



## Legal Corner

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# "REVISITING PROPRIETARY SPECIFICATIONS"

An issue which resurfaced in recent months has to do with the use of proprietary specifications in public construction projects. As you may recall from past articles, M.G.L. c. 30, §39M mandates that materials and equipment used in public projects be subject to competition. The statute requires that in order to promote competition, there be at least three (3) manufacturers of equipment or materials for a public project.

A contractor may submit an or equal which must be accepted if it is a functional equivalent of the "specified product". If the specifications refer solely to one product, a contractor has the right to demand from the awarding authority the names of three manufacturers of comparable equipment which would be acceptable to the awarding authority.

The statute does provide that an awarding authority may allow and elect to use a proprietary specification which would require the contractor to provide a specifically identified product if it conducts a "reasonable investigation" to determine that it is in the best interest to do so. There is no definition as to what constitutes "reasonable". Obviously, it means more than an authority's desire to use a proprietary product. There must be a rational and sound basis to justify the use of a proprietary product and eliminate competition which is the cornerstone of public construction.

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Recently, an awarding authority had specified a proprietary product and had in fact gone so far as to have the consulting engineer file a statement in the "public record" setting forth the reason as to why this decision was justified. Upon closer scrutiny, it appeared as if there was virtually no investigation which had taken place in order to justify the use of this proprietary product. When challenged, the awarding authority amended the document so as to allow other comparable non-specified products.

*This recent event illustrates that consultants and the awarding authorities will attempt to utilize a proprietary specification without having established the proper foundation as required by the statute. Contractors who do not want to utilize such a product, should challenge it and make sure that there has been a reasonable investigation and that the use of such a product is fully justified. ■*