

## **Proprietary Product Certification Process**



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Note: The FDOT Certification Procedure that I will describe is under development. The actual implementation date of this procedure has not been determined.

A formal memo with implementation date will be released. Until that time, use of this procedure will be optional.





**Objectives:**

- ◆ Proprietary Products
  1. Federal Requirements
  2. State Process
  3. When the Process is Used
  4. Documentation Requirements



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§ 635.411

23 CFR Ch. I (4-1-12 Edition)

availability issues or more than one FHWA region may be submitted by the RPHWA to the Administrator for action.

(5) A request for waiver and an appeal from a denial of a request must include facts and justification to support the granting of the waiver. The FHWA response to a request or appeal will be in writing and made available to the public upon request. Any request for a nationwide waiver and FHWA's action on such

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§ 635.411 Material or product selection.

(e) In the case of a design-build project, the following requirements

(d) Reference in specifications and on plans to single trade name materials will not be approved on Federal-aid contracts.

ment unless the conditions of paragraph (a) of this section are applicable.

forth in a proje (1) Se is purch petively unpatented items; or (2) The State transportation department certifies either that such patented or proprietary item is essential for synchronization with existing highway facilities, or that no equally suitable alternate exists; or (3) Such patented or proprietary item is used for research or for a distinctive type of construction on relatively short sections of road for experimental purposes. (b) When there is available for purchase more than one nonpatented, non-proprietary material, semifinished or finished article or product that will fulfill the requirements for an item of

work of a project and these available materials or products are judged to be of satisfactory quality and equally acceptable on the basis of engineering analysis and the anticipated prices for the related item(s) of work are estimated to be approximately the same, the PS&E for the project shall either contain or include by reference the specifications for each such material or product that is considered acceptable for incorporation in the work. If the

pate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the Request for Proposals document unless the conditions of paragraph (a) of this section are applicable. (4) FR 2004, Aug. 27, 1976, as amended at 67 FR 5926, Dec. 10, 2002; 71 FR 66454, Nov. 15, 2006.

**§ 635.413 Guaranty and warranty clauses.**  
The STD may include warranty provisions in National Highway System (NHS) construction contracts in accordance with the following:

212

## Definition

### **Patented or Proprietary Product.**

- ◆ A product, specification, or process identified in the plans as a "brand" or trade name (e.g. 3M, Corten). 
- ◆ However, it may also be a product so narrowly specified that only one or two providers can meet the specification.



## Narrowly Defined Specifications

The specification cannot be used to allow proprietary products to be inappropriately or inadvertently required for Federal-aid projects.

- ◆ If the specification reduces the pool products to a single proprietary product, the contracting agency must certify that this is a unique product for which there is no equally suitable alternative
- ◆ The specification must include a 'reasonable' number of products that can meet the requirements. This is 2 or more.
- ◆ Do not assume if a national organization (e.g. AASHTO, ASTM) has issued a specification that it is non-proprietary:
- ◆ Must verify a 'reasonable' number of products that can meet the requirements. This is 2 or more.



## When Do These Limitations Apply?

- ◆ Whenever Federal funds are used or might be used on a project.
  - ✓ Note: Since this process is to be completed early in the Design phases, it should be assumed that all projects will use Federal funds
- ◆ Does not apply when no Federal funds are being used.
  - ✓ This includes when a Local Agency is paying for it specifically (without using Federal funds)



### § 635.411 Material or product selection.

(a) Federal funds shall not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the plans and specifications for a project, unless:

(1) Such patented or proprietary item is purchased through competitive bidding or by suitable unpatented material or process.

(2) The State transportation department

(a)(2) The State transportation department certifies that...

(3) Such patented or proprietary item is used for research or for a distinctive type of construction on relatively short sections of road for experimental purposes.



### *When Can a Proprietary Product be used on a project?*

1. The State Certifies it meets one of the following criteria:
  - ✓ Essential for synchronization, or
  - ✓ There is no equal capable of meeting *of the need.*
2. It is being used in research (Experimental) – State Approval required.
3. It is in the public interest – requires Federal Highway approval.
4. No Federal funds are being used.

