



PATENTED AND PROPRIETARY PRODUCTS/ PROCESSES

UCI ANNUAL MEETING
MAY 21, 2014

Todd Halacy, P.E.
VDOT

Elliott Moore, P.E.
FHWA

Lorenzo Casanova, P.E.
FHWA



The Urban Construction Initiative (UCI)

Agenda

- ❑ Introductions/ Background
- ❑ FHWA Process Review on Patented & Proprietary Products
- ❑ Definitions
- ❑ Proposed New Procedures for Patented & Proprietary Products
- ❑ Q&A

Background - Why are we here?

- Request by UCI Municipalities to Review Requirements
 - FHWA Presentation on Topic at the March 2013 UCI Meeting
 - Municipalities requested that VDOT look into the possibility of allowing certifications and Public Interest Findings (PIFs)
- Events following the March 2013 UCI Meeting
 - VDOT/FHWA discussion on patented and proprietary product processes
 - Concurrent FHWA National and Division offices discussing same topic
 - Led to FHWA Process Review



U.S. Department
of Transportation

**Federal Highway
Administration**

Federal Highway
Administration –
Virginia Division
Office

Virginia
Department of
Transportation

Process Review

Patented & Proprietary Products

January 2014

PATENTED

FINAL REPORT

Process Review – Team Members

- Lorenzo Casanova – FHWA, Senior LPA & Research Engineer
- Jose Granado – FHWA, Area Engineer
- Elliott Moore – FHWA, Area Engineer
- Richard Britton – VDOT, Locally Administered Program Manager
- Todd Halacy – VDOT, Local System Policy Manager

Process Review – Primary Objectives

1. Determine if both VDOT and FHWA are approving Public Interest Findings (PIFs) and Certifications correctly in accordance with 23 CFR 635.411 and the FHWA Memorandum dated November 20, 2011
2. Determine if the process could be improved and possibly simplified to satisfy the applicable Federal requirements

Process Review – Scope

- Related only to patented and proprietary products
- Verify or suggest recommendations to provide a consistent approach with current FHWA policies
- DID NOT explore “Findings of Cost Effectiveness”
- DID NOT explore Public Interest Findings required to use state furnished materials

Process Review – Methodology

Conducted a thorough review of the following documents:

- 23 CFR 635.411
- FHWA Memorandum – Guidance on Patented and Proprietary Product Approvals, 11/30/2011
- FHWA Memorandum – Patented and Proprietary Products: Database of FHWA Approvals, 11/14/2012
- Questions and Answers Regarding Title 23 CFR 635.411, 04/11/2013
- Virginia Department of Transportation/Federal Highway Administration – Virginia Division, Stewardship and Oversight Agreement, November 2012
- Federal Highway Administration – Virginia Division Delegation of Signature Authority for the Project Delivery Unit, 07/20/2011
- Commonwealth of Virginia Construction and Professional Services Manual, 09/15/2012
- Administrative Services Division Procurement Procedures Manual, November 2013
- Locally Administered Projects Manual, May 2013
- Urban Construction Initiative Program Administration Guide, 10/28/2009
- Urban Construction and Maintenance Program Policies and Guidelines, 01/01/2007
- Virginia Safe Routes to School Program Infrastructure Procedures Manual, May 2012

