



**US Army Corps
of Engineers®**

ENGINEERING AND CONSTRUCTION BULLETIN

No. 2022-1

Issuing Office: CECW-EC

Issued: 07 Jan 22

Expires: 07 Jan 24

SUBJECT: Prohibitions in the Use of Brand Name (or Equal) References in Solicitations

CATEGORY: Guidance

1. References.

- a. The National Defense Authorization Act of 2017 (NDAA 2017), Pub. L. 114-328 §888
- b. Defense Federal Acquisition Regulation Supplement (DFARS), Subpart 206.302-1(c)(2) and DFARS 206.302(c)(s-70), Subparts 211.104 and 211.170.
- c. Federal acquisition regulation (FAR) Subpart 36.202(c) and FAR 52.236-5(a).

2. **Purpose.** The purpose of this ECB is to clarify the policy and requirements regarding the use of brand name (or equal) references in US Army Corps of Engineers (USACE) designs and specifications and the associated solicitations and provide examples of permissible and prohibited language.

3. **Applicability.** The referenced policies apply to all USACE contract documents and solicitations regardless of program or funding.

4. **Background.** FAR 6.302-1(c)(2) currently states that “Brand-name or equal descriptions, and other purchase descriptions that permit prospective contractors to offer products other than those specifically referenced by brand-name, provide for full and open competition and do not require justifications and approvals to support their use.” FAR Clause 52.211-6, Brand Name or Equal, goes on to require that, if an item in a solicitation is identified as "brand name or equal," the purchase description must reflect the characteristics and level of quality that will satisfy the Government’s needs. The salient physical, functional, or performance characteristics that "equal" products must meet must be specified in the solicitation. However, upon the issue of reference a., Congress now takes the view that the use of any brand name or equal references does in fact limit competition, even when multiple vendors are listed; when salient physical, functional, or performance characteristics are listed with brand name or equal references; or when disclaimer statements are included (i.e., manufacturer references are not intended to limit the selection of other manufacturers).

5. Guidance.

a. The paragraphs at DFARS 206.303-1(c)(2) and 206.302(c)(s-70) were updated in 2018 to implement section 888 of the NDAA for FY 2017, which requires that competition on DoD contracts not be limited by specifying brand names or brand name or equivalent descriptions, or proprietary specifications or standards. Notwithstanding FAR 6.302-1(c)(2), the DFARS now stipulates that the justification and approval addressed in FAR 6.303 is required to use brand

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name or equal descriptions or proprietary specifications. Note that a J&A is not required for a task or delivery order where a J&A was approved for the basic contract.

b. If a justification and approval (J&A) is provided, brand name or equal specifications “must clearly identify and describe the particular physical, functional, or other characteristics of the brand-name items which are considered essential to satisfying the requirement” in accordance with FAR 36.202(c).

c. The DFARS change also impacts use of FAR Clause 52.236-5, Material and Workmanship, in construction contracts. The clause language states that specification references to equipment, material, articles, or patented processes by trade name, make, or catalog number are included to establish a standard of quality and are not to be construed as limiting competition, a “brand name or equal”. However, a J&A is now required in order to include these references and should explain why it is necessary to include these references in order to effectively convey the Government’s requirements.

d. DFARS 211.104: Use of brand name or equal purchase descriptions. A justification and approval is required to use brand name or equal purchase descriptions.

(1) When using sealed bidding or negotiated acquisition procedures (see 206.302-1(c)(2) for justification requirements); or

(2) When using the simplified procedures for certain commercial items at FAR 13.5 (see 213.501(a)(ii) for justification requirement).

e. DFARS 211.170: Use of proprietary specifications or standards.

A justification and approval is required to use proprietary specifications and standards—

(1) When using sealed bidding or negotiated acquisition procedures (see 206.302-1(S-70) for justification requirements); or

(2) When using the simplified procedures for certain commercial items at FAR 13.5 (see 213.501(a)(ii) for justification requirements).

f. Examples of Permissible and Prohibited Contractual Language:

(1) Prohibited Specification Language in absence of a J&A:

(a) Provide single leaf, “Noise-Lock D-53” acoustic doors as manufactured by IAC Acoustics. Equivalent products which meet or exceed the requirements of this specification may be submitted for approval.

(b) Paint PT-1: Latex interior eggshell; Benjamin Moore “Snowfall White” 2144-70 or approved equal.

(c) Paint PT-1: Benjamin Moore “Snowfall White” 2144-70, Sherwin Williams “High Reflective White” SW 7757, Behr “Ultra Pure Whites” PPU18-06, or approved equal.

(d) Brand name products are listed as examples only to establish a level of quality and performance, not to limit competition or to exclude equivalent products. Equivalent products meeting the examples' physical, functional, or other characteristics may be submitted for approval.

(2) Allowable language in absence of a J&A:

(a) Provide acoustic rated single leaf doors as follows:

(b) Minimum Sound Transmission Class (STC) 59 tested to ASTM E90.

(c) Acoustic core construction, longitudinal edges fully welded.

(d) Reinforce doors where surface-mounted hardware is required.

(e) Drill and tap for mortised, templated hardware.

(f) Top and Bottom Channels: Inverted, recessed, welded steel channels.

(g) Paint PT-1: Latex interior eggshell; matching RGB 247, 248, 239

g. When a J&A is deemed necessary, it must explain why it is not possible or, is unreasonably cumbersome to describe the government's requirements without reference to a brand name. Potential rationales for use in a J&A for inclusion of brand name or equal reference in designs and specifications include but are not limited to:

(1) Architectural Finishes: Unified Facility Criteria 3-120-10 Interior Design, paragraph 2-1 b. Design Requirements states: "Provide a design that is fully coordinated with architectural features, interior finish materials, furnishings, and building systems". There are no recognized industry standards for pattern, fabric, texture, or other finishes other than those which are the brand name or proprietary specification of particular manufacturers. Therefore, it is essential to complete a 100% design that such brand name or equal identifications be made, and it is the technical opinion of the Engineering & Construction Division that these brand name or equal designations are mandatory to satisfy the government's interests.

(2) Furniture, Fixtures, and Equipment: For some classes of FF&E, there are not recognized industry standards for the levels of quality that would be required for particular pieces of furniture or systems furniture. Further, in some cases, because of the diverse ways in which different manufacturers aggregate components of systems furniture, giving detailed specifications for systems components may further restrict competition more than providing 3 brand names and models to establish a standard of quality, as directed by the UFC. In these circumstances, it is the technical opinion of the Engineering & Construction Division that these brand name or equal designations are mandatory to satisfy the governments interests and establish the standard of quality for these items.

(3) Brand name or equal references and proprietary specifications for other building systems and components: For most other systems, where non-proprietary specifications are readily available in the Unified Facility Guide Specifications or other resources, it is not necessary to use brand name or equal designations to meet the government's minimum

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requirements. While it is recognized that this is a standard industry practice that provides an efficient way to complete designs and specifications, efficiency is not a recognized basis for limiting competition under FAR 6.302-1 and the limitations implemented in NDAA 2017 § 888 preclude this practice. Unless other justification is available, the use of brand names in this context should be removed from all design documents and specifications.

6. **Update.** This guidance does not affect higher level documents and does not require updating any existing requirements.

7. **Point of Contact.** HQUSACE point of contact for this ECB is Scott Wick, CECW-EC, (202) 761-7419.

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