Proprietary Product  
Certification Process



### *FDOT Proprietary Products Process*

- ◆ Definitions
  - ✓ Initiator – the designated agency/contractor representative requesting the use of the proprietary product
  - ✓ Agency – any agency: Local or State
  - ✓ Reviewer – the designated representative in the Department with the job knowledge in the area where the proprietary product is requested.
- ◆ District Level process



## *FDOT Proprietary Product Certification Process*

**BEGIN  
WORK  
ZONE**

1. The Initiator will submit the request for the use of the proprietary product to the Department's District Design Project Manager. The submittal will consist of
  - A. The Certification form with the following:
    - I. The necessary information completed and signature from the Initiator
    - II. And a documentation package to support the request.
2. The Project's Design Manager will receive the package and identify the appropriate office within the Department to conduct the review and make recommendations for approval.
3. The Project's Design Manager will then forward the package with the review and recommendations to the District Design Engineer for approval. The District Design Engineer will sign the Certification portion of the form when the request is approved and summarize any special conditions or limitations.
4. The form, complete with signature, and document package will remain with the project documentation.



## *Conditions and Limitations*

- ◆ Certifications can be granted beyond a single project:
  - ✓ Multiple projects in a series
  - ✓ Time limited to all projects
  - ✓ Regional
  - ✓ Agency specific
  - ✓ Any combination of the above
- ◆ Justification must support the conditions and limitations.



## Proprietary Product Certification

To: \_\_\_\_\_ Design Engineer Date: \_\_\_\_\_

Financial Project ID: \_\_\_\_\_ New Const. ( ) RRR ( )  
 Federal Aid Number: \_\_\_\_\_  
 Project Name: \_\_\_\_\_  
 State Route Number: \_\_\_\_\_ Co./Sec./Sub: \_\_\_\_\_  
 Begin Project M/P: \_\_\_\_\_ End Project M/P: \_\_\_\_\_  
 Full Federal Oversight: No ( ) Yes ( ) Note: If Yes, Submit to FHWA Director.

A justification and all supporting documents must be attached to this document, using the appropriate certification:

I, \_\_\_\_\_ of the \_\_\_\_\_ do hereby certify that in accordance with the requirements of 23 CFR 655.411(a)(2), with reasonable \_\_\_\_\_  
 that this patented or proprietary item is essential for synchronization with existing highway facilities.  
 that no equally suitable alternative exists for this patented or proprietary item.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**For Department Use Only**

I, \_\_\_\_\_ of the Florida Department of Transportation, do hereby approve this certification request made in accordance with the requirements of 23 CFR 655.411(a)(2), with reasonable \_\_\_\_\_  
 that this patented or proprietary item is essential for synchronization with existing highway facilities.  
 that no equally suitable alternative exists for this patented or proprietary item.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_



## Certification Requirements

The Certification form consists of two parts:

1. The Initiator completes the top portion
2. District Design Engineer signs and 'Certifies' the request.

## Who Initiates the Request?

The Contracting Agency:

- ◆ Local Agency requests – Local Agency personnel or Local Agency Consultant
- ◆ FDOT contracts out the Plan set – Consultant
- ◆ FDOT identifies certain needs that must be included in the Plan set – FDOT personnel that identified the need.

***What documentation is required to justify a request?***



***Synchronization Definition***

- ◆ Matching, coordination or conformance of a device to a previous standard
- ◆ Or integrating a process into an established method of doing business.

## Synchronization

Justification must be based on the following:

- ◆ Function: the proprietary product is necessary for the satisfactory operation of the existing facility,
- ◆ Aesthetics :the proprietary product is necessary to match the visual appearance of existing facilities,
- ◆ Logistics: the proprietary product is interchangeable with products in an agency's maintenance inventory,



And/or any combination thereof.



## Synchronization cont.

In addition, it is advisable for the contracting agency to evaluate the following factors as they relate to synchronization:

- ✓ Lifecycle is the relative age of existing systems compared to when the system is outdated and will need to be expanded and the remaining projected life of the proposed proprietary element in relation to the remaining life of the existing elements,



✓ Size/extent of products and systems to be synchronized to/with, and the relative cost of the proprietary elements compared with replacing the elements requiring synchronization.