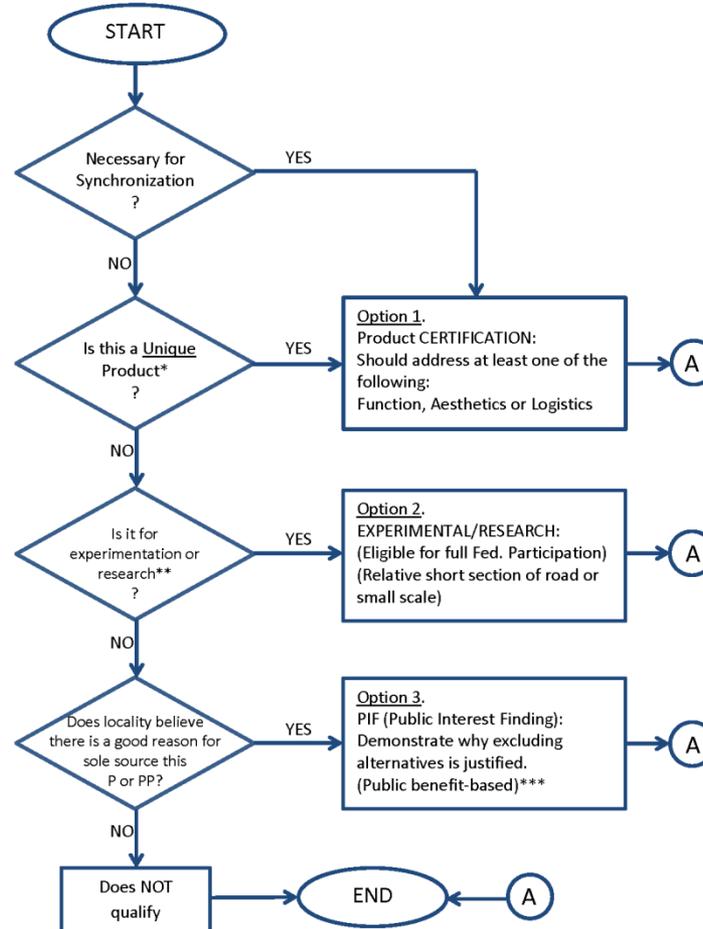
Process Review – Projects Reviewed

- Evaluated 11 PIFs
 - ▣ 7 Full Oversight, 4 Non Full Oversight
 - ▣ 7 from Locality, 4 from VDOT

- Evaluated 1 Certification:
 - ▣ Non Full Oversight
 - ▣ Requested by Locality

Process Review – Flowchart

Patented and 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



DEFINITIONS



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



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)



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



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?



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

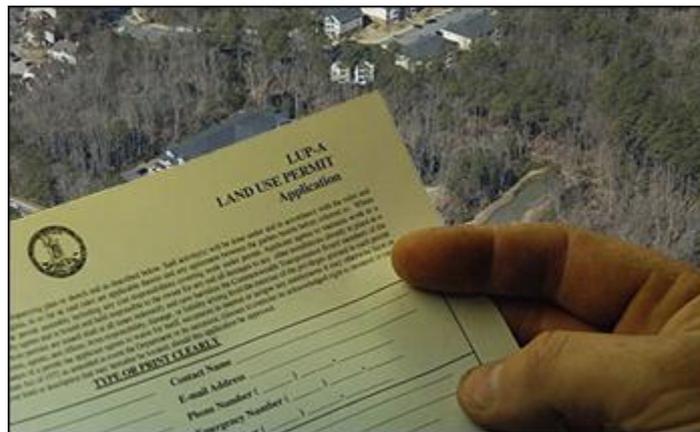
- ✓ one of three **non-competitive** options is used:
 1. product certification,
 2. experimental purposes, or
 3. public interest finding (PIF)



