



# PATENTED AND PROPRIETARY PRODUCTS/ PROCESSES UPDATE

UCI SEMI-ANNUAL MEETING  
OCTOBER 21, 2014

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VDOT – Construction Division



The Urban Construction Initiative (UCI)

# Agenda



- ❑ Definitions
- ❑ Background
- ❑ Proposed New Procedures for Patented & Proprietary Products
- ❑ Q&A

# What is a Proprietary Product?



# 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 product specific selection within the contracting process
- ✓ And may be eligible for Federal funding if one of three **non-competitive** options is used:
  1. product certification,
  2. public interest finding (PIF), or
  3. experimental purposes

# Difference between a Product Certification and a PIF...



- A Certification and a PIF are different in that:
- A Certification is used if a product is essential for synchronization or if the contracting agency specifies a unique product for which no equally suitable alternative exists.
- A PIF is used if a contracting agency elects to require a specific product when other acceptable products are available.

# Background - FHWA 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

## □ Recommendations:

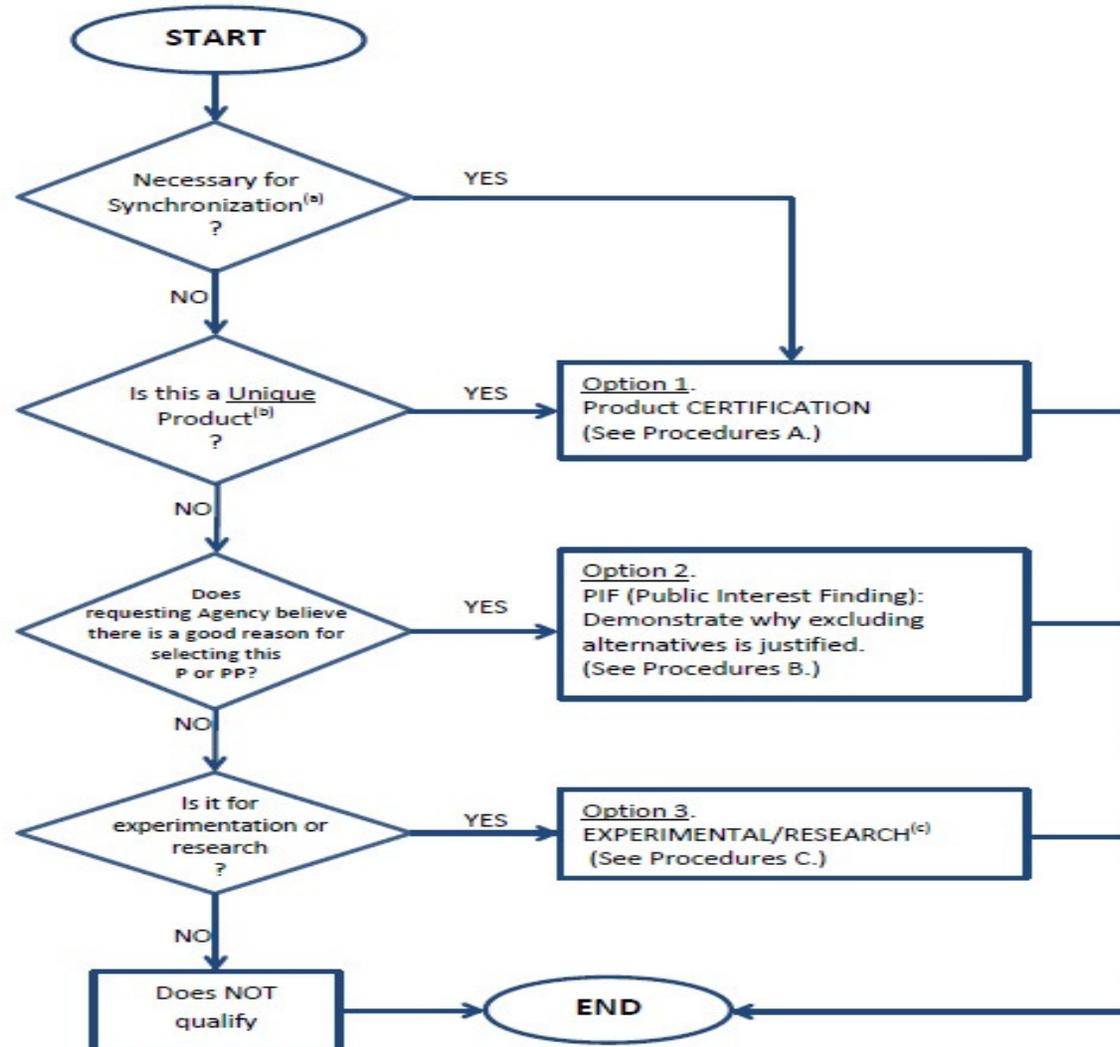
- Create a well-defined procedure on how to process PIFs and Certifications for patented and proprietary products
- Update the existing language in the VDOT/FHWA Stewardship and Oversight Agreement to define the difference between a PIF and Certification