## Synchronization Example

As part of a highway expansion, the City has requested a landscaped area in the median to include a sprinkler system. As a site sensitive solution, the District has agreed to the request. The City has signed a MMOA for the landscaping. The City's Maintenance Department has now submitted a list of proprietary equipment for the system and a Certification form with Synchronization marked as the reason for requesting these parts.

What should the City Maintenance Department include in the justification package?



## Justification Guidance

- Function
    - An explanation of how it fits into an existing system, may or may not be applicable. Depends on how extensive the connections are in the list.
  - Aesthetics
    - Appearance is not likely going to be unnecessary in this situation. But if it is a reason for requesting certain parts include it and identify which parts are affected.
  - Logistics
    - Most likely reason for the parts list. If so, a discussion of the number of parts are used in the City's Maintenance Department inventory should be included and how many other systems maintained by the City use these parts. If the City does use other parts, address why these parts have been selected (may be address in Lifecycle if applicable).
  - Lifecycle
    - The lifecycle for complete replacement of the City's Main spinkler system should be addressed: i.e. Is it new or close to its end of life and soon to be updated/replaced. Is it older, but still maintainable? There should be some facts to back this up, not just a sentence or two.
  - Size/Extent\*
    - How does this request fit into the entire project?
    - What is the cost of the proprietary products requested compared to its closest competitor?
- \* This is the FDOT Reviewer's chance at a reality check: Is the request for a few items of low dollar value or is the total a very high dollar value compared to the overall project? Is the difference in the dollar amount small in the cost of the closest competitor?



## *What is Unique Need?*

- ◆ Sole source,
- ◆ One of a kind,
- ◆ Or has no equal capable of meeting the need with any other product or process.



## *Unique Need Example*

- ◆ The Designer has requested a proprietary Controller on an ITS installation. The Certification form has been submitted with Unique Need marked as the reason.
- ◆ What should the Designer include in the justification package?



## *Justification Guidance*

Such documentation may include, as appropriate:

- ◆ An evaluation of the pool of potential or alternate products, and a discussion of why these products cannot meet the project needs.
  - ✓ Identify any reasons or critical decision points that would justify a higher standard.
- ◆ A description of how the unique proprietary product requirement will benefit the public.
  - ✓ Identify the unique need(s) that are being addressed.
  - ✓ Identify any safety locations or critical decision points that would justify a higher standard.
- ◆ An estimate of additional costs, if any, incurred as a result of this proprietary product requirement.



## *District Certification Options*

- ◆ The extent of the Certification must be specified. (project-specific, multiple projects, region/district-wide, statewide, or programmatic)
- ◆ When the extent of a Certification extends beyond a single project, a sunset date must be specified.





***Can the FDOT require the contracting agency to provide additional supporting documentation?***

FDOT may request, but not require, additional information. However, failure to submit additional information may result in a rejected request.



## Review

5 reasons a proprietary product or process can be identified in plans:

1. Bids equally against a non-proprietary product
2. Synchronization
3. Unique or no suitable alternative
4. Experimental or other Special Program
5. Public Interest Finding



## *Bids against a Nonproprietary product*

- ◆ Presented as an alternative,
- ◆ Equal to the non proprietary product or process for the bidding.



## *When is a PIF necessary?*

A certification and a PIF are different in that:

A PIF is used if a contracting agency elects to require a specific product when other acceptable products are available.

- ✓ Reasons other than Synchronization and Unique Need.



*What about using a Specification instead of identifying proprietary products in the plans?*



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## *Specifications*

- ◆ The specification cannot be used to allow proprietary products to be inappropriately or inadvertently required for Federal-aid projects.
  - ✓ if the specification reduces the pool products to a single proprietary product, the contracting agency must certify that this is a unique product for which there is no equally suitable alternative
  - ✓ The specification must include a 'reasonable' number of products that can meet the requirements. This is 2 or more.
- ◆ Do not assume if a national organization (e.g. AASHTO, ASTM) has issued a specification that it is generic:
  - ✓ Must verify a 'reasonable' number of products that can meet the requirements. This is 2 or more.



