



**PROCEDURES FOR USING PROPRIETARY PRODUCTS ON
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION PROJECTS GOVERNED BY
NC GENERAL STATUTE §133-3 AND §136-28.1**

revised June 27, 2024

The North Carolina Department of Transportation (NCDOT) and the Federal Highway Administration (FHWA) encourage competition in project lettings. To further assure that the NCDOT, Municipalities, and Counties comply with the appropriate regulations, this information and process is being brought to your attention. **These requirements apply to any entity advertising projects through NCDOT, using Federal or State Funds governed by NC General Statute §133-3 and §136-28.1(n).** The purpose of these statutes is to mandate and encourage free and open competition on all public contracts, while not restricting the use of new and innovative products.

Through the Stewardship and Oversight Agreement between NCDOT and the NC Division of the FHWA, NCDOT has been given the responsibility to approve and track the usage of proprietary products and processes. Engineers have an inherent duty to use generic products instead of simply specifying proprietary products. Standard, generic, performance-based specifications, and standards should be used to the greatest extent practicable. If proprietary products are used, procedures within this document must be followed.

The links below are valuable sources of information on proprietary items using state and federal funds.

In accordance to State General Statute §133-3 and §136-28.1(n), the purpose of these statutes are to mandate and encourage free and open competition on public contracts, while not restricting the use of new and innovative products.

State General Statute §133-3:

https://www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_133/GS_133-3.pdf

State General Statute §136-28.1(n):

https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_136/GS_136-28.1.pdf

"(n) The Department of Transportation may specify a brand name or specific manufacturer of construction materials in order to promote system compatibility or synchronization; long-term maintenance savings or efficiencies; research, testing, or experimental projects; product evaluation; or when it is impossible or impractical to specify the required performance and design characteristics for such materials."

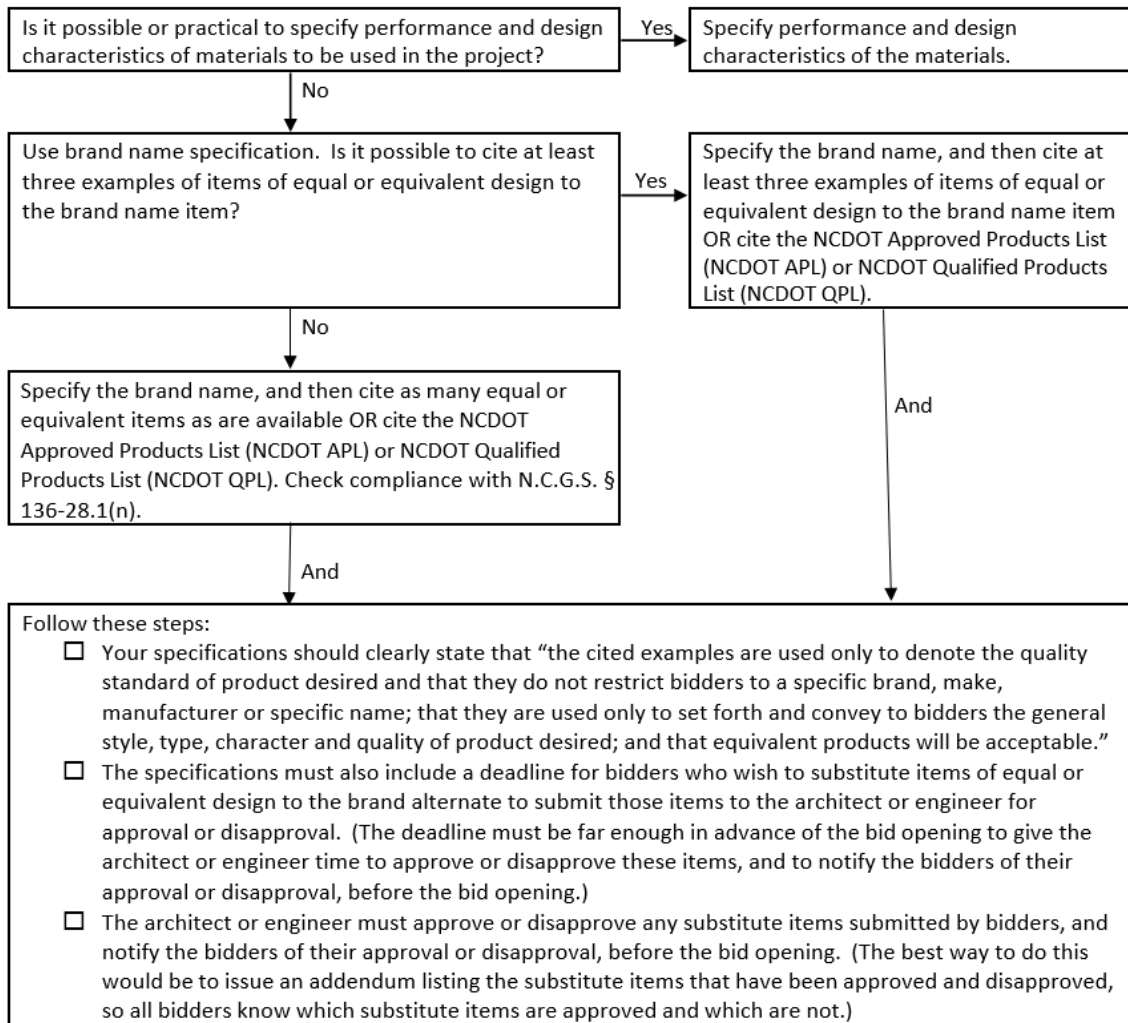
Please carefully read this statute to govern proprietary item decision making. A summary of the statute is provided on the next page below.

