MEMORANDUM

TO: District Engineers
    Regional Directors

FROM: John A. Barton, P.E.

DATE: March 9, 2012

SUBJECT: FHWA Guidance for the Use of Patented and Proprietary Products on Federal-Aid Projects

The Federal Highway Administration (FHWA) has recently revised its guidance on patented and proprietary products to clarify their use and reimbursement on Federal-aid projects.

The FHWA may participate in the costs of a proprietary product on a Federal-aid highway project when one of the following applies:

1. The patented or proprietary product goes through the competitive bidding process (listing of acceptable products from multiple manufacturers). It can be:
   • Non-proprietary vs. proprietary, or
   • Proprietary vs. proprietary.

2. The product is being used for research or a short section on an experimental basis

3. TxDOT certifies that a product is:
   • Necessary for compatibility with existing facilities, or
   • A unique product for which there is no equally suitable alternative.

4. The FHWA issues a Public Interest Finding (PIF) on a product that has equally suitable alternatives.

Proprietary products which competitively bid and are used on an experimental basis require no special process or documentation, but certification and PIFs do require additional documentation. To address the need for this documentation, the Department has developed the following guidance to help districts secure FHWA financial participation.

Certification Process

Use the following process if a product is needed for a single project, multiple projects, or districtwide use:
1. The district sends requests to the appropriate division for the use of a specific product stating that:
   o No equally suitable alternative is available, or
   o There is a need for compatibility because of:
     ▪ Function (operates with existing facility)
       i.e., City's existing signal control system which contains a significant percentage of intersections already working with only one brand and model of controller, or
     ▪ Aesthetics (match the visual appearance of existing facility)
       i.e. A specific light pole in a City Historical area or specific light pole designated in the vicinity of previous projects, or
     ▪ Logistics (interchangeable with products in an agency's maintenance inventory)
       i.e. Due to scarce county financial and labor resources, specifying one type of NCHRP 350 or MASH compliant end treatment already in use and maintained by the county which will be responsible for maintenance of this location.

2. Division evaluates requests and makes determination for certification. The certification includes the assessment of need for compatibility or no suitable alternative. It also includes information on whether it is project specific and/or has a specific date when it is no longer in effect. This will allow for reexamination of the product and possible new innovations.

3. Division responds to the district with a cc to RTI.

4. A copy of the certification goes to RTI which posts the certification on RTI site and AASHTO’s Product Evaluation List (APEL) website.

**Public Interest Finding Process**

Use the following process if a proprietary product is selected for use when others are available.

1. District sends a request to the appropriate division for use of the unique product. Include as much of the following information as possible. (The more documentation provided, the greater the chance of FHWA approval.)
   • Description of how the proprietary product requirement will benefit the public
   • Evaluation of the pool of other equally acceptable products
   • 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
• Extent of Approval: Is the approval project-specific, for multiple projects, district/region-wide, statewide, or programmatic.

2. Division evaluates the submittal and sends to FHWA Division office for consideration.

3. FHWA notifies TxDOT and posts approved PIFs to its website; FHWA notifies TxDOT of denied PIFs.

4. Division notifies district of PIF disposition.

Existing Acceptable Product Lists

As a reminder, items of work or products listed on current Approved Product Lists do not need certification or PIFs unless specifying only one of the acceptable products on a project. The lists include:

• Maintenance (Erosion Control and Re-Vegetation)
  ▪ Item 164, “Seeding for Erosion Control”
  ▪ Item 169, “Soil Retention Blanket”
• Construction—Material Producer List
• General Services—Prequalified Producer List
• Traffic—Compliant Work Zone Traffic Control Device List
• Design—CAD Standards

Please direct questions related to the use of proprietary products to Aurora (Rory) Meza, P.E., Design Division at (512) 416-2678.

cc: Benito Ybarra, AUD
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