# Proposed New Procedures - Highlights



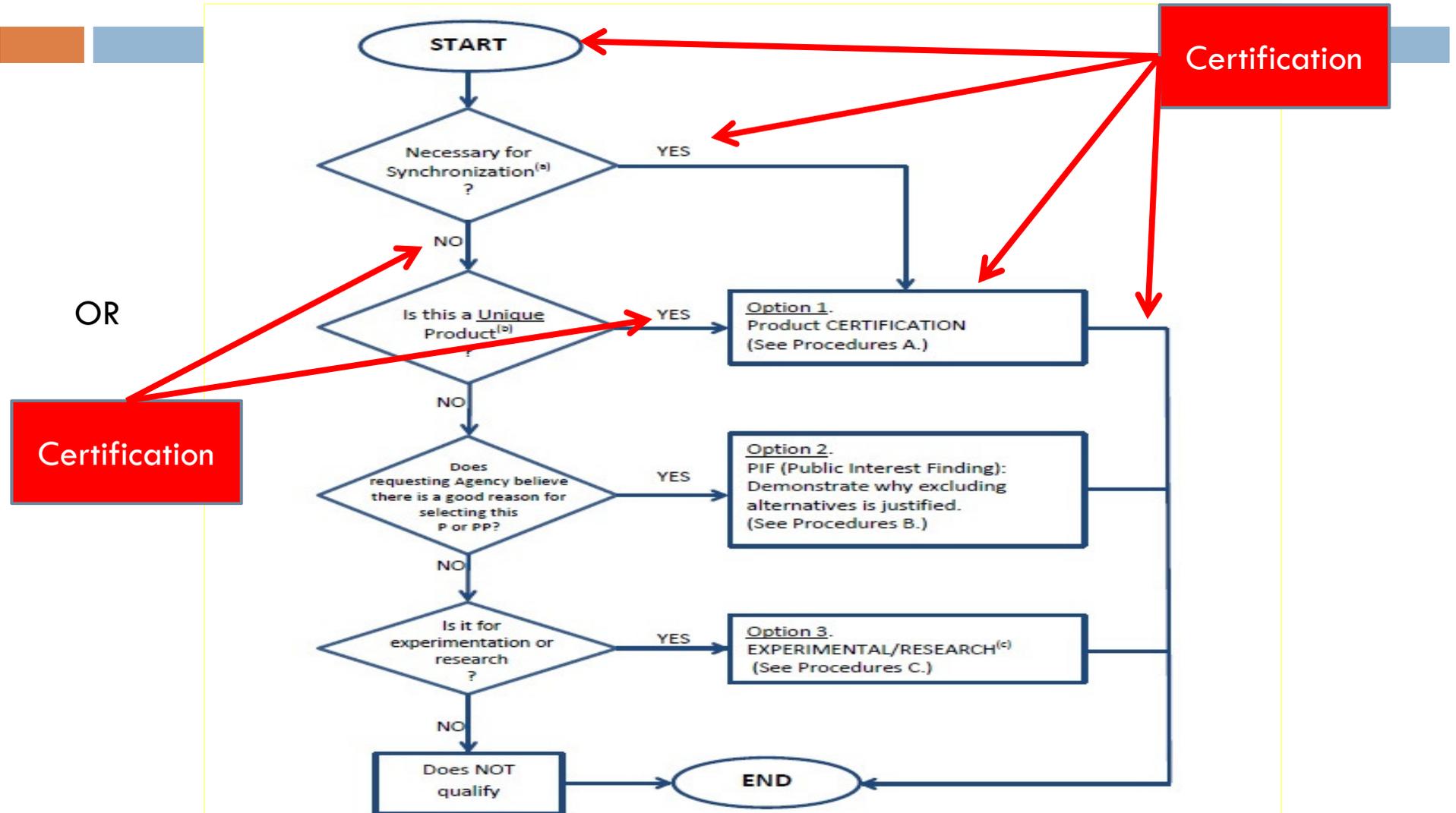
- ❑ Will allow the use of PIFs, Certifications, and Experimental/ Research for approving Patented & Proprietary Products
- ❑ Certifications, PIFs and Experimental/ Research must meet criteria outlined in 23 CFR 635.411
- ❑ Defines the procedure for evaluating the request to use proprietary items
- ❑ Sunset Clauses
  - ❑ Multi-Year and/or
  - ❑ Multi-project
- ❑ **NOTE:** New Process still under review for approval by FHWA and VDOT's Executive Team

