

By Mark Rice

THE TONY SOPRANO DEFINITION OF A CONSTRUCTION PROJECT SUBMITTAL

Tony, the Architect on your Project, tells you, after you complain about his 9th rejection of your submittal, that:

“I ain’t going to tell you what to do. Just don’t do it unless I approve it.”

Sound familiar?

To many contractors, the whole process of submittals and shop drawings is mired in voodoo, make work, arbitrary lines in the sand bearing no engineering reasoning, and frustration. The designer, whether an engineer or architect, declines to tell you what they want — schooled by their risk management team that to do so would be interfering in the contractor’s “means and methods.” At the same time, as a contractor you suspect that there is a “right answer” lurking in all these submittal rejections. Like a game of blind man’s bluff, you continue to try to pin the tail on the donkey — you try to get the shop drawing to match the unstated criteria. By process of elimination, you eliminate all your intended means and methods, all your backups considered at bid, and do it “their way”. You are no longer Sinatra — “my way” failed. Cost, time, and early project progress all compromised, and you wonder what the job is going to be like.

I have seen in the last several years a significant increase in demands on pile contractors in terms of pile submittals, from requiring engineer stamps, drivability analyses, and considerable “design-assist” like detail. Pile driving

contractors do not always have an engineer with a stamp on staff, and often have liability insurance that does not include design. But, inch by inch, these lines are getting blurred, or effort is being made to blur the lines of who is the designer and whether or not the contractor is being asked to take on design-assist or near “design build” responsibilities. And this is not just in wall thickness co-efficients, where the contractor can show a thinner but wider steel can provides the same structural value as the steel pipe pile on the plans.

With the emergence of electronic drawings these design-like demands will increase. So will they increase as cost and overhead constraints dictate the concentrated exploration of alternative materials and methods, and the design industry is more able to protect its castle from risk than contractors who invariably provide broad insurance and indemnity to the owner.

What can be done? Is this just a “grin and bear it” situation?

Let’s start with the standard, AIA definitions of submittals:



- AIA201 Sec. 3.12.4 “Shop Drawings...purpose is **to demonstrate** the way by which the Contractor **proposes to conform** to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals.”
- AIA Sec. 4.2.7, “The Architect will **review and approve**, or take other appropriate action upon, the Contractor’s submittals such as Shop Drawings, Product Data and Samples, **but only for the limited purpose of checking for conformance with information given and the design concept** expressed in the Contract Documents.”
- AIA201, 4.2.7, “The Architect’s review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures.”

The problem here becomes obvious when you ask the project architect, be he Tony Soprano or Tony Randall, what he wants. He knows he cannot tell you, but you still need to get his approval. Sounds like you do not own your means and methods, even if the AIA documents and most specifications suggest you do. Someone has to fill in the details on the design concept, and that someone is lucky you.

In getting ready to give a seminar on the topic, I decided to examine the court cases I could find that involved a court holding that a public agency’s contracting officer or engineer

unreasonably rejected a submittal. I expected to find nothing, as the whole area of submittals and shop drawings do not get into published court decisions typically, except in the other situation, where a design professional mistakenly approves a submittal, like the PVC pipe drain at the Hyatt Kansas City, that did not conform to the specifications and later led to failure and human tragedy. I expected to find nothing where a judge said the owner’s design team was unreasonable in rejecting a submittal. But, happily, I was dead wrong.

I found the case. And it’s a good one for any contractor to have in his backpocket.

The case is Waldinger Corp v. CRS Group Engineers, Inc. (7th Cir. 1985) 775 F2d 781, out of the Federal Courts in Texas, involving waste water treatment plants. The mechanical subcontractor who bid the supply of sludge dewatering equipment was unable to supply the specified equipment, and the prime contractor obtained the equipment elsewhere, and sued the original sub. The prime contractor also sued the outside engineering firm to the Sanitary District, alleging in the alternative that the engineer drafted defective specifications and interfered with the subcontract by intentionally preparing impracticable specifications and insisting without justification that the sub comply literally with those specifications.

The District Court agreed that the engineer’s specifications were excessive, and it was unreasonable in rejecting the mechanical subcontractor’s alternative equipment, and therefore,

the sub was excused from literal performance of the subcontract. The evidence showed the specified equipment had not been inspected, and the reasons for its insistence, arbitrary.

Because the equipment involved supply, the Court looked at the Commercial Code’s rules relating to commercial impracticability, and found it was not foreseeable that the engineer would be inflexible on accepting variants that satisfy the benefit of the bargain and objective of the specifications. Arguably, it was akin to a refusal to accept an “or equal” substitution when the specifications say an equal product will be reviewed reasonably, and accepted if truly equal in quality and against performance criteria.

The Trial Court found that insistence on exact compliance was commercially impracticable — not foreseeable that the engineer would not accept submittal for equipment not strictly in compliance where strict compliance impracticable. After a detailed comparison of the engineer’s basis for its spec, and refusal to accept the performance criteria of the alternate, the Court of Appeal wrote:

“Implicit in the district court’s conclusion that there was no justification for Dietz’s insistence on literal compliance with the restrictive mechanical specifications is its finding that Dietz’s action was not necessary to protect the Sanitary District’s best interests.”

This case, and a couple others involving over-inspection, give some solace to the “can do” contractor trying to meet a spec that is either not well conceived, in terms of cutting edge techniques, price of availability,

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PILE BUCK SPOTLIGHT

but where the design team is wed to its call out. I have seen instances post NAFTA where outdated sheet pile specifications called for products no longer available stateside in any volume, the specified product like asking NBA players to wear Chuck Taylors instead of Air Jordan's, or be busted for trying to substitute a better product over a specified one.

How to avoid this trap? It is the contractor's job in a submittal to not only submit to conform, but diplomatically educate and share know how. Most pile driving contractors have more up to date knowledge on rolling schedules, material availability, and industry supply and technical trends at bid than always the case with specs written 6 months earlier. With China's rise and fall and rise again, the spot markets for steel and steel scrap still impact a variety of industry players, as does oil prices and competing demand for steel pipe. Bidders will know these

commodity markets more intimately than design teams typically.

This case, and the approach to submittals, suggests early investigation of the design team's view of the sanctity of its specified items, and a "break bread" approach to get the design team to find favor in your approach. After two rejections of a favored submittal, ask to meet and see if same page thinking can emerge from a candid exchange of engineering and constructability. In court cases I have been amazed at how often submittal rejections, once examined by engineered peer review and experts, are mistaken, shortsighted, poorly justified, and often a function of "wed to design" thinking and not based on the actual needs of the project. But if dialogue does not succeed, *Waldinger* is the dinger to throw up against the wall, to help win your claim. If not, let your "Tony" do the talking and see if he can get the submittal approved. ■

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Mark J. Rice is a practicing attorney representing pile driving contractors for over 25 years on all facets of their business, from collections, claims, differing site conditions and specification claims, delay claims, crane accident resolution, insurance, bid and contract forms, and corporate advising. Mr. Rice is a member of the California Associated General Contractors Legal Advisory Committee, and a member of trade associations serving the deep foundation and pile driving industries. Mr. Rice is a frequent lecturer on liens, stop notices, Miller Act and other bond claims, construction management and project delivery.



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