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Project Development Contract Specifications Patented or Proprietary Products

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Certain requirements must be met when sole-sourcing a patented or proprietary product on Federal-aid projects



When it comes to brand name products, we like what we like for many different reasons, whether it's our favorite ice cream or a specific brand of soda. We often choose a specific product or brand because we believe it is the best choice, regardless of cost or other arguments.



However, when you choose to use branded products on Federal-aid projects, there are specific requirements that must be followed. Using branded products is an exception to the standard of fair and open competition for product use. Unless you meet the terms of these requirements, any premium costs associated with that item are not eligible for Federal participation.

Just as Coca-Cola® or Pepsi® are globally recognized as branded beverages, **patented or proprietary products** required for projects are often easily recognizable and designated under common industry trade names. In the Federal-aid program, a patented or proprietary product is defined as a

product, specification, or process that has a premium or royalty cost associated with its value or use. Examples of patented or proprietary products that may be familiar to you on a construction project include the 3M™ brand for sign sheeting or Tensar® for geotextiles.



Why is it important for you to consider how you use brand name products on your Federal-aid project? Normally, Federal funds eligibility applies to your entire project. However, when you require a patented or proprietary product for your project, the cost of individual products are evaluated for eligibility for Federal funding.

As you prepare the contract specifications for your construction project, it is essential that you recognize when a patented or proprietary item is being required.

The use of patented or proprietary products often involves making a sole-source selection within the contracting process.

This occurs when a specification is written so narrowly that only a specific, single supplier or product is acceptable. You effectively prohibit competing products by requiring a sole source, or exclusively using a trade name product within the specifications. This violates the basic principle of Federal-aid contracting for competitive awards.

You provide open and fair competition when you allow product competition on Federal-aid projects.



When you include product trade names within your project's specifications, FHWA requires that a reasonable number of branded products be represented and allow equally suitable products that are not specifically named. The words "or equal" should always be added within the specification to ensure the broadest range of options. This means instead of specifying a Coke by Coca-Cola®, you allow competing and generic brands by specifying "a Coke, Pepsi, or equal cola beverage."

However, there are circumstances when patented or proprietary products can be used and be eligible for Federal funding.

Full participation with Federal funding may apply for a patented or proprietary product if one of three non-competitive selection options is used for product certification, experimental purposes, or a public interest finding or PIF.

Prepare a product certification statement when a specific product is needed to build or operate the constructed project. This is a written and signed statement by a State department of transportation, or State DOT, official prepared in advance of requiring the product in the contract

specifications. The agency official certifies that a particular patented or proprietary product is either necessary for synchronization with existing facilities or is a unique product for which there is no equally suitable alternative.

A certification statement should specifically address at least one of these factors:

1. **Function** – pertains to when the product is necessary for the continued satisfactory operation of the existing facility
2. **Aesthetics** – addresses when the product has consistent visual appearance and blends with existing features; or
3. **Logistics** – pertains to interchangeability with maintenance inventory and using products that provide ease of replacement and operation

For example, a historic bridge over a busy highway needs repairs. The project designer determines that there is only one supplier that can provide the replacement parts. In order to maintain the aesthetics and still meet design requirements, the designer names the manufacturer in the material specification. The designer prepares a draft certification statement explaining why there is no alternative that can provide the aesthetics and function for the project. The LPA's project manager prepares the certification statement for the State DOT representative, which accepts the rationale and signs the statement. Completing this process ensures that the chosen product is fully eligible for Federal-aid funding on this project.

A patented or proprietary product used for research or experimentation is eligible for full Federal participation. This occurs when a product or a distinctive type of construction method is being evaluated on an experimental basis on a relatively short section of road. Normally, these items or processes have not been incorporated into prior projects and are being tested for general use in the future. You must obtain concurrence from your oversight agency when experimenting with a patented product or process.

Finally, when you believe there is good reason to sole source a patented or proprietary product, you may request a PIF.

The FHWA or your oversight agency has the authority to issue a PIF when it concurs with your request.

PIF requests must be submitted in writing and demonstrate why excluding acceptable alternatives is justified. Support for your PIF request could include engineering and economic analyses, product availability or logistical concerns, unique safety performance, or other reasons.

You may also elect to use non-Federal local or state funds to pay for a patented or proprietary product. This option exempts you from compliance with the Federal-aid requirements for selecting specific patented or proprietary products. However, the remaining project activities must comply with all other regulations to keep the project eligible for federal funding.

When it comes to product selection, each of these circumstances has specific documentation or justification requirements to support use of a patented or proprietary product on Federal-aid projects. Make sure you obtain the appropriate approval from the oversight agency in advance of construction authorization.

Web Resources

- FHWA guidance on patented and proprietary products in Q & A format
<http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm>
- *Contract Administration Core Curriculum* training manual. Section II.C.5.b covers patented and proprietary products
<http://www.fhwa.dot.gov/programadmin/contracts/coretoc.cfm>
- Link to 23 CFR 635.411 covering material or product selection
<http://www.ecfr.gov/cgi/t/text/text-idx?c=ecfr&rgn=div5&view=text&node=23:1.0.1.7.23&idno=23#23:1.0.1.7.23.4.1.7>
- FHWA's searchable database of examples of approved patented or proprietary items
<http://www.fhwa.dot.gov/construction/contracts/pnpapprovals/index.cfm>
- FHWA's 2006 guidelines on evaluating public-interest findings for sign sheeting
http://safety.fhwa.dot.gov/roadway_dept/night_visib/policy_guide/memo_retroguid/

The content of this document is not a substitute for information obtained from State departments of transportation, appropriate FHWA Division Offices, and applicable laws. Scenarios have been simplified for emphasis and do not necessarily reflect the actual range of requirements applicable to the scenario or this topic. This document was created under contract number DTFH63-12-F-00025 by the Federal Highway Administration, U.S. Department of Transportation, and is offered to the public to heighten and focus awareness of Federal-aid requirements within the local public agencies community and reinforces the importance of these necessary policies, procedures, and practices.

This companion resource is the script content for the video production of the same name.