Sole Source & Proprietary Products

April 10, 2014
Lorenzo Casanova, P.E.
FHWA - Local Programs/Research and T2
What is a Proprietary Product?

a) A **product** that has a premium
b) A **specification**
c) A **process** that has a royalty cost associated with its value or use
d) Any of the above
What is a Proprietary Product?

a) A **product** that has a premium
b) A **specification**
c) A **process** that has a royalty cost associated with its value or use
d) **Any of the above**

![Logos of various technology companies]
A Proprietary Product is…

✔ A **product, specification, or process** that has a premium or royalty cost associated with its value or use. Examples: 3M™, Tensar®

✔ The use of patented or proprietary products often involves making a **sole-source selection** within the contracting process.
What is Sole Source?

a) A very exclusionary specification
b) When only one product is available in the market
c) When only one company bid on the contract
d) When a specification is written so narrowly that only a specific, single supplier or product is acceptable
e) A comfortable shoe
f) a) and d)
What is Sole Source?

a) A very exclusionary specification
b) When only one product is available in the market
c) When only one company bid on the contract
d) When a specification is written so narrowly that only a specific, single supplier or product is acceptable
e) A comfortable shoe
f) a) and d)
Sole Source is...

✓ when a specification is written so narrowly that only a specific, single supplier or product is acceptable

✓ In essence, eliminating any competition
Why consider the use of brand name products on your Federal-aid project?

a) To effectively prohibit competing products by requiring a sole source, or by exclusively using a trade name product within the specifications

b) To violate the basic principle of Federal-aid contracting for competitive awards

c) To avoid fair competition on Federal-aid projects

d) None of the above
Why consider the use of brand name products on your Federal-aid project?

a) To effectively prohibit competing products by requiring a sole source, or by exclusively using a trade name product within the specifications

b) To violate the basic principle of Federal-aid contracting for competitive awards

c) To avoid fair competition on Federal-aid projects

d) None of the above
Things to consider when using brand name products on Federal-aid project

✓ Normally, Federal funds eligibility applies to your entire project.
✓ The cost of each individual product is evaluated for eligibility for Federal funding
Brand Name Vs. Generic
“a Coke by Coca-Cola®”

Vs.
“a Coke by Coca-Cola®, Pepsi, Royal Crown Cola or equal cola beverage.”
Can Patented or Proprietary Products be used & be eligible for Federal funding?

a) Yes 😊

b) No 😞

c) Perhaps…

d) Only in Emergencies?
Can Patented or Proprietary Products be used & be eligible for Federal funding?

a) Yes 😊

b) No 😞

c) Perhaps…

d) Only on Emergencies?
Patented or Proprietary (PP) Products may be eligible for Federal funding IF…

✓ one of three non-competitive options is used:

1. product certification,
2. experimental purposes, or
3. public interest finding (PIF)
Patented or Proprietary Product Decision Tree Flow Chart

START

Necessary for Synchronization? YES

NO

Is this a unique product? YES

Option 1.
Product CERTIFICATION: Should address at least one of the following: Function, Aesthetics or Logistics

NO

Is it for experimentation or research? YES

Option 2.
EXPERIMENTAL/RESEARCH: (Eligible for full Fed. Participation) (Relative short section of road or small scale)

NO

Does locality believe there is a good reason for sole source this POF/FPP? YES

Option 3.
PIF (Public Interest Finding): Demonstrate why excluding alternatives is justified. (Public benefit-based)

NO

Does NOT qualify

END

*A For which there is no equally suitable alternative
**Is it small scale?
***Option is to supplement Federal funds with other funds to cover the difference
**Option 1: Product Certification**

✓ When a specific product **is needed** to **build** or **operate** the constructed project

✓ Locality writes and signs statement in advance of requiring the product in the contract specifications

✓ VDOT reviews and, if approves, issues a certification
1. Product Certification

✔ VDOT certifies that a particular patented or proprietary product is either

A. necessary for synchronization with existing facilities or

B. is a unique product

✔ for which there is no equally suitable alternative
A certification statement should specifically address at least one of these factors:

a) Function
b) Aesthetics
c) Logistics
1. Product Certification…cont.

