



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

Memorandum

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

Date: November 30, 2011

From: King W. Gee
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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.