Use of Proprietary Equipment & Sole Source Procurement Process

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What Are Sole-Source / Proprietary Products?

**Proprietary Product**: Owned and sold by a patent holder for profit

- Ex: 3M, QuadGuard, Brifen Wire Rope Safety Fence etc.

**Sole-Source Product**: Obtained through non-competitive bidding

- Ex: specific supplier or trade name products in contract requirements without any chance for competition by another
Patented/Proprietary Products Eligibility

1. Competitive Bidding
   a. Performance Warranty

2. Certification

3. Public Interest Finding

4. Experimental Project
2. Certification

FHWA Definition of a **Product Certification**

A certification document issued by an agency to use a *single product* based on specific functional and/or synchronization requirements and technically does not require an FHWA approval action.

Note - FHWA still has ability and authority, as stewards of the Federal-aid highway program, to determine non-compliance if agency justification is insufficient.
When can a certification be used?

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

• Synchronization based on
  • Function
  • Aesthetics
  • Logistics
  • Combination of these
2. Certification...cont

What documentation is required to process a Certification?

How will this proprietary product benefit the public?
  – Unique needs?
  – Is a higher standard justified?

Why other potential products cannot meet the STA's or local agency's needs.

What additional costs will be incurred as a result of this proprietary product requirement?
2. Certification...cont

• May still be subject to FHWA concurrence (Q&A # 13)

http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm
3. Public Interest Finding (PIF)

FHWA Definition of a Public Interest Finding (PIF)

An agency request to choose one of several options (eg. product, specification, or process) that could provide acceptable service on a project or within the Federal-Aid Program which does require an FHWA approval action.
3. Public Interest Finding (PIF)

When is a Public Interest Finding (PIF) Required?

I. Use of Patented/Proprietary Product(s)

II. Mandatory Material Source

III. Use of Public-owned Equipment

Note - This does not include the category of projects procured through means other than competitive bidding. In 1983 the law was changed to require this determination be based on Cost Effectiveness.
3. Public Interest Finding (PIF)

What documentation is required to process a PIF?

- STA or local agency submits the PIF to the FHWA for approval.
- No specific format required
- We recommend:
  - Description of need
  - Limitations & Conditions (Scope)
  - Engineering / economic analysis; and
  - Duration of approval
When is a Cost Effectiveness Finding required?

**Procurement other than competitive bidding**
- Special course of action
- Lack of bids
- Unreasonable bid unit costs
- Agency force account
- Railroad/Utility facility improvements

**Emergency**
- Force account
- Negotiated contract method
- Minimum documentation elements
Certification vs. PIF?

PIF

Multiple available products providing competition

Certification

• No equally suitable alternate
• Unique Considerations (i.e., “above average” performance measures)
• Synchronization
Certification vs. PIF?

1. Is the product experimental?
   - Yes: Agency prepares experimental product work plan for FHWA approval
   - No: Proceed to next step

2. Is the product required for synchronization?
   - Yes: Proceed to next step
   - No: Proceed to next step

3. Is the product unique?
   - Yes: Agency prepares Certification
   - No: Proceed to next step

4. Is the agency using solely state or local funds for item?
   - Yes: Agency follows own processes and procedures
   - No: Proceed to next step

5. Patented/Proprietary Product

   - Yes: Proceed to next step
   - No: Agency prepares Public Interest Finding petition for FHWA approval
Does FHWA track approved PIFs?

- FHWA HQ Office of Program Administration
  - Tracks all approved PIFs nationwide
  - Uses PIF information to develop guidance and ensure program consistency

  http://www.fhwa.dot.gov/construction/contracts/pnpapprovals/approvals.cfm

- Divisions submit approved PIFs for database

- FHWA Stewardship Portal Link
PIFs Vs. Certification Recap

• Use under unique circumstances

• PIF required under following conditions:
  • Proprietary/patented products
  • Mandatory Material Source
  • Use of Public-owned Equipment

• Documentation detail and information is dependent on PIF petition type

• PIF involves multiple sources (FHWA approval)
  Certification is single unique source (No FHWA approval)
Public Interest Finding (PIF) References

Title 23 C.F.R. § 635.411(c)
Title 23 C.F.R. § 635.106
Title 23 C.F.R. § 635.407

23 USC § 112

FHWA website(s):
  Contract Administration Manual
  PIF Program Guide
    – http://www.fhwa.dot.gov/construction/cqit/findings.cfm
What Does Sole-Sourcing Look Like?

You don’t have to have a trade name in your specifications to have a sole-source requirement

– If you specification is so narrowly defined that only 1 product can bid and meet the requirements, it could be considered a sole-source requirement

– If your Qualified Products List only allows one vendor/type of material, it could be considered a sole-source requirement
Can a Trade Name be Included in a Specification?

• Is it included to demonstrate a standard of quality and not construed as limiting competition?
• Are there a reasonable number of alternatives that meet the performance requirements and either listed or readily available and known?
• Is there more than one trade name listed?
• Do the requirements specify “or equal”?

• Did you answer yes to the above questions?

  – Then the answer is YES
Sole Sourcing...cont.

Registered Trademark

FX-70® PILE PROTECTION SYSTEM
WITH PUMPABLE EPOXY GROUT

Description
The work under this section shall include furnishing and installing a permanent outer jacket, made from durable, inert corrosion-free materials and filling the annular space between the pile and the permanent jacket with a Hydro-Ester, Pumpable Epoxy Grout; constructing a bevel at the top of the jacket with a trowel grade hydro-ester grout and applying a hydro-ester protective coating to the pile between the top of the jacket and the underside of the bent. All materials shall be compatible and shall be manufactured by a single source.

Materials
Sole Sourcing...cont.

Graphics Inserted
Sole Sourcing...cont.

Special Restrictions Issued

LIMITATIONS:

Due to the pre-inspection and field evaluation requirements, the following limitations shall apply:

- Maximum of five (5) projects per year per manufacturer
- Maximum of 1500 SF of sheeting per project
- New construction projects only – Not allowed on State-wide or District-wide sign projects due to field monitoring requirements
- Roadside signs only – Not allowed on Overhead signs, including extruded panel and span cable type I & II, due to field monitoring requirements
End of
PIF and Product Certification
Presentation

Question & Answer Session