Other resources:

- Construction Program Guide: <http://www.fhwa.dot.gov/construction/cqit/propriet.cfm>
- Proprietary Products Final Rule Rollout Questions and Answers:
https://www.fhwa.dot.gov/construction/cqit/fr_qa.cfm
- Federal Registrar Final Rule: <https://www.govinfo.gov/content/pkg/FR-2019-09-27/pdf/2019-20933.pdf>



GS. 133-3 (first part – brand specifications)



PRODUCT EVALUATION PROGRAM

The [Product Evaluation Program \(PEP\)](#) is a valuable service offered by NCDOT to assist vendors when submitting their unique products for consideration for use on NCDOT projects. Most products used on NCDOT projects require prior listing on the APL, and/or listing on the Approved Producer/Supplier List. Please check to make sure that:

1. If a proprietary product is being used on an NCDOT project, the Product Evaluation Program is notified prior to its use. The PEP will determine whether the product in question needs to be listed on the APL, and
2. If it does need to be listed on the APL that a new product application is submitted prior to its use on a project.

If you have any questions regarding whether or not a proprietary product needs to be listed on the APL, please contact the product evaluation program at:

productevaluation@ncdot.gov.



North Carolina Department of Transportation Recommended Procedures for Compliance with GS 133-3 and 136-28.1(n)

1. For all city, county, state and other public entities whose projects are subject to Article 8 of Chapter 143 of the General Statutes, for all NCDOT funded projects, the Engineer of Record shall prepare specifications in accordance with the latest provisions of [N.C.G.S. § 133-3](#) and [N.C.G.S. § 136-28.1\(n\)](#) which provides for free and open competition on public contracts, while not restricting the use of new and innovative products.
2. The specifications shall contain a performance specification or name at least three brands of equal or equivalent design characteristics. If the Engineer of Record or owner prefers a particular brand of product or material then such brand shall be bid as an alternate to the three items of equal or equivalent design in the base bid, one of which may be the preferred brand.
3. The Engineer of Record's specifications for the preferred brand alternate must also identify the performance standards that support the preference.
4. The Engineer of Record shall confirm electronically to the Department Project Manager and Technical Unit the method to ensure that they are in compliance with [N.C.G.S. § 133-3](#) and [N.C.G.S. § 136-28.1\(n\)](#). If not possible to cite at least three examples of items of equal or equivalent design or cite the NCDOT APL or NCDOT QPL, first use the [Proprietary Approval Form for NCGS 136-28.1](#) to ensure compliance with [N.C.G.S. § 136-28.1\(n\)](#), where if in compliance, the Engineer of Record will maintain all documentation as part of the project file consistent with the public records requirements of the State of North Carolina.
5. Unless a different method was approved in the prior step, the Engineer of Record shall use the following steps to comply with [N.C.G.S. § 133-3](#), since [N.C.G.S. § 136-28.1\(n\)](#) was not applicable.
 - a. The Engineer of Record shall complete and obtain approval using the [Proprietary Approval Form](#) to document the requirements.
 - b. The Engineer of Record shall post a *virtual open meeting* notice on the NCDOT public facing website as described in the following pages. The [Proprietary Approval Form](#) and supporting documents shall be posted on the "[Proprietary Products](#)" website on connect.ncdot.gov for presentation of the performance standards for the project(s) where the proprietary product is being proposed for. The notice shall be published no later than 7 days prior to the meeting. Access to the virtual meeting link, date and time will be found on the [Proprietary Approval Form](#) and NCDOT public facing website. The notice shall include a listing of the preferred item(s) to be presented if applicable.
 - c. The *virtual open meeting* may be held separately or in conjunction with the project pre-bid meeting.