PATENTED

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



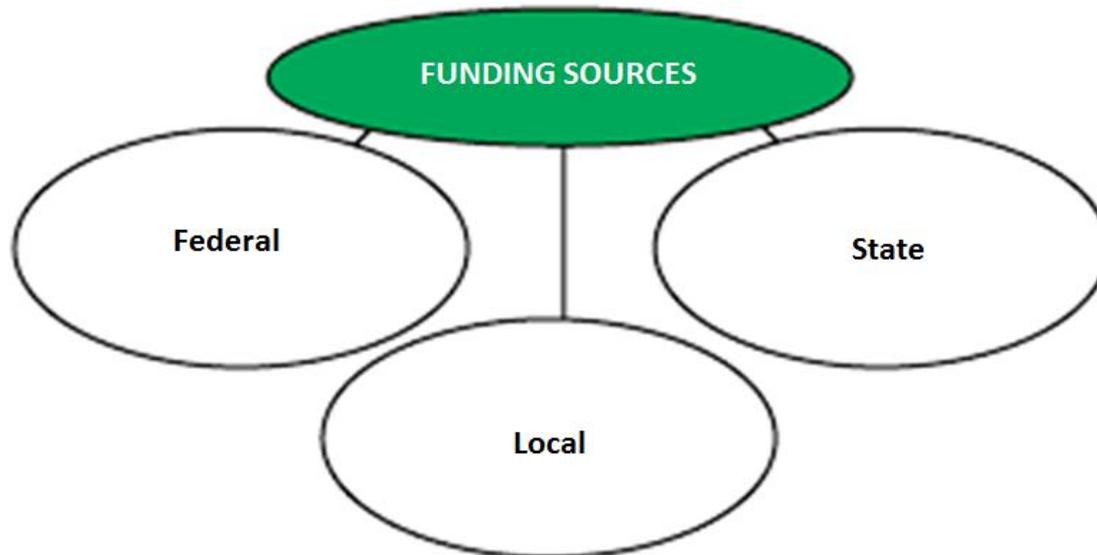
3. Public Interest Finding (PIF)

- ✓ 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...



...and One 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

Process Review – Observations

- A review of both VDOT and FHWA documents indicated that there is no consistent process for VDOT or FHWA to review and approve/deny requests to use patented and proprietary products
- The current VDOT/FHWA Stewardship and Oversight Agreement misuses the term “public interest find of cost effectiveness”
- 10 out of 11 approved PIFs should have been processed as Certifications
- Inconsistencies on which agency approved PIFs for NFO projects.

Process Review – Recommendations

- Create a well-defined procedure on how to process PIFs and Certifications for patented and proprietary products
- Update the existing language in the VDOT/FHWA Stewardship and Oversight Agreement to define the difference between a PIF and Certification



PROPOSED NEW PROCEDURES

Proposed New Procedures - Development

- ❑ Being developed by the same team members as the process review
- ❑ Reached out to FHWA Headquarters for input
- ❑ Reviewed other states' procedures (Arizona & Minnesota)
- ❑ Modeled the draft procedures after Arizona's guidance document

Proposed New Procedures - Highlights

- ❑ Will allow the use of both PIFs and Certifications
- ❑ Certifications and PIFs must meet criteria outlined in 23 CFR 635.411
- ❑ Defines the procedure for evaluating the request to use proprietary items and processes
- ❑ Sunset Clauses
 - ❑ Multi-Year and/or
 - ❑ Multi-project

Proposed New Procedures - Approvals

□ Certifications

▣ VDOT Administered Projects

- Project Manager/ Responsible Charge Certifies
- VDOT District Supports/Does not Support
- VDOT CO Construction Division Supports/Does not Support

▣ Locally Administered Projects

- Locality Responsible Charge Certifies
- VDOT District Supports/Does not Support
- VDOT CO Construction Division Supports/Does not Support

Proposed New Procedures – Approvals

(Continued)

□ PIF's

▣ VDOT Administered Projects

- Project Manager/ Responsible Charge Requests Approval
- VDOT District Supports/Does not Support
- VDOT CO Construction Division Approves/Does not Approve
- *Note:* Requires FHWA Approval for FO Projects

▣ Locally Administered Projects

- Locality Responsible Charge Requests Approval
- VDOT District Supports/Does not Support
- VDOT CO Construction Division Approves/Does not Approve
- *Note:* Requires FHWA Approval for FO Projects

Proposed New Procedures – Next Steps

- **Spring 2014:**
 - Finalize draft guidance document
- **Summer 2014:**
 - FHWA and VDOT management team to review and approve guidance document
- **Fall 2014:**
 - Final guidance document will be share with VDOT District and Locality Staff

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>



Questions?