

**Tennessee Department of Transportation
Division of Materials and Tests**

**Procedures for Using Patented or Proprietary Products
with Federal Funds (SOP 1-5)**

Purpose: The purpose of this document is to establish the procedures and requirements to use patented or proprietary products eligible for federal highway funds on the National Highway System (NHS), State Routes, or Local Program Development Projects. When projects are located on the Interstates System, the following procedures and requirements are to be followed, however, approval must be obtained from the FHWA Division Administrator.

Background: United States Code (23 USC 112(a)) and the Code of Federal Regulations (23 CFR 635.411) prohibit the use of federal funds to be used to purchase patented or proprietary products unless certain requirements are followed and proper and sufficient justification is made.

The Federal Highway Administration (FHWA), through the Stewardship and Oversight Agreement, has delegated TDOT authority to approve the use of patented and proprietary products. The TDOT approval process must be completed in accordance with the procedures and guidelines established within this SOP.

Policy: Designers and specifiers should not design/specify the use of a patented or proprietary product unless necessary and justifiable. When it is necessary, the designer/specifier must do so in accordance with the following four (4) procedures:

Procedure:

1. Competitive Bidding (23 CFR 635.411(a)(1)). The proprietary product is obtained through competitive bidding with other suitable proprietary and non-proprietary products from multiple manufacturers. When it is determined a patented or proprietary product is needed and there are no non-proprietary products, the designer must identify preferably three (3) “equal” proprietary products, but a minimum of two (2), if three (3) is not possible, and include the words “or equal” for competitive bidding, OR
2. Certification (23 CFR 635.411(a)(2)). A signed statement from an appropriate contracting agency official (Division Director or the Local Agency Representative) certifying that a particular patented or proprietary product is either:
 - a. Necessary for synchronization with existing facilities; or
 - b. A unique product for which there is no equally suitable alternative.

Complete the attached example and fillable letter (SUBJECT: Proprietary Item Request and Justification) with the appropriate supporting information.

Synchronization:

Provides a product that matches specific current or desired characteristics of a project. 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 an agency's maintenance inventory),*

or any combination thereof.

In addition, it may be advisable to evaluate the following factors as they relate to synchronization:

- *Lifecycle (the relative age of existing systems that will be expanded and the remaining projected life of the proposed proprietary element in relation to the remaining life of the existing elements),*
- *Size/extent of products and systems to be synchronized to/with, and the relative cost of the proprietary elements compared with replacing the elements requiring synchronization. OR*

3. Experimental/Research (23 CFR 635.411(a)(3)). A patented or proprietary product may be used for research or for a distinctive type of construction on relatively short sections of road on an experimental basis. To do so requires the submittal of an experimental product work plan for review and approval by the Assistant Chief Engineer of Operations OR the Assistant Chief Engineer of Design. The work plan should provide for the evaluation of the proprietary product, and where appropriate, a comparison with current technology.

If this approach is used the product evaluation results must be submitted to the American Association of State Highway and Transportation Officials (AASHTO) Product Evaluation Listing (APEL) database so that other agencies may benefit from their experience. The requesting Director should submit this information to the Materials and Tests Division for proper coordination with APEL, OR

4. Public Interest Finding (23 CFR 635.411(c)). If the Division or Local Agency wishes to use a patented or proprietary product and there are other equally acceptable materials or products available, then a public interest finding must be completed and approved by the Assistant Chief Engineer of Operations OR the Assistant Chief Engineer of Design.

The Public Interest Finding (PIF) request consists of a request for approval that using a particular product (even though other suitable products are available) is in the public interest, along with sufficient material to support the request.

There is no specific format for a PIF, and the level of documentation will depend upon the specific nature of product and projects involved. In general, the PIF request should document the reasonableness of the 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.

The PIF request should include:

- A description of how the proprietary product requirement will benefit the public;
- An evaluation of the pool of other equally acceptable products;
- An estimate of additional costs incurred as a result of this proprietary product requirement;
- Description of need, including limitations and conditions (types of roadways, traffic volumes, and other critical factors);
- Engineering / economic analysis supporting the requested action;
- Duration of approval; and
- Extent of approval, e.g. project-specific, multiple projects, district or region wide, statewide, or program based.

If a product or process is approved for use under one of the previous procedures/categories it will be it will be approved for use for the time appropriated and listed on the Materials and Tests website. When the appropriated time is up the approval will be archived for record keeping purposes.

There may be instances where the uses of patented or proprietary products are not approved in accordance with the above procedures and the product may be used as a non-participating cost (100% state or local funds). This would require approval of the Assistant Chief Engineer of Operations or the Assistant Chief Engineer of Design. If a local project, the Local Agency Representative must make the request to use 100% local funding.

Reference/Guidelines: Q&A on 23 CFR 635.411
23 USC 112(a)



**STATE OF TENNESSEE
DEPARTMENT OF TRANSPORTATION**

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JOHN C. SCHROER
COMMISSIONER

BILL HASLAM
GOVERNOR

TO: **Mr. Charles Rychen, P.E., Assistant Chief Engineer of Operations**
Or
Mr. Jeff Jones, P.E., Assistant Chief Engineer of Design

FROM: **Division Director**

SUBJECT: **Proprietary Item Certification Request and Justification**

*Note: This is a fillable letter the **Blue Text** indicates you need to Fill-in or follow instructions. **Remove this Text box before sending to appropriate Designee.***

Project Number/ Contract Number/ PIN Number

The (**fill-in the name of the appropriate Division Director**) requests approval to utilize the following proprietary items in the subject project: list the proprietary items, manufacture and model number.

Project Description

Provide a brief, over-all project description. It should include (Project Number/ Contract Number/ PIN Number etc.). Also include a reference to the appropriate Buy America if foreign steel is in the product.

Justification

Base the justification on the reasons given in the Code of Federal Regulations, 23 CFR 635.411 which can be found in the Plans Preparation Manual, Division 7. This will be either

(1) The item is essential for the synchronization with existing facilities,

Or

(2) No equally suitable alternative exists. Explain why one of these reasons applies.

If you have any questions or comments, please contact **(contact information for the person that can answer the justification questions)**

I, **(fill-in the name of the appropriate Division Director)**, Division Director, of the Tennessee Department of Transportation, do hereby certify that in accordance with the requirements of 23 CFR 635.411(a) (2) that **(fill-in the text from either (1) or (2) below. This should match the justification that you used above.)**

(1) This patented or proprietary item(s) listed above is essential for the synchronization with existing facilities.

Or

(2) No equally suitable alternative exists for this patented or proprietary item.

Division Director

Date

Assistant Chief Engineer of Operations

Date

Or

Assistant Chief Engineer of Design