PURPOSE

This policy outlines the roles and responsibilities pertaining to the use and acquisition of proprietary items on Arizona Department of Transportation (ADOT) construction projects. This policy applies to both Federal-aid Highway Program projects and non-federal-aid projects.

BACKGROUND

There are numerous highway construction items that are unique or state-of-the-art that can bring overall cost or safety benefits to ADOT projects. In recognition of this, the Federal Highway Administration (FHWA) and ADOT have published guidelines on how and when these items may be incorporated into plans and specifications. The subject of proprietary items is addressed in ADOT’s Standard Specifications, Section 106 (Exhibit 1 of this policy; see page 7), and in the Code of Federal Regulations (CFR), Section 635.411 (Exhibit 2 of this policy; see page 8).

Related information is provided in the FHWA and ADOT Stewardship and Oversight Agreement for Arizona effective April 2013, available at http://www.fhwa.dot.gov/azdiv/stewtoc.cfm. This agreement provides the requirements related to oversight and administration of the Federal-aid Highway Program in Arizona.

DEFINITIONS

Certification: A signed statement from the Assistant State Engineer certifying that a particular proprietary item is either:

- Necessary for synchronization with existing facilities; or
- A unique product for which there is no equally suitable alternative.

Experimental Product: A proprietary item used for research or for a distinctive type of construction on relatively short sections of road on an experimental basis.

Oversight: As defined in the FHWA and ADOT Stewardship and Oversight Agreement for Arizona, oversight is the act of ensuring that the Federal-aid Highway Program is delivered in accordance with applicable laws, regulations, and policies. Oversight
activities include process reviews, program evaluation, program management activities, and project involvement activities.

On certain projects, FHWA may delegate oversight and approval authority to ADOT, in conformance with project criteria described in the Stewardship and Oversight Agreement. This policy references two types of projects:

**Projects requiring FHWA oversight:** Federally funded projects requiring full FHWA involvement in project administration.

**Projects administered by ADOT or local public agency (LPA):** Federally funded projects where FHWA has delegated oversight and approval authority to ADOT.

**Proprietary Item**
A specific product, specification, or process identified in project plans or specifications (also referred to as a patented or proprietary product). A proprietary item must meet one of the conditions listed under 23 CFR 635.411(a) or (c) in order to receive federal funding or to be used on a federal-aid highway construction project.

**Public Interest Finding (PIF)**
An approval based on a request from a contracting agency stating 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.

**Synchronization**
Providing a product that matches specific current or desired characteristics of existing facilities or products. Synchronization may be based on any combination of:

- **Function:** The proprietary item is necessary for the satisfactory operation of existing facilities.
- **Aesthetics:** The proprietary item is necessary to match the visual appearance of existing facilities.
- **Logistics:** The proprietary item is interchangeable with products in an agency’s maintenance inventory.

In addition, the following factors should be considered in determining the need for synchronization:

- **Life cycle:** 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 and extent** of products and systems to be synchronized with, and the relative cost of the proprietary elements compared with the cost of replacing the existing elements requiring synchronization.
POLICY

A. The Intermodal Transportation Division (ITD) may allow for the specification of proprietary items in construction projects when:

1. Such items are essential for synchronization with other highway facilities;
2. Competitive bidding with equally suitable nonproprietary items has been provided;
3. An experimental product is used for research purposes; or
4. The use of such items is deemed to be in the public interest.

B. For nonproprietary items, ITD shall ensure that all materials and processes used are cost-effective and consistent with the requirement for the broadest practical competition. An absolute minimum of two products in the marketplace is required; three or more products are preferred whenever possible.

IMPLEMENTATION

A. The use of trade names in specifications and on plans shall be avoided.

B. Preapproved plans and/or specifications for frequently used products and processes shall be developed and kept on file for use on applicable projects. It is unacceptable to create preapproved plans or specifications that are duplications of proprietary specifications, as this could exclude competing products or processes.

C. Proprietary items may be listed in Special Provisions when the items have been preapproved for use by ADOT and are listed on the Approved Products List (APL), provided that the items comply with one of the provisions of Subpart A of the “Policy” section above and are accompanied by drawings and specifications if necessary. Items in this category include attenuation devices, preformed pavement markings, and precast concrete structures. Any alternatives allowed to preapproved items will be stated in Special Provisions.

PROCEDURES

A. Certification of a proprietary item—ITD may certify that a particular proprietary item is either necessary for synchronization with existing facilities or is a unique product for which there is no equally suitable alternative. The authority to approve certification requests is currently limited to ADOT by FHWA. Therefore, ADOT is responsible for all product certifications on Local Public Agency (LPA) projects, including certified acceptance LPA projects.

1. The Project Manager shall provide documentation to be approved by the appropriate Assistant State Engineer justifying the use of only one product or patented process. The documentation shall include a description of the proprietary item's:
• Uniqueness.
• Essentiality.
• Cost.
• Synchronization with existing highway facilities.
• Maintenance requirements.
• Availability.
• Impacts on safety.
• Potential benefit to the Department.

2. This justification document shall be submitted for approval prior to inclusion of the products or processes in the plans or specifications. This should be accomplished as early in the design process as possible to avoid any adverse impact or schedule delay.

3. The Assistant State Engineer will provide approval in the form of a signed statement certifying that a particular proprietary item is either necessary for synchronization with existing facilities or is a unique product for which there is no equally suitable alternative.

4. Copies of the approval shall be forwarded to the Contracts and Specifications Section and any affected services or consultants, and a copy shall be placed in the project file.

5. Blanket certification—The extent of a certification should be specified. A certification can be approved on a per-project basis, or may cover multiple projects, regions, or districts; a certification may also be statewide or programmatic. When a certification extends beyond a single project, a sunset date of two to three years should be specified.