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## ***COMMON QUESTIONS***



### *What about using the 'or equal' clause?*

- ◆ No. Cannot use.
- ◆ This is the same as naming a proprietary product.
- ◆ The Initiator must do their homework to name equals or write TSP.



### *What about Naming Several Products?*

- ◆ No, because...
- ◆ If you can name several products, you can write a TSP with requirements.
- ◆ If you can do this, you don't have a proprietary product and this process is unnecessary.
  - ✓ However, you may need to justify the TSP.

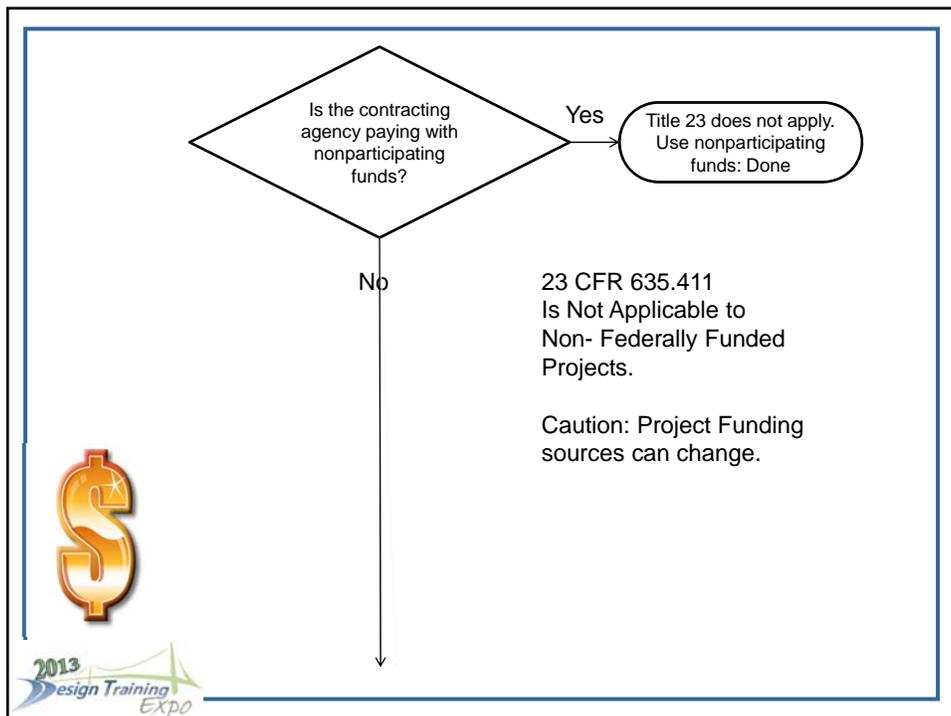
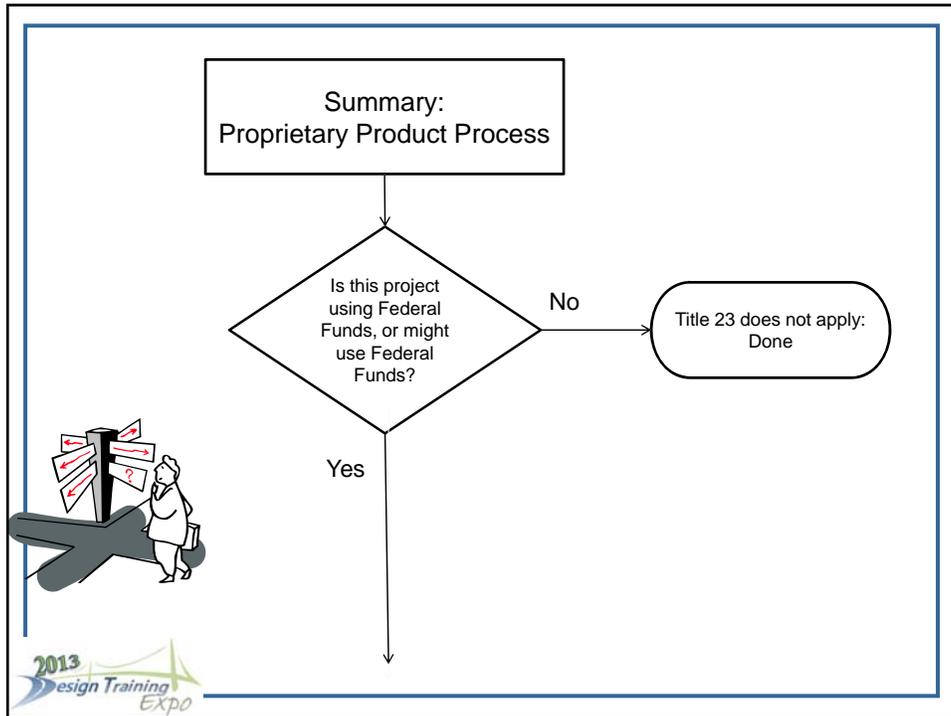


