

Department Memorandum

Idaho Transportation Department



DATE: June 16, 2020

Program Number(s)

TO: District Engineers

Key Number(s)

FROM: Kevin Sablan
Design/Traffic Services

Program ID, County, Etc.

RE: Proprietary Products and Patented Materials

The following guidelines on the use of proprietary products and methods supersedes procedures outlined in *Section 455.00-Special Provision Items-SP* of the Roadway Design Manual (August 2013) and the August 8, 2017 Design/Traffic Services Proprietary Products Memo.

On September 27, 2019 FHWA issued a final rule rescinding 23 CFR 635.411(a) ~ (e) eliminating the limitations placed on the use of proprietary or patented materials on Federal-aid highway projects; encouraging the use of innovative transportation technology and methods. This revision to Federal Code went into effect October 28, 2019.

Federal participation on projects awarded on or after October 28, 2019 will no longer be restricted when:

- Specifying a proprietary product in Federal-aid contacts;
- Referencing single trade name materials in specifications and on plans;
- Specifying proprietary products on the Qualified Product List;
- Using AASHTO or ASTM specifications where only one manufacturer can meet the requirements; or
- Specifying proprietary products in design-build Request-for-Proposal documents.

Projects let prior to October 28, 2019 are to be administered under the proprietary products requirements in effect at the time of contract award.

Federal repeal of proprietary products approval requirements does not affect the need to follow current State procurement policy and procedures. It also does not remove the need to evaluate and qualify products, methods, and systems prior to their installation and/or use on the State highway system. Follow ITD Qualified Product List procedures for product pre-qualification and inclusion on the QPL.

The attached FHWA Q&A document provides additional information on this revision to the CFR.

cc: COO, CE/HDA, HCOA, Hwy Mgrs., GARVEE, FHWA, DEM2s, DCMs, DOMs, ACHD, LHTAC

Attachment: FHWA Proprietary Products Final Rule Questions & Answers.

Proprietary Products Final Rule

Questions and Answers

September 27, 2019

Q1. What is the purpose of the final rule?

A1. The FHWA is revising its regulations by rescinding 23 CFR 635.411(a)-(e). This will provide greater flexibility for States to use proprietary or patented materials in Federal-aid highway projects. Rescinding the requirements limiting the use of Federal funds in paying for patented or proprietary materials, specifications, or processes specified in project plans and specifications will encourage innovation in transportation technology and methods.

Q2. When will the final rule be effective?

A2. The final rule is effective on **October 28, 2019**

Q3. How will the repeal of 23 CFR 635.411(a)-(e) affect FHWA participation in the cost of patented or proprietary products?

A3. Project sponsors may procure patented or proprietary products (proprietary products) for Federal-aid Highway Construction contracts. State Departments of Transportation (State DOTs) will no longer be required to provide certifications, request public interest findings (PIFs), or develop research or experimental work plans to use patented or proprietary products in Federal-aid projects.

Federal participation will no longer be restricted when:

- State DOTs specify a proprietary product in Federal-aid contracts,
- State DOTs reference single trade name materials in specifications and on plans.
- State DOTs specify proprietary products on their Approved Product List or Qualified Product List,
- State DOTs use AASHTO or ASTM specifications where only one manufacturer can meet the requirements, or
- State DOTs specify proprietary products in design-build Request-for-Proposal documents.

The costs associated with premiums or royalties for proprietary products are eligible for Federal-aid participation. See [2 CFR 200.448](#) Intellectual Property.

Q4. How will this rulemaking affect the text of 23 CFR 635.411?

A4. The revised text is contained in the final rule under PART 635 – Construction and Maintenance - Subpart D – General Material Requirements. See link to final rule at:

<https://www.govinfo.gov/content/pkg/FR-2019-09-27/pdf/2019-20933.pdf>

Q5. Regarding Section 1525 of MAP-21 – State Autonomy for Culvert Pipe Selection, will FHWA maintain Q&A's K1 -K5 on its web site?

A5. Yes. As Q&As K1– K5 reflect guidance issued in accordance with Section 1525 of MAP-21, these Q&As will be maintained on the FHWA web site. K4 will be revised to eliminate the reference to the proprietary product requirements

Q6. What product selection policies will be used by contracting agencies?

A6. Consistent with this final rule:

- Under [2 CFR 200.317\(a\)](#), State DOTs will follow their own procurement procedures.
- Under [2 CFR 1201.317](#), local public agencies will follow State DOT-approved procedures for procurement.

As per Q&A 3 above, FHWA approval is no longer required.

Q7. How will patented or proprietary product issues on active construction projects be addressed?

A7. Projects will be administered under the requirements in effect at the time of contract award.

Q8. Will FHWA maintain the existing patented and proprietary product information on the FHWA web page at <https://www.fhwa.dot.gov/construction/cqit/propriet.cfm> ?

A8. Yes, FHWA will archive the existing patented and proprietary product materials on the FHWA website.

Q9. For active and prior projects subject to 23 CFR 635.411, how long should States keep their proprietary product justifications and other paperwork for Certifications, Experimental Products, and PIFs?

A9. Under [2 CFR 200.333](#), project records must be retained for at least three years after the payment of the final voucher (or, in the case of warranty projects, three years from the end of the warranty period). However, in the document “[Suggestions for the Detection and Prevention of Construction Contract Bid Rigging](#)”, the Interdepartmental Bid Rigging Investigations coordinating Committee of the USDOT/USDOJ suggests a minimum retention period of 5 years, which is the statutory period of limitations for prosecution under Federal antitrust laws.

Q10: Can States require (or provide an administrative preference for) in-State or local products?

A10: No. Nothing in this rulemaking repeals the FHWA prohibition on in-State preference for materials selection, pursuant to [23 CFR 635.409\(a\)](#).