
Coates' Canons Blog: Brand-specific specifications

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Article: <https://canons.sog.unc.edu/brand-specific-specifications/>

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Your public works department is planning to construct a new waste water collection system, and, in a meeting with your engineer, you learn that a piece of equipment she plans to include in the bid specifications is a proprietary piece of equipment manufactured by only one company, No-Stink, Inc. She tells you that this particular brand of equipment will greatly improve the function of the collection system. Specifying one brand of equipment doesn't seem right to you, though. So what do you do?

Can you specify only one brand?

The answer is yes, but it's a little complicated, as explained below.

G.S. 133-3 is the statute that answers this question, and it's not an easy statute to read. Although it's hard to tell from a first reading of the statute, it generally requires the use of competitive (open) specifications for materials used in construction projects. It also addresses two different questions: (1) when can you use a brand-specific specification on a public works contract, and (2) what you have to do if you'd like to list a certain brand as a *preferred alternate* (that is, if you have a preference among the brands that meet your minimum performance requirements)?

The first part of G.S. 133-3 requires that specifications for public projects "specify . . . the required performance and design characteristics of" the materials to be used in those projects. In other words, when possible, you should specify what you want the material to be able to *do* and describe any other characteristics or requirements that the material must meet (e.g. does it have to be small enough to fit into a specific space, or strong enough to hold a certain amount of weight?) rather than specifying a particular brand of material. At the same time, the statute recognizes that sometimes it is "impossible or impractical" to specify the required performance and design characteristics *without* referencing a specific brand. In that case, the statute says your specifications can reference a specific brand—or, preferably, several brands—that will meet your needs. I've created **this flowchart** to work through the first part of G.S. 133-3.

The second part of G.S. 133-3 addresses the use of preferred brand alternates. You only need to go through the preferred brand alternate procedures if your designer wants to make it clear that one brand is preferable to other brands (and if you can justify that preference). I've created **a second flowchart** to work through the second part of G.S. 133-3.

So, back to our original question: can you spec out just one brand? This is authorized by the first part of G.S. 133-3 ("Where it is impossible to specify performance and design characteristics for such materials and impossible to cite three or more items due to the fact that there are not that many items of similar or equivalent design in competition, then as many items as are available shall be cited."). However, you'll want to be able to justify your preference based on performance requirements in case you receive complaints. Although not required by the statute, you might avoid the time and effort you would have to invest in a bid protest by doing one of two things when you specify only one brand: (1) do something similar to the preferred brand alternate process outlined above—develop a written justification that describes the performance requirements and list the single brand; then give bidders an opportunity to propose substitute items to your designer; or (2) purchase the item separately, and use the sole source exception found in **G.S. 143-129(e)(6)** (note that board approval is required under this exception).

Bottom line: You'll need to find out from your engineer whether this brand of equipment is the only brand that will meet your requirements. Tell her that she'll need to provide performance and design specifications for this equipment, if possible, and list the No-Stink brand, along with other brands that meet those specifications (if any), as an example of item(s) that meet those specifications. (If there are other brands that will meet the performance and design characteristics, but the engineer can show that the No-Stink brand of equipment will (1) provide cost savings and/or (2) maintain or

improve the functioning of any process or system affected by the preferred item(s), you can use the No-Stink brand as a preferred brand alternate as long as you follow the steps in the second flowchart above.)

Fleming Bell discusses G.S. 133-3 on page 34-35 of *Construction Contracts with North Carolina Local Governments*, which you can order [here](#).

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_133/GS_133-3.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html
- www.sog.unc.edu/publications/books/construction-contracts-nc-local-governments