# Proprietary Process Flowchart - General



- (a) Should address at least one of the following: Function, Aesthetics or Logistics
- (b) For which there is no equally suitable alternative
- (c) Relative short section of road or small scale

# Option 1 - Proprietary Process Flowchart - Certification



- (a) Should address at least one of the following: Function, Aesthetics or Logistics
- (b) For which there is no equally suitable alternative
- (c) Relative short section of road or small scale

# Option 1: Product Certification

- ✓ When a specific product is needed to build or operate the constructed project
- ✓ Locality certifies that a particular patented or proprietary product is either
  - A. necessary for synchronization with existing facilities
    1. **Function** (the proprietary product is necessary for the satisfactory operation of the existing facility),
    2. **Aesthetics** (the proprietary product is necessary to match the visual appearance of existing facilities),
    3. **Logistics** (the proprietary product is interchangeable with products in an agency's maintenance inventory),
  - B. is a unique product
- ✓ for which there is no equally suitable alternative

# Certification Request Form – Page 1

Exhibit 1

Form C-98a  
10-14-14

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF TRANSPORTATION  
*PATENTED OR PROPRIETARY ITEM*  
**CERTIFICATION REQUEST FORM**

*A specific patented or proprietary material, specification, or process shall not be required on a contract except as permitted in 23 CFR 635.411. Use this form to obtain approval of the use of a proprietary feature on a project or group of projects.*

**SUBMIT TO FEDERAL SUBMISSIONS OFFICER**

Name of Requestor

Title

Requesting Agency

Date Submitted

State Project No.

UPC

Federal Project No  
Project Description

**Extent of Approval**

Project Specific

Locality-wide,   
District-wide or   
Region-wide

Programmatic

Statewide

**Proprietary Product(s) or Process(es)**

**Manufacturer Information (Name, Address, Phone Number, & Website)**

**For a corridor, locality-wide, district-wide, region-wide, or statewide request, the certification will have a term of:** (Check only one)

Term Start Date

End Date

Duration

Comments:

# Certification Request Form – Page 2

Form C-98a  
10-14-14

UPC: \_\_\_\_\_  
Date: \_\_\_\_\_  
of the \_\_\_\_\_

\_\_\_\_\_  
*Requestor or Locality Representative (Print)*

\_\_\_\_\_  
*Title*

\_\_\_\_\_  
*Agency*

do hereby certify that in accordance with the requirements of 23 CFR 635.411(a)(2), that:

- the identified patented or proprietary item(s) is essential for synchronization with existing highway facilities.
- no equally suitable alternative exists for the identified patented or proprietary item(s).

\_\_\_\_\_  
*Signature Date*

I concur with this Request \_\_\_\_\_  
*VDOT Project Manager / Project Coordinator (Print)*

\_\_\_\_\_  
*Signature Date*

This request  Meets  Does Not Meet  Additional Information Required  
FHWA & State Procurement Requirements

- Concur
  - Do Not Concur
- this Request

\_\_\_\_\_  
*VDOT Federal Submissions Officer*

\_\_\_\_\_  
*Signature Date*  
(May act on requests on any Federally Eligible non-PODs)

Meets  Does Not Meet  Additional Information Required

\_\_\_\_\_  
*FHWA Engineer*

