U.S. Department
of Transportation
**Federal Highway
Administration**

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February 2, 2006

In Reply Refer To: HPO-FL

Mr. Kevin Thibault
Assistant Secretary for Engineering and Operations
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Fl 32399-0450

Attention: Mr. Ananth Prasad

Dear Mr. Thibault:

Subject: Guidance for Approval of Proprietary Products

Effective February 1, 2006, the FHWA's policy on the approval for the use of proprietary or patented products has changed. The new policy applies the regulation contained in 23 CFR 635.411, "Material or product selection," to all federal aid highway projects. Previously, since the passage of the ISTEA legislation in 1991, this regulation had been applied only to projects located on the NHS. Prior to ISTEA it had been applied to all federal-aid projects.

This change applies to all federal-aid projects not under contract prior to February 1, 2006. We interpret "under contract" to mean those projects not authorized in FMIS as of this date. For FHWA full-oversight projects this office must review and approve all proprietary product specifications and public interest findings. For state-oversight (exempt projects) the Florida DOT documents and acts for FHWA to review and approve the use of proprietary products consistent with this regulation.

To assist you in implementing this change and to provide consistency in the interpretation of FHWA policies regarding proprietary products, we have attached the following documents:

- A list of questions and answers regarding 23 CFR 635.411, and
- A copy of the regulation 23 CFR 635.411, Material or product selection.

If you have any questions about this policy or desire further information, please contact Mr. Chris Richter at 942-9650 x3022.

Sincerely,

For: David C. Gibbs
Division Administrator

Celebrating 50 Years
1956 2006
Eisenhower Interstate System

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Questions and Answers Regarding Title 23 CFR 635.411

1. **What is a proprietary product?**

   Generally, this is a product, specification, or process identified in the plans or specifications as a "brand" or trade name (e.g. 3M, Corten). However, it may also be a product so narrowly specified that only a single provider can meet the specification. A proprietary product must meet one of the conditions listed under 23 CFR 635.411(a) or (c) for Federal funds to participate in its use on a highway construction project. See Item 7 below.

2. **Does FHWA's policy also apply to proprietary processes?**

   Yes, the FHWA's policy also applies to patented or proprietary or processes required in the plans or specifications on a Federal-aid project. An example of a proprietary process would be that used for liquefying rubber for use in rubberized asphalt.

3. **Does 23 CFR 635.411 apply to all Federal-aid projects?**

   As the provisions in 23 CFR 635.411 implement the competitive bidding principles in Title 23 USC 112, these requirements apply to all highway construction projects funded under Title 23. Contracting agencies may use state-approved procedures for "non-highway" construction projects located off the highway right-of-way (such as Transportation Enhancement projects off the highway right-of-way).

   Note: For a period of time after the Intermodal Surface Transportation Efficiency Act of 1991 was implemented, the FHWA's policy limited the regulation's applicability to National Highway System projects. However, further evaluation of 23 USC 112 and 23 CFR 635.411 led this office to determine that the regulation should apply to all Federal aid highway construction projects. Therefore, effective February 1, 2006, this policy will apply to all Federal-aid highway construction projects not under contract prior to that date. Any non-NHS project under contract prior to February 1, 2006 that incorporates a patented or proprietary product approved through the State DOT's procedures would not require any additional approvals

4. **Is FHWA approval required for all proprietary product specifications and public interest findings?**

   As established in the FHWA / State DOT oversight agreement, the FHWA has approval authority for full oversight projects. On "state-approved" projects, the State DOT (or a local public agency if authorized by State DOT) will document and act for the FHWA regarding any proprietary product issues, including approvals.

5. **What issues should be considered in the material selection process?**

   If there are a limited number of products available that may meet the proposed specifications, a State DOT should undertake an engineering and economic analysis. The analysis should address the following questions:

- Are there other products on the market that meet the specifications?
- Are these products of satisfactory quality? and,
- Are the anticipated costs for the products are approximately the same?

The extent of the analysis should be appropriate for the value and complexity of the products involved, using life cycle cost analysis to develop cost comparisons based on comparable designs to meet product requirements using the anticipated service life for each product.

6. **May contracting agencies set "above average" performance standards for a product?**

   Yes. A contracting agency may specify a higher or "above average" standard of performance on certain construction projects. However, if this "above average" standard reduces the pool of suitable products to a single proprietary product, the contracting agency must then prepare a public interest finding, which would document its minimum needs and support its contention that such a performance standard is necessary and reasonable to achieve these needs.