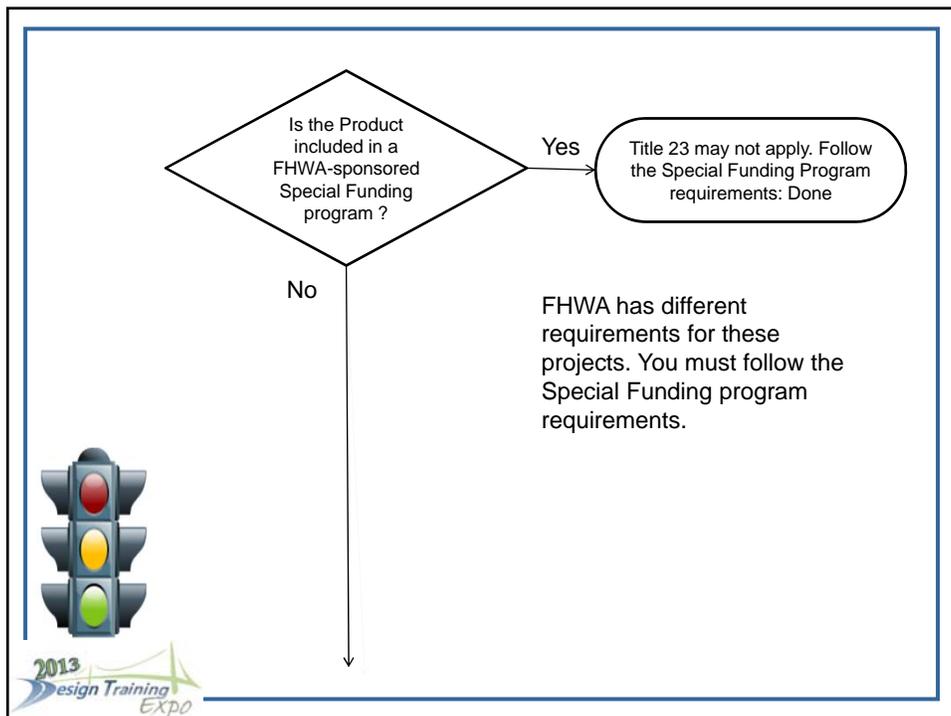
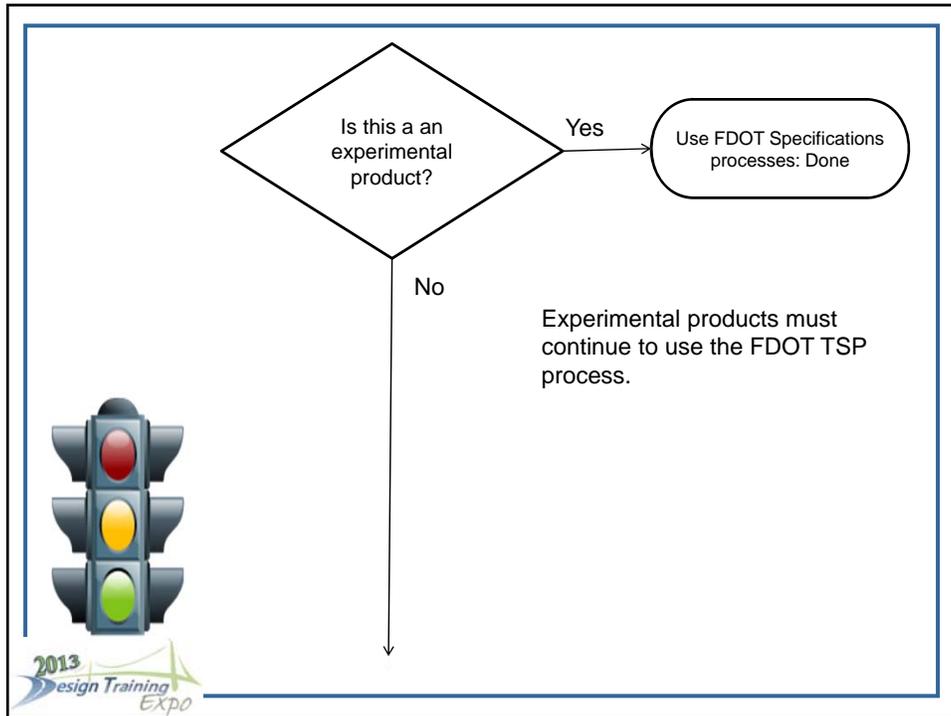
### *What about listing both: a Single Product as an Alternative to a Generic Process?*