- d. The Engineer of Record and any stakeholders will conduct the meeting. The Engineer of Record will present information to the interested stakeholders in support of the preferred product alternate(s) and include written documentation using the [*Proprietary Approval Form*](#). The Engineer of Record should allow time at the meeting for input from interested stakeholders and those who have requested in advance to comment on the preferred alternate(s). The Engineer of Record may consider comments at the meeting and/or written comments or documents provided in advance in approving or disapproving the preferred brand alternate(s).
- e. Where alternates are approved at the meeting, the Engineer of Record shall provide justification in a written statement made available to the public using the [*Proprietary Approval Form*](#) including the criteria used to support the approval. [*N.C.G.S. § 133-3*](#) lists the only criteria as *cost savings* or *to maintain or improve the function of any process or system affected by the preferred product* or *both* using the *Proprietary Approval Form* to document. The justification documented within the [*Proprietary Approval Form*](#) and all supporting documents shall be published on the public facing [“Proprietary Products” website on connect.ncdot.gov](#) for the project(s) where the proprietary product is being proposed for.
- f. The Engineer of Record will maintain all documentation as part of the project file consistent with the public records requirements of the State of North Carolina.



Recommended Procedures for Open Meeting Notice to Interested Stakeholders Webpage regarding Proprietary Product

INSTRUCTIONS:

- 1) The Engineer of Record that is managing the proprietary product should complete this process. This form template is located on the [“Proprietary Products” website on connect.ncdot.gov project template folder “TIP X-XXXX Contract CXXXXXX”](#).
- 2) Ensure you have a virtual meeting “REGISTRATION LINK” (*i.e.* Microsoft Teams [Create a Microsoft Teams Event with a Registration Link / NCDIT](#)), GoToMeeting, WebEx, etc.) set-up for the public meeting.
- 3) Ensure the supporting documents and the *Proprietary Approval Form* and any supporting documents for the proprietary product manufacturer(s) is posted at the NCDOT public facing WEBSITE that supports this product to ensure it is a resource when advertised. This *Proprietary Approval Form* template is located on the [“Proprietary Products” website on connect.ncdot.gov project template folder “TIP X-XXXX Contract CXXXXXX”](#).
 - a. Modify all “yellow shaded” locations below and insert this in the request. You can modify the “yellow shaded” location or amend the “yellow shaded” location (ex. If the proprietary product was identified for multiple projects list all projects you are evaluating that proprietary product for.)
 - b. *Indicate what advertisement date you want this advertised in your request (this is the date you want the document available to the public), Date/Time of the meeting, and registration link below:*

Advertisement date requested:

Public Meeting Date/Time:

“REGISTER NOW” Link (insert REGISTRATION LINK here):

Note: **LINK** below is the path to the “Proprietary Approval Form - Submit Prior to Mtg Form” for specific Product.

Send this page and the following page to Amanda VanDerbroek (avanderbroek@ncdot.gov), Jamie Kritzer (jbkritzer@ncdot.gov), Jamille Robbins (jarobbins@ncdot.gov), and the Department’s Project Manager for NCDOT Public Event advertising (<https://www.ncdot.gov/news/events/Pages/default.aspx>).



**NCDOT NOTICE TO INTERESTED PARTIES - VIRTUAL OPEN MEETING ON
PROPRIETARY PRODUCTS
FOR [PROJECT DESCRIPTION/PURPOSE]**

STIP Project No. [X-XXXX], Contract Number C[XXXXXX]

The purpose of this meeting is to communicate the performance standards for the preferred product(s) and solicit alternatives from manufacturers that the Engineer will consider for approval on this project. The Engineer will give a presentation of the preferred product(s) during the virtual open meeting. Any additional product alternates, submitted prior to the meeting or during the meeting will be discussed by the manufacturer at this meeting.

Municipality/County – This open meeting is for any interested stakeholders to participate in a live virtual open meeting on **DATE** from **TIME** to learn more about the performance standards for alternates for the preferred product(s) for **PROJECT DESCRIPTION/PURPOSE**.

In accordance with [N.C.G.S. § 133-3](#), the following preferred product(s) is/are being considered for the project:

PRODUCT A as manufactured by **MANUFACTURER A** and **PRODUCT B** as manufactured by **MANUFACTURER B**. **PRODUCT A** as manufactured by **MANUFACTURER A** and **MANUFACTURER B**.

Documents related to this product will be open for inspection at the following location: **WEBSITE** or contacting **ENGINEER OF RECORD NAME** at **###-###-####** or **EMAIL**.

Anyone interested may sign up for the virtual open meeting by going to **WEBSITE** to review the preferred product(s), and anyone interested in learning about **this product/these products** or have an alternate option please click on the registration link below.

REGISTER NOW

The audience may submit questions via a chat box or **EMAIL**.

If you are a manufacturer interested in being considered for **PRODUCT A**, please fill out this form at this **LINK** and submit to **ENGINEER OF RECORD NAME** at **EMAIL** no less than 2 business days prior to the virtual open meeting on **DATE** and **TIME**.

If you are a manufacturer interested in being considered for **PRODUCT B**, please fill out this form at this **LINK** and submit to **ENGINEER OF RECORD NAME** at **EMAIL** no less than 2 business days prior to the virtual open meeting on **DATE** and **TIME**.