7. **Under what circumstances may the FHWA participate in the costs of a proprietary product on a Federal-aid project?**

   The FHWA may participate in the costs of a proprietary product under the following circumstances:

   a. Competitive bidding, provided under 23 CFR 635.411(a)(1)

      1. The proprietary product is obtained through competitive bidding with other suitable proprietary and non-proprietary products from multiple manufacturers. Where both proprietary and non-proprietary products are available, the contracting agency must compose specifications that allow the contractor to choose amongst as many acceptable products and technologies as possible. If the specification lists specific products, it must list all or at least a reasonable number of products, and must include the words "or equal" to ensure the broadest range of choice.

      2. A competitively bid performance-based warranty specification is permitted, if it does not limit product selection to a single source. The warranty specification must clearly describe all potential products that are acceptable for use at the time of project advertisement

   b. A certification by the contracting agency, as provided in 23 CFR 634.411(a)(2), that the specified proprietary product is either:

      1. Necessary for synchronization with existing facilities; or

      2. A unique product for which there is no suitable alternative.

   c. A proprietary item is to be used for research or for a distinctive type of construction on relatively short sections of road on an experimental basis as provided in 23 CFR 635.411(a)(3).

product as being in the public interest as provided in 23 CFR 635.411(c).

8. **If a specification lists a number of acceptable products and includes the "or equal" phrase, would it be prudent for a bidder to base its bid on those listed products?**

   Yes. The bid proposal should be based only on the acceptable products listed. The contracting agency would be responsible for evaluating the bids and determining whether a particular product is equal to that specified. Some agencies require bidders to include the name of the selected agency subsequently determines to be "not equal", the bid could be declared nonresponsive.

9. **23 CFR 635.411(a)(1) requires that patented and proprietary products be purchased or obtained through competitive bidding with equally suitable unpatented devices. For many roadside appurtenances such as barrier terminals and crash cushions, there are no comparable generic or unpatented devices. Is it acceptable to bid patented devices against other patented devices when no generic product exists?**

   Yes. At present, single proprietary products can be specified under 635.411(a)(2) if the contracting agency can certify that no suitable unpatented product exists. However, if two or more proprietary products exist, they can and should be bid competitively.

10. **For a performance-based warranty specification, if the warranty period exceeds that of the manufacturer-provided warranty, may the contractor select multiple listed acceptable products to fulfill the warranty requirements?**

    Yes. If for example, a contracting agency requires the contractor to warrant the pavement markings for 7 years after project acceptance, and the listed acceptable products have manufacturer warranties of less than 7 years, the contractor may opt to use any combination of listed acceptable products to fulfill the requirements of the performance-based warranty

11. **What factors should be considered when basing the use of a proprietary product on synchronization?**

    Synchronization may be based on 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 with an agency's maintenance inventory) or a combination of the three. This may be best demonstrated by the following examples:

    - A Federal aid construction project in City A includes the replacement of traffic signals and controllers in the downtown area. The City's existing signal control system is compatible with only Controller X. As part of its Downtown Beautification Plan, the City has specified Signal Pole Y for all intersections in the downtown area. To ensure FHWA participation, the contracting agency should provide sufficient documentation to support both functional and aesthetic synchronization, which could merely consist of a statement from the City justifying its decision to specify Controller X (functional synchronization with control system) and Signal Pole Y (aesthetic synchronization with signal poles).

    - A Federal-aid construction project includes the replacement of existing substandard

guardrail end terminals with those conforming to NCHRP 350 requirements. Upon project completion, the County will be responsible for the maintenance of the project. End Terminal T, which is NCHRP 350-compatible, has been constructed on other County-maintained routes in the vicinity. Due to scarce financial and labor resources, it desires to stock only one type of NCHRP 350-compatible end treatment, and has requested that the contracting agency to specify Terminal T. To ensure FHWA participation, the contracting agency should address these logistical issues in its supporting documentation.

12. **If the State DOT certifies that a proprietary product is essential for synchronization with existing facilities; or that no equally suitable alternative exists; can the FHWA Division Office require the State DOT to provide supporting documentation?**

    Yes. Under 23 CFR 1.5, the FHWA may require the State DOT to provide "information as the Administrator shall deem desirable" to administer the Federal-aid highway program. Supporting documentation can be in a number of formats, including correspondence from a public agency that explains the need for synchronization, market analyses of the availability of suitable alternatives, and other unique considerations.Note: For Intelligent Transportation System (ITS) products, there are national interoperability standards that allow various products (e.g. dynamic message signs, signal controllers, cameras) to be used in place of each other. It is appropriate for the FHWA to verify whether a proprietary product is necessary.