7. For projects requiring FHWA oversight, ITD will include a copy of the certification with the authorization request. For all federal-aid projects, the following information shall be included in the authorization request letter: [PRODUCT NAME] certified by [ADOT Group Section] on [DATE]. ITD shall provide documentation of the certification to FHWA upon request for program or process reviews.

B. Proprietary item PIF—A PIF letter is required when the contracting agency requests to use a specific material or product even though other equally acceptable materials or products are available. Approval authority follows the Stewardship and Oversight Agreement; as such, ITD provides approval on ADOT or LPA-administered projects and FHWA provides approval on projects requiring FHWA oversight. Blanket PIFs must be approved by FHWA regardless of the project type. After approving a PIF, FHWA will post details of the approval to the FHWA website at http://www.fhwa.dot.gov/construction/contracts/pnpapprovals/approvals.cfm.
1. All PIF requests should include documentation of a compelling justification of the reasonableness of ADOT or LPA minimal needs and the best method to meet these needs consistent with the requirement for the broadest practical competition.

The level of documentation included depends on the nature of the product and projects involved. Supporting material may include:

- Engineering and economic considerations.
- Product availability and compatibility.
- Logistical concerns.
- Other unique considerations.

A Blanket PIF should include a sunset provision (typically two to three years) and provisions for ongoing evaluation of the market.

2. Approval to specify a proprietary item is needed at project authorization. Staff are encouraged to submit requests for approval early in project development to avoid potential delays in authorization. A copy of all approved PIFs must be included with the federal-aid authorization request. The authorization request letter must include the following information:


3. All approvals made by ITD on ADOT-administered projects shall be made using the same rules and guidance under which FHWA would have made the decision.

4. If a PIF is denied, then the item must be competitively bid.

C. Experimental products—ITD may decide to use a proprietary product for research or for a distinctive type of construction on a relatively short section of road for experimental purposes. FHWA provides approval of experimental products on projects requiring FHWA oversight. ITD provides approval on ADOT or LPA-administered projects. The same approval authority applies when an experimental feature is requested through a construction change order. The following procedures must be followed:

1. Designate the project as an experimental research project.

2. Develop a work plan that includes a description of the experimental feature, experimental feature objectives, construction requirements (including necessary measurements), characteristics to be evaluated, time schedules, reporting requirements, cost estimates, construction and post-construction inspection schedules, control sections, and evaluations to be conducted.
3. Report results in accordance with the funding program (State Planning and Research Program funds or project construction funds).


Jennifer Tóth  
Deputy Director for Transportation  
08/13/2013  
Date
106.08 Proprietary Products, Trade Names and Substitutions:

The contract may contain references to equipment, materials or patented processes by manufacturer, trade name, make or catalog number.

Such references shall be regarded as establishing a standard of quality, finish, appearance or performance or as indicating a selection based upon compatibility with existing equipment or materials and shall not be construed as limiting selection to a specific item or source.

The use of an alternative or substitute article of equipment, material or process which, for the purpose intended, is of equal quality, finish, appearance, or performance and which is compatible with existing equipment and materials, when required, will be permitted, subject to the following conditions:

A. No consideration will be given to a request for substitution prior to contract award. After award and in time to permit consideration and approval without delaying work, the contractor shall submit a written request for substitution.

B. A request for substitution shall include all information necessary for proof of equality and suitability for substitution, including samples for testing, if required. The request for substitution shall meet the stipulations set forth in Subsection 104.13 for Value Engineering Proposals.

C. The Department will evaluate the information submitted, perform tests when necessary and make comparison. The Engineer will then make the final decision as to acceptability of the proposed substitution. The Department will neither be liable for any delay in acting upon any request for substitution nor for any failure to accept any request pursuant to this substitution.
SUP 01-1 Proprietary Items

Effective: August 9, 2013

23 CFR Section 635.411

Material or Product Selection

a. Federal funds shall not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the plans and specifications for a project, unless:

1. Such patented or proprietary item is purchased or obtained through competitive bidding with equally suitable unpatented items; or
2. The State transportation department certifies either that such patented or proprietary item is essential for synchronization with existing highway facilities, or that no equally suitable alternate exists; or
3. Such patented or proprietary item is used for research or for a distinctive type of construction on relatively short sections of road for experimental purposes.

b. When there is available for purchase more than one nonpatented, nonproprietary material, semifinished or finished article or product that will fulfill the requirements for an item of work for a project and these available materials or products are judged to be of satisfactory quality and equally acceptable on the basis of engineering analysis and the anticipated prices for the related item(s) of work are estimated to be approximately the same, the PS&E for the project shall either contain or include by reference the specifications for each such material or product that is considered acceptable for incorporation in the work. If the State transportation department wishes to substitute some other acceptable material or product for the material or product designated by the successful bidder or bid as the lowest alternate, and such substitution results in an increase in costs, there will not be Federal-aid participation in any increase in costs.

c. A State transportation department may require a specific material or product when there are other acceptable materials and products, when such specific choice is approved by the Division Administrator as being in the public interest. When the Division Administrator’s approval is not obtained, the item will be nonparticipating unless bidding procedures are used that establish the unit price of each acceptable alternative. In this case Federal-aid participation will be based on the lowest price so established.

d. Reference in specifications and on plans to single trade name materials will not be approved on Federal-aid contracts.

e. In the case of a design-build project, the following requirements apply: Federal funds shall not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the Request for Proposals document unless the conditions of paragraph (a) of this section are applicable.
f. State transportation departments (State DOTs) shall have the autonomy to determine culvert and storm sewer material types to be included in the construction of a project on a Federal-aid highway.