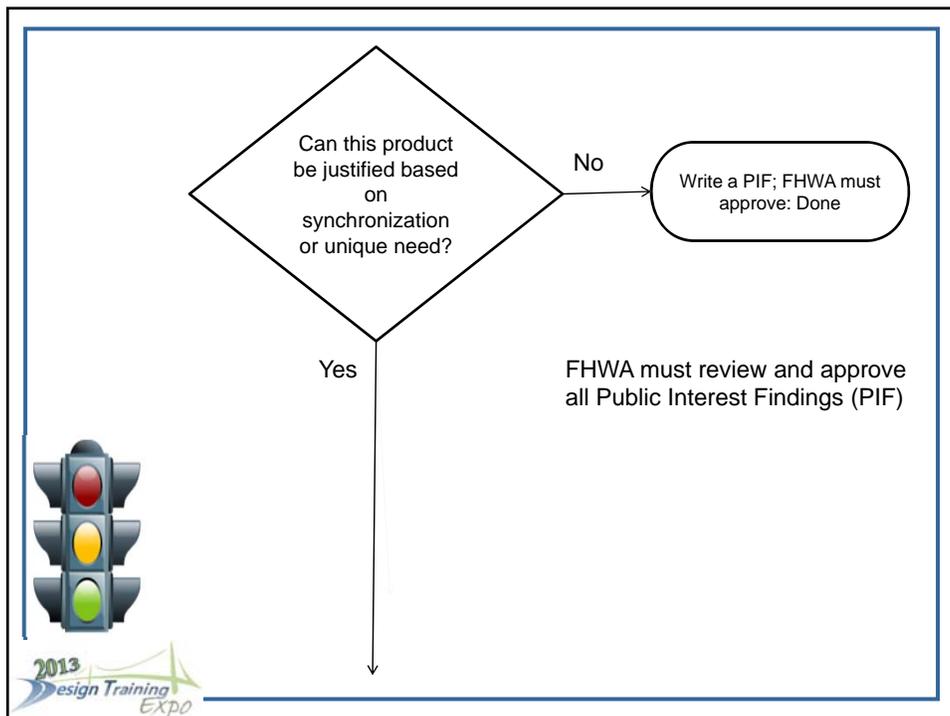
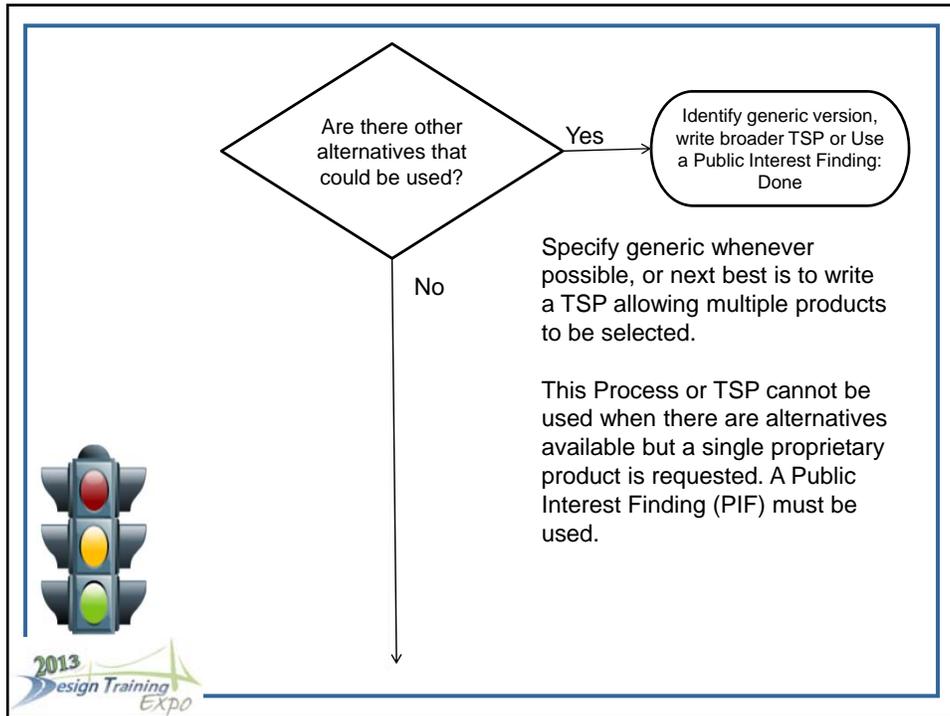
In this case you are presenting the Proprietary Product as an alternative for bidding purposes. (Design/Build)

