



INDIANA DEPARTMENT OF TRANSPORTATION

Driving Indiana's Economic Growth

Design Memorandum No. 19-11

October 10, 2019

TO: All Design, Operations, and District Personnel, and Consultants

FROM: /s/ Jeremy Hunter
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SUBJECT: Federal Ruling on Proprietary Materials

On September 27, 2019 FHWA published the final rule on Promoting Innovation in Use of Patented and Proprietary Products. As noted in the Federal Register, the rule rescinded 23 CFR 635.411 (a)-(e) to encourage innovation in the development of highway transportation technology and methods. As a result, State Departments of Transportation (State DOTs) will no longer be required to provide certifications, make public interest findings, or develop research or experimental work plans to use patented or proprietary products in Federal-aid projects. Federal funds participation will no longer be restricted when State DOTs specify a trade name for approval in Federal-aid contracts.

The rule goes into effect October 28, 2019. The FHWA Q&A on the final rule is attached for reference.

INDOT will be reviewing the effect of this ruling on our processes across multiple divisions. Until further notice, the following apply.

Proprietary Materials

INDOT will continue its current practice and process requests for the use of proprietary materials through the Highway Design Division. After October 28th, FHWA signatures will no longer be required for projects on the NHS.

New Products and Approved Materials List

INDOT will continue to utilize its new product evaluation process and approved materials lists to provide fair and transparent procedures for the evaluation, selection, and use of materials, including proprietary products. This process supports INDOT's commitment to being responsible stewards of taxpayer dollars and the limited amount of Federal funding allotted for transportation projects in Indiana. It also allows INDOT to compile more objective evidence about the effectiveness of a product as compared to a vendor's sales or promotional material.

Questions regarding proprietary materials during the design phase should be directed to Elizabeth Phillips, Standards and Policy Director at ephillips@indot.in.gov.

Questions regarding proprietary materials during construction should be directed to the appropriate Construction Management Field Engineer.

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Proprietary Products Final Rule Questions and Answers

September 27, 2019

Q1. What is the purpose of the final rule?

A1. The FHWA is revising its regulations by rescinding 23 CFR 635.411(a)-(e). This will provide greater flexibility for States to use proprietary or patented materials in Federal-aid highway projects. Rescinding the requirements limiting the use of Federal funds in paying for patented or proprietary materials, specifications, or processes specified in project plans and specifications will encourage innovation in transportation technology and methods.

Q2. When will the final rule be effective?

A2. The final rule is effective on **October 28, 2019**.

Q3. How will the repeal of 23 CFR 635.411(a)-(e) affect FHWA participation in the cost of patented or proprietary products?

A3. Project sponsors may procure patented or proprietary products (proprietary products) for Federal-aid Highway Construction contracts. State Departments of Transportation (State DOTs) will no longer be required to provide certifications, request public interest findings (PIFs), or develop research or experimental work plans to use patented or proprietary products in Federal-aid projects.

Federal participation will no longer be restricted when:

- State DOTs specify a proprietary product in Federal-aid contracts,
- State DOTs reference single trade name materials in specifications and on plans.
- State DOTs specify proprietary products on their Approved Product List or Qualified Product List,
- State DOTs use AASHTO or ASTM specifications where only one manufacturer can meet the requirements, or
- State DOTs specify proprietary products in design-build Request-for-Proposal documents.

The costs associated with premiums or royalties for proprietary products are eligible for Federal-aid participation. See [2 CFR 200.448](#) Intellectual Property.

Q4. How will this rulemaking affect the text of 23 CFR 635.411?

A4. The revised text is contained in the final rule under PART 635 – Construction and Maintenance - Subpart D – General Material Requirements. See link to final rule at:

<https://www.govinfo.gov/content/pkg/FR-2019-09-27/pdf/2019-20933.pdf>

Q5. Regarding Section 1525 of MAP-21 – State Autonomy for Culvert Pipe Selection, will FHWA maintain Q&A's K1 -K5 on its web site?

A5. Yes. As Q&As K1– K5 reflect guidance issued in accordance with Section 1525 of MAP-21, these Q&As will be maintained on the FHWA web site. K4 will be revised to eliminate the reference to the proprietary product requirements

Q6. What product selection policies will be used by contracting agencies?

A6. Consistent with this final rule:

- Under [2 CFR 200.317\(a\)](#), State DOTs will follow their own procurement procedures.
- Under [2 CFR 1201.317](#), local public agencies will follow State DOT-approved procedures for procurement.

As per Q&A 3 above, FHWA approval is no longer required.

Q7. How will patented or proprietary product issues on active construction projects be addressed?

A7. Projects will be administered under the requirements in effect at the time of contract award.

Q8. Will FHWA maintain the existing patented and proprietary product information on the FHWA web page at <https://www.fhwa.dot.gov/construction/cqit/propriet.cfm> ?

A8. Yes, FHWA will archive the existing patented and proprietary product materials on the FHWA website.

Q9. For active and prior projects subject to 23 CFR 635.411, how long should States keep their proprietary product justifications and other paperwork for Certifications, Experimental Products, and PIFs?

A9. Under [2 CFR 200.333](#), project records must be retained for at least three years after the payment of the final voucher (or, in the case of warranty projects, three years from the end of the warranty period). However, in the document "[Suggestions for the Detection and Prevention of Construction Contract Bid Rigging](#)", the Interdepartmental Bid Rigging Investigations coordinating Committee of the USDOT/USDOJ suggests a minimum retention period of 5 years, which is the statutory period of limitations for prosecution under Federal antitrust laws.

Q10: Can States require (or provide an administrative preference for) in-State or local products?

A10: No. Nothing in this rulemaking repeals the FHWA prohibition on in-State preference for materials selection, pursuant to [23 CFR 635.409\(a\)](#).