

(1) Identification of each closed specification;

(2) A concise statement of the reasons for including a closed specification;

(3) Identification of other products which are apparently equal and a concise statement as to why they may be excluded under the provisions of R.S. 38:2290.

*Added by Acts 1965, No. 40, §1.*

**§2292. Acceptance or rejection of closed specification**

The approving authority may accept a closed specification only after it determines that all products brought to its attention are excludable under the provisions of R.S. 38:2290, however, the approving authority must reject the closed specification, should another product of equal utility and appearance be submitted to them prior to letting of the bid, in which event the specifications must be amended so as to allow substitution of an equal.

*Added by Acts 1965, No. 40, §1.*

**§2293. Effect of violation; proceedings to annul contracts violating provisions of this Part**

A. Any contract entered into in violation of any provision of this Part shall be null and void.

B. The district attorney in whose district a violation of this Part occurs, the attorney general, or any interested party has a right of action to bring suit for appropriate injunctive relief in the district court to nullify a contract entered into in violation of this Part.

C. If a judgment of nullity is rendered in an action brought by a district attorney or by the attorney general pursuant to Subsection B hereof, the district court may award a civil penalty not in excess of ten thousand dollars against each offending party.

*Added by Acts 1965, No. 40, §1. Amended by Acts 1980, No. 803, §1.*

**§2294. Separate bids**

A. Each closed specification authorized by the approving authority shall be offered for bid as a separate item.

B. No contractor or sub-contractor shall accept a bid on a closed specification unless the item is priced separately in the bid.

*Added by Acts 1965, No. 40, §1.*

**§2295. Plans and specifications; required provisions**

A. All plans and specifications for public works submitted by an architect or engineer shall include the following provisions relating to equal brand products other than those specified:

(1) The name of a certain brand, make, manufacturer, or definite specifications is to denote the quality standard of the article desired, but does not restrict bidders to the specific brand, make, manufacturer, or specification named. It is to set forth and convey to prospective bidders the general style, type, character, and quality of article desired.

(2) When in specifications or contract documents a particular brand, make of material, device, or equipment is shown or specified, such brand, make of material, device, or equipment shall be regarded merely as a standard.

B. When in specifications or contract documents an architect or engineer specifies a particular brand, make of material, device, or equipment, or equal thereto, he shall adequately identify said product by including, minimally, the model or catalog number of the product.

C.(1) If a potential supplier wishes to submit for prior approval a particular product other than a product specified in the contract documents, he shall do so no later than seven working days prior to the opening of bids. Within three days, exclusive of holidays and weekends, after such submission, the prime design professional shall furnish to both the public entity and the potential supplier written approval or denial of the product submitted.

(2) Notwithstanding Paragraph (1) of this Subsection, for public works of the New Orleans Sewerage and Water Board, if a potential supplier wishes to submit for prior approval a particular product other than a product specified in the contract documents, he shall do so no later than fourteen working days prior to the opening of bids. Within three days, exclusive of holidays and weekends, after such submission, the prime design professional shall furnish to both the public entity and the potential supplier written approval or denial of the product submitted.

*Added by Acts 1965, No. 40, §1; Amended by Acts 1980, No. 803, §1; Acts 1984, No. 182, §1; Acts 1985, No. 832, §1; Acts 1995, No. 484, §1; Acts 2011, No. 51, §1, eff. June 20, 2011.*

**§2296. Definitions**

A. A "closed specification" shall be a product specified to the exclusion of all other products of apparent equal quality and utility.

B. "Exclusive distribution" shall be the right to control, either by contract or practice, directly or indirectly, the distribution of a product in a particularly defined area to the exclusion of any other distributor.

Added by *Acts 1965, No. 40, §1. Amended by Acts 1980, No. 803, §1.*

Title 34

GOVERNMENT CONTRACTS, PROCUREMENT, AND PROPERTY CONTROL

*Designer to always check latest version*

Part III. Facility Planning and Control

Chapter 9. Public Contracts

§901. Closed Specifications for Certain Products

A. This rule applies to the closing of specifications to products that are necessary to expand or match products in existing systems but for which a person or group of persons possesses the right to exclusive distribution.

B. A closed specification may be submitted and authorized where a person or group of persons possesses the right to exclusive distribution of the specified product when that product is required to expand or extend an existing system at a facility or site if that product is one of the systems listed in §901.B.1-11, or a component of one of them, and the approving authority has determined that all products other than the one specified would detract from the utility of the system; and all other applicable requirements of R.S. 38:2290-2296 have been met:

1. energy management systems;

2. chillers when necessary for refrigerant conversion;

3. fire alarm systems;

4. electronic security systems;

5. elevators;

6. nurse call systems;

7. medical gas systems;

8. stage lighting systems;

9. sound systems;

10. clock systems;

11. brick and stone.

C. It is the responsibility of the approving authority to verify that the product for which the specification is closed is the only acceptable product and to comply with all applicable requirements of R.S. 38:2290-2296.

AUTHORITY NOTE: Promulgated in accordance with R.S. 38:2290(B).

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Office of Facility Planning and Control, LR 24:333 (February 1998).