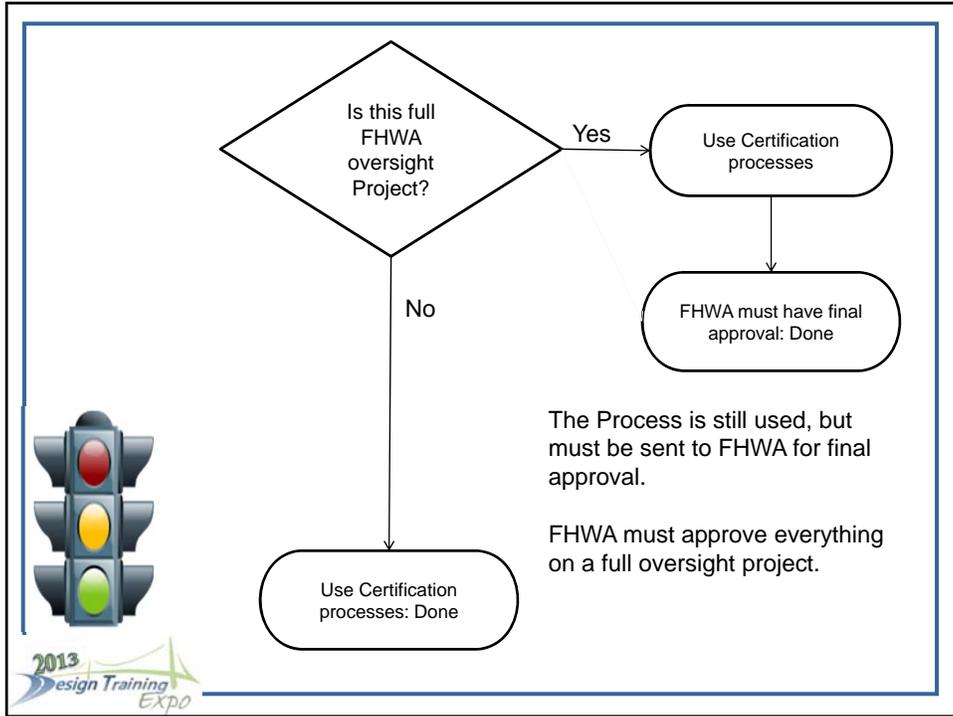
- ◆ OK, It is bidding equally against an non-proprietary process, therefore this process is not necessary.











### Product Evaluation Staff



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**THANK  
YOU**

*Questions?*

