

DEPARTMENT OF TRANSPORTATION STATE OF GEORGIA

INTERDEPARTMENT CORRESPONDENCE

FROM Russell R. McMurry, P.E., Chief Engineer 
TO Program Delivery, IPD, TIA, Engineering, Operations, Construction, and Field Districts
SUBJECT **Patented and Proprietary Products on Federal-Aid Projects**

DATE March 15, 2013

A *Patented or Proprietary Product* is a product identified in plans or specifications as having a "brand" or trade name. Federal regulations concerning the use of patented and proprietary products (proprietary products) on federal-aid projects are contained in [23 CRF 635.411](#). On November 30, 2011, FHWA sent memorandum to state DOTs revising their guidance to ensure implementation of the regulations do not conflict with their goal of promoting innovation on federal-aid projects (Attachment A). This is to clarify the current GDOT protocol for obtaining FHWA approval whenever a proprietary product is proposed for use on a federal-aid project, absent of the competitive bid process:

1. A request package for use of a proprietary product is prepared by the lead contracting agency (GDOT or Local Government) and submitted for approval under cover-letter by the GDOT Project Manager to the Office of Design Policy & Support. The Office of Design Policy & Support will conduct a QA review of the request and process the package with the Georgia Division of the FHWA for approval. There are three categories under which approval may be considered:
 - **Synchronization:** a product that matches specific current or desired characteristics of a project based on function, aesthetics, or logistics. The contracting agency submits request with a certification statement to FHWA for review and approval. The certification statement will identify the proprietary product as either necessary for synchronization with existing facilities or as a unique product for which there is no equally suitable alternative.
 - **Experimental Product:** a proprietary product used for research or for a distinctive type of construction on relatively short sections of road on an experimental basis. The contracting agency submits an experimental product work plan to FHWA for review and approval. The work plan should provide for the evaluation of the proprietary product, and where appropriate, a comparison with current technology. Coordination with the GDOT Office of Research should occur prior to a request to identify how the follow-up evaluation will be performed.
 - **Public Interest Finding (PIF):** an approval by the FHWA Division Administrator, based on a request from a contracting agency, that it is in the public interest to allow the contracting agency to require the use of a specific material or product even though other equally acceptable materials or products are available.

See references below for additional explanation on form and content of requests.

2. FHWA approval is required prior to construction authorization. Therefore, the request should be made as early in the plan development process as possible, but no later than Final Field Plan Review.
3. A successful approval from FHWA will be issued in the form of a letter to GDOT.
4. If approval is not received, the contracting agency may elect to use non-federal funds (i.e., state or local) to pay for the proprietary product. However, State funds may only be used for this purpose after receiving prior written approval from the GDOT Chief Engineer.

If you have any questions, feel free to contact the Office of Design Policy and Support at (404)631-1978.

RRM:BAS

References:

FHWA Guidelines: <http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm>

FHWA Informational Video: <http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=68>

Proprietary Products Request Template: <http://www.dot.ga.gov/doingbusiness/PoliciesManuals/roads/Pages/OtherResources.aspx>

U.S. Department
of TransportationFederal Highway
Administration

Memorandum

Subject: **INFORMATION:** Guidance on Patented and Proprietary
Product Approvals

Date: November 30, 2011

A handwritten signature in black ink, appearing to read "King W. Gee".

From: King W. Gee
Associate Administrator for Infrastructure

To: Division Administrators
Federal Lands Highway Division Engineers

The Federal Highway Administration's (FHWA) regulations concerning the use of patented and proprietary products are contained in 23 CFR 635.411. In recent years, we have received concerns from the State Departments of Transportation (DOTs), industry, and Congress regarding FHWA's implementation of this regulation. Specifically, some have viewed the regulation as prohibiting the specification of better-performing innovative products on Federal-aid projects simply because the products were patented or proprietary.

In response, we have examined this issue and have revised our guidance to ensure that the implementation of 23 CFR 635.411 does not conflict with FHWA's goal of promoting innovation. The updated guidance is now posted on the FHWA website at <http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm>.

In summary, the guidance:

- Clarifies that a State DOT may specify proprietary products when the State DOT certifies that there is no suitable alternative product (such as an innovative product offering better performance) or that the product is needed for synchronization.
- Clarifies that FHWA must approve, through a public interest finding, the specification of a proprietary product when other equally suitable alternatives exist.
- Provides for the Internet posting of FHWA's approval of public interest findings on FHWA's website and encourages the posting of State DOT certifications on the AASHTO Product Evaluation List website.
- Clarifies that additional approvals are not required when proprietary products are being evaluated in FHWA-sponsored programs such as Highways for Life, the Innovative Bridge Research and Deployment Program, and the Innovative Pavement Research and Deployment Program.
- Continues to support the principle of competition in the selection of materials whenever more than one equally suitable product exists to fulfill project requirements.

Please share the updated guidance with your staff and State DOT, and ensure that all parties are familiar with their respective authorities and responsibilities.