



Sole Source & Proprietary Products

April 10, 2014

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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





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



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)





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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





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- 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?





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b) No ☹️

c) Perhaps...

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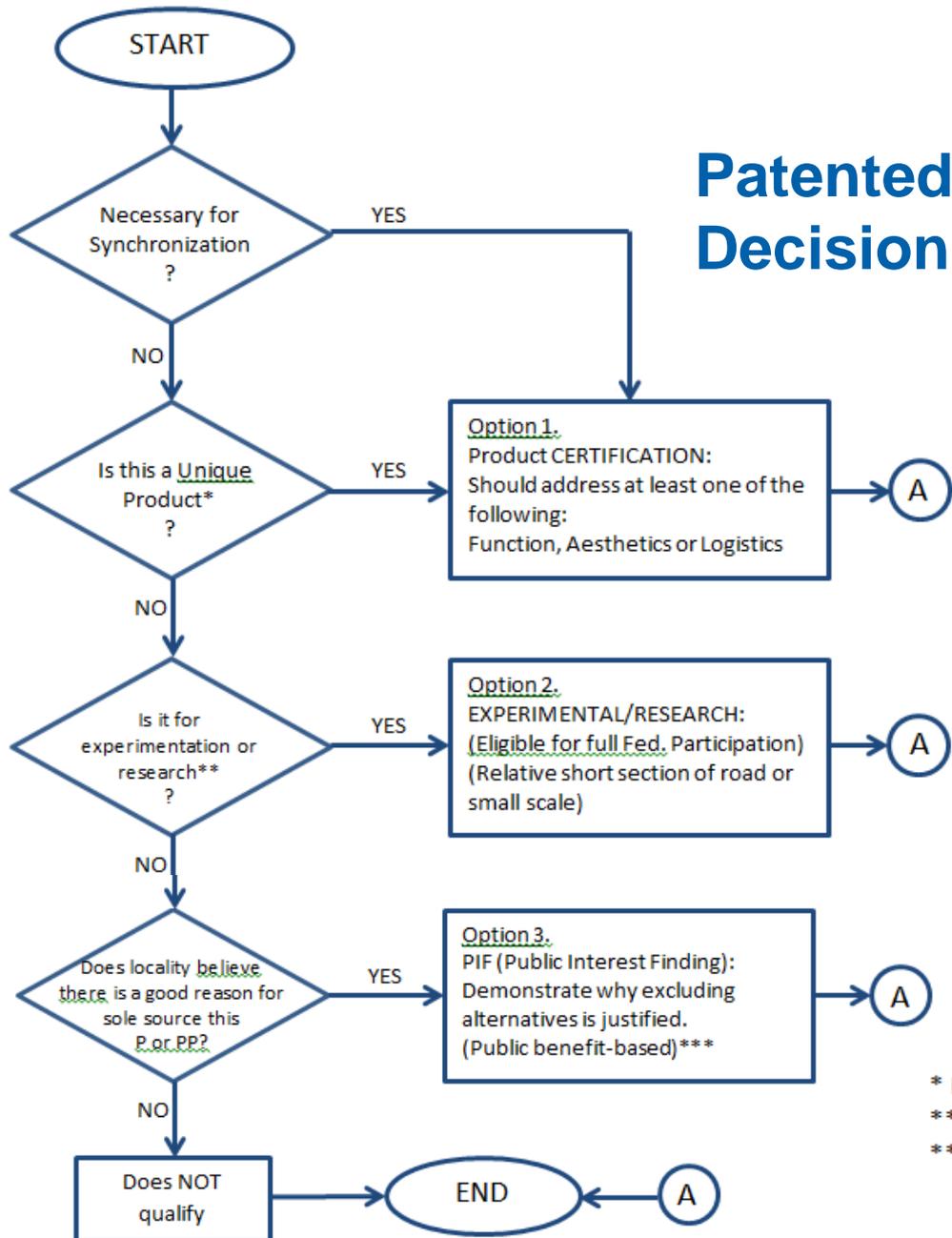


Patented or Proprietary (PP) Products may be eligible for Federal funding IF...

- ✓ 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



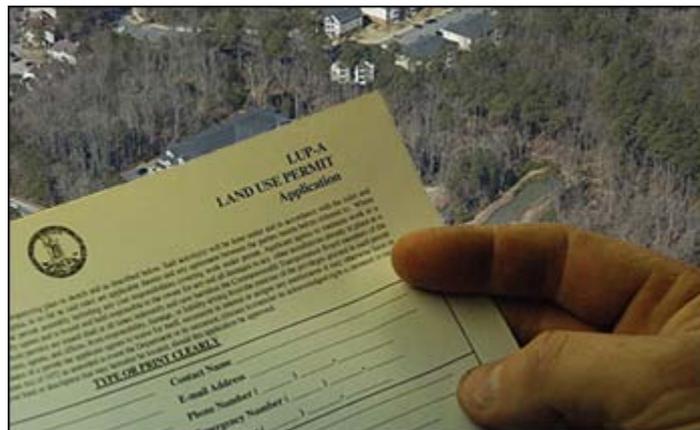
* For which there in no equally suitable alternative

** 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



1. Product Certification...cont.

- ✓ 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 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