13. **13. What should be included in a public interest finding (PIF)?**

    While there is no specific format for a public interest finding, the level of documentation will be dependent upon the specific nature of product and projects involved. In general, the PIF should document the reasonableness of the contracting agency's minimum needs and the best method to meet these needs consistent with the requirement for the broadest practical competition. The supporting material may include engineering and economic considerations, product availability and compatibility, logistical concerns, and other unique considerations.

    For your information, the FHWA "Contract Administration Core Curriculum Participant's Manual and Reference Guide 2005" contains guidance regarding the content and review of PIFs. The manual also contains guidance about product selection, specifications and other contract administration topics, and is available on the FHWA Internet site at www.fhwa.dot.gov/programadmin/contracts/coretoc.htm.

14. **Should a proprietary product approval include a "sunset" provision?**

    Yes. It is important to review the PIF on a periodic basis to assess changes in market conditions and re-examine the need for the PIF. If appropriate, the Division Office and State DOT should agree on a process for reviewing and approving multiple-project or statewide public interest findings. We recommend that the PIF be based on a limited approval cycle (two to five years, as appropriate) to encourage re-evaluation of the continued need for a specific product in light of changes in the State DOT's performance objectives, product availability, technological improvements, and market conditions.

15. **What should be included in a State DOT request to use a proprietary product for research or experimental purposes?**

    If the State DOT requests to use a proprietary product for research or for a distinctive type of

construction on a relatively short section of road for experimental purposes, it must submit an experimental product work plan for review and approval in accordance with the FHWA/State DOT Oversight agreement. The work plan should provide for the evaluation of the proprietary product, and where appropriate, a comparison with current technology. Go to http://www.fhwa.dot.gov/programadmin/contracts/expermnt.htm for additional information.This office recommends that the State DOT submit the product evaluation results information to the AASHTO Product Evaluation Listing (APEL) database so that other agencies may benefit from their experience. The APEL is available on the AASHTO Internet site at: http://apel.transportation.org/programs/apel/site.nsf/homepage/Overview?OpenDocument

16. **Does the use of an AASHTO or ASTM specification equate to the use of a "non-proprietary specification"?**

    No. Even though a national organization (e.g. AASHTO, ASTM) has issued a specification for a particular product, State DOTs and FHWA Divisions should be aware that this alone does not ensure that the specification is generic in nature. Such specification may be considered proprietary if only one manufacturer can meet the specification requirements. To determine whether a given specification complies with FHWA policy, it is necessary to assess the availability of acceptable materials and the degree of competition within the industry.

17. **Is a specification reference to a State DOT's approved product list subject to the FHWA's proprietary product requirements?**

    Yes. Since many State DOTs reference their "Qualified" or "Approved" products list in either standard specifications or project special provisions, FHWA Division staff should become familiar with the State DOT's product approval process to ensure that proprietary, sole source, or in-state or local preference products are not being inappropriately or inadvertently required for Federal-aid projects.

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635.411 Material or product selection.

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(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 or obtained through competitive bidding with equally suitable 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, nonproprietary 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 State transportation department wishes to substitute some other acceptable material or product for the material or product designated by the successful bidder or bid as the lowest alternate, and such substitution results in an increase in costs, there will not be Federal-aid participation in any increase in costs.

(c) A State transportation department may require a specific material or product when there are other acceptable materials and products, when such specific choice is approved by the Division Administrator as being in the public interest. When the Division Administrator's approval is not obtained, the item will be nonparticipating unless bidding procedures are used that establish the unit price of each acceptable alternative. In this case Federal-aid participation will be based on the lowest price so established.

(d) Appendix A sets forth the FHWA requirements regarding (1) the specification of alternative types of culvert pipes, and (2) the number and types of such alternatives which must be set forth in the specifications for various types of drainage installations.

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

(f) In the case of a design-build project, the following requirements apply: 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 Request for Proposals document unless the conditions of paragraph (a) of this section are applicable.

[41 FR 36204, Aug. 27, 1976, as amended at 67 FR 75926, Dec. 10, 2002]