

Please find below a summary of the legal requirements for including a proprietary specification in D-B-B public works (M.G.L. c. 30, § 39M) solicitations/contracts and D-B-B building (M.G.L. c. c. 149, §§ 44A-44L) solicitations/contracts.

There are 3 legal requirements for use of a proprietary specification in an NFA D-B-B solicitation/contract under M.G.L. c. 30, § 39M or M.G.L. c. 149, §§ 44A-44L:

1.) Documentation of Rationale for Proprietary Specification.

M.G.L. c. 30, § 39M(b) states that specifications in D-B-B public works contracts and D-B-B building contracts “shall be written to provide for full competition for each item of material to be furnished under the contract; except, however, that said specifications may be otherwise written [i.e., proprietary specifications may be listed] when: “for sound reasons in the public interest stated in writing in the public records of the awarding authority ... such writing to be prepared after reasonable investigation.”

2.) “Or Equal” Provision.

“Every such contract shall provide that an item equal to that named or described in the said specifications may be furnished;  
and an item shall be considered equal to the item so named or described if, in the opinion of the awarding authority:

- (1) it is at least equal in quality, durability, appearance, strength and design,
- (2) it will perform at least equally the function imposed by the general design for the public work being contracted for or the material being purchased, and
- (3) it conforms substantially, even with deviations, to the detailed requirements for the item in the said specifications.” M.G.L. c. 30, § 39M(b).

3.) The solicitation for the contract must expressly identify the specification as proprietary.

“A critical aspect of open and honest competition is that all participants should have complete and accurate information about the terms of the procurement, either a listing of acceptable sources of materials for a competitive bid or a clear indication that the specifications are proprietary. The mere addition of the words “or equal” to the designation of PlymoVent [manufacturer] ... did not constitute a middle ground ... or otherwise satisfy the requirements of § 39M(b).” *E. Amanti & Sons v. R.C. Griffin*, 53 Mass. App. Ct. 245, 253 (2001).

I recommend that the solicitation contain language along the lines of the following: “A letter discussing [INSERT NAME OF PROPRIETARY PRODUCT/SPECIFICATION] as a proprietary specification pursuant to M.G.L. c. 30, § 39M(b) has been filed with MassDOT.”

Please note that M.G.L. c. 30, § 39M(b) contains an additional requirement: “for each item of material the specifications shall provide for either a minimum of three named brands of material or a description of material which can be met by a minimum of three manufacturers or producers.” This requirement pertains solely to competitive specifications, not to proprietary specifications. *Amanti* at 252.

One last note: With respect to FA projects, a proprietary item will only be participating if FHWA authorizes it, pursuant to 23 CFR 635.411.