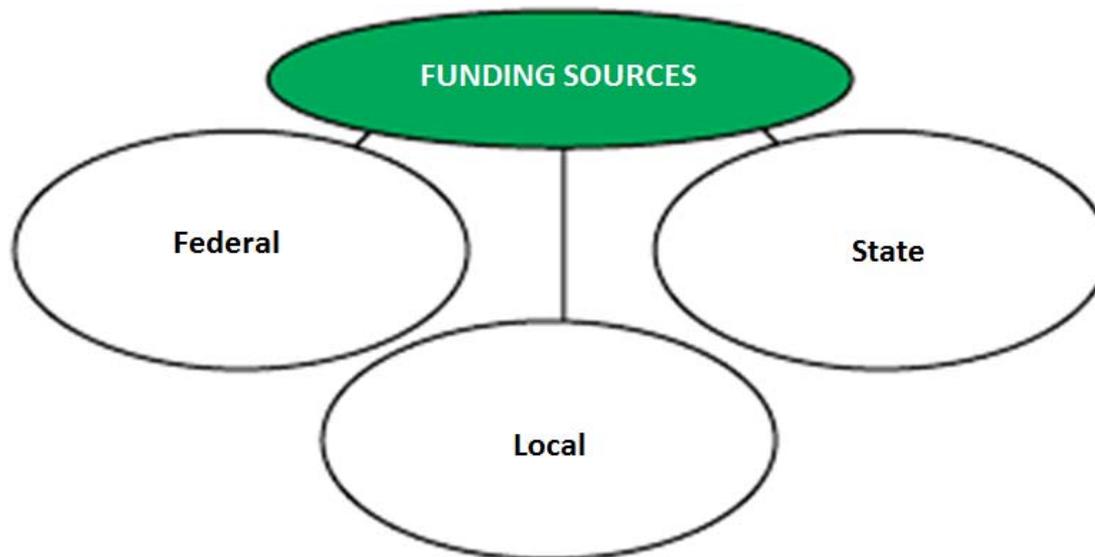
3. Public Interest Finding (PIF)

- ✓ 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?

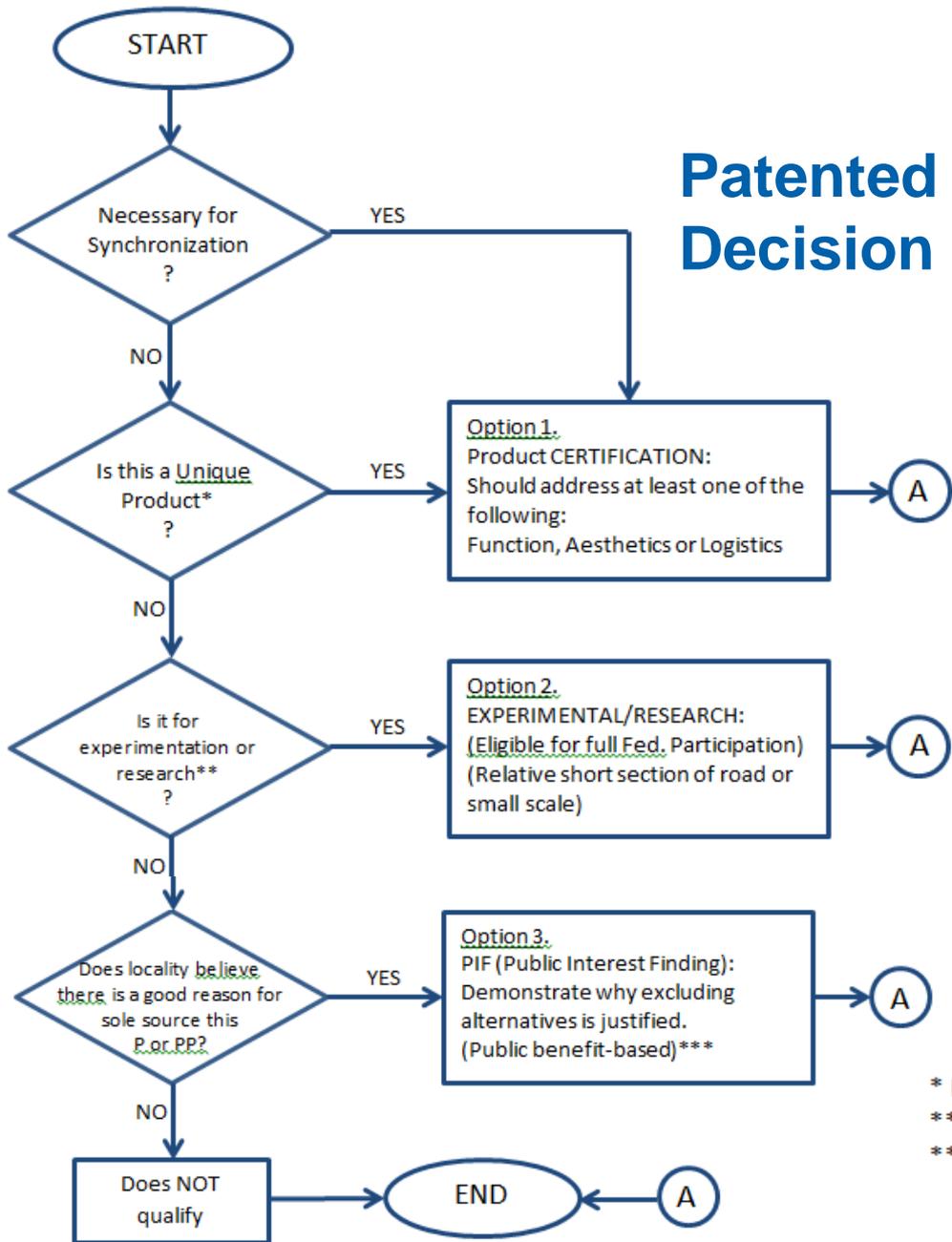
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Difference between a Product Certification and a PIF...

- ✓ **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



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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>

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