a) **Function** – when product is necessary for the continued satisfactory operation of the existing facility. E.g., traffic signals: synchronization with existing system
1. Product Certification...cont.

b) **Aesthetics** – addresses when the product has consistent visual appearance and blends with existing features
1. Product Certification…cont.

c) **Logistics** – pertains to interchangeability with maintenance inventory and using products that provide ease of replacement and operation.
Option 2: Experimental/Research

- Patented or Proprietary Products used for research or experimentation are eligible for full Federal participation
- Locality must obtain concurrence from VDOT when experimenting with a patented product or process
- Distinctive product or construction method is being evaluated on an experimental basis
- Items or processes are being tested for general use in the future
- Relatively short section of road
Option 3: Public Interest Finding (PIF)

- When locality believes there is good reason to sole source a patented or proprietary product, it may request a PIF.
- Must be submitted in writing.
- Demonstrate why excluding acceptable alternatives is justified.
3. Public Interest Finding (PIF)

VDOT has authority to issue a PIF when it concurs with request

Support for PIF request could include:

- Engineering and economic analyses,
- Product availability or logistical concerns,
- Unique safety performance, or
- Other reasons
3. Public Interest Finding (PIF)

- Locality may use non-Federal or state funds
- This option exempts locality from compliance with the Federal-aid requirements for selecting specific patented or proprietary products
3. Public Interest Finding (PIF)

✓ **However**, the remaining project activities must comply with all other regulations to keep the project eligible for federal funding. E.g.: “Buy America”, ”NEPA”, etc.
One Final Question…
What is the difference between a Product Certification Vs. a PIF?

a) PIF is based on “benefits”
b) Label “PIF” is shorter than “Product Certification”
c) Product Certification is based on “needs”
d) The spelling
e) All of the above
f) None of the above
Final Answer?
What is the difference between a Product Certification Vs. a PIF?

a) PIF is based on “benefits”
b) Label “PIF” is shorter than “Product Certification”
c) Product Certification is based on “needs”
d) The spelling
e) All of the above
f) None of the above
Difference between a Product Certification and a PIF…

✔ **Certification**: product is either necessary for **synchronization** with existing facilities or is a **unique product** for which there is no equally suitable alternative - (need-based)

✔ **PIF**: When locality believes **there is good reason** to sole source a patented or proprietary product, it may request a PIF – (public benefit-based)

✔ Benefits are typically economic, logistical or safety in nature
Patented or Proprietary Product Decision Tree Flow Chart

START

Necessary for Synchronization?

YES

Is this a **Unique** Product?*

YES

**Option 1.**
Product CERTIFICATION: Should address at least one of the following: Function, Aesthetics or Logistics

NO

**Option 2.**
EXPERIMENTAL/RESEARCH: (Eligible for full Fed. Participation) (Relative short section of road or small scale)

NO

Is it for experimentation or research?**

YES

NO

Does locality believe there is a good reason for sole source this P.O. or PPP?*

YES

**Option 3.**
PIF (Public Interest Finding): Demonstrate why excluding alternatives is justified. (Public benefit-based)***

NO

Does NOT qualify

END

* For which there is no equally suitable alternative
** Is it small scale?
*** Option is to supplement Federal funds with other funds to cover the difference
More information

FHWA guidance on patented and proprietary products in Q & A format
http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm

Link to 23 CFR 635.411 covering material or product selection
http://www.ecfr.gov/cgi/t/text/text-idx?c=ecfr&rgn=div5&view=text&node=23:1.0.1.7.23&idno=23#23:1.0.1.7.23.4.1.7

FHWA’s searchable database of examples of approved patented or proprietary items
http://www.fhwa.dot.gov/construction/contracts/pnpapprovals/index.cfm

Link to Federal Aid Essentials: Patented or Proprietary Products
http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=68

Link to Federal Aid Essentials: Buy America (2 videos)
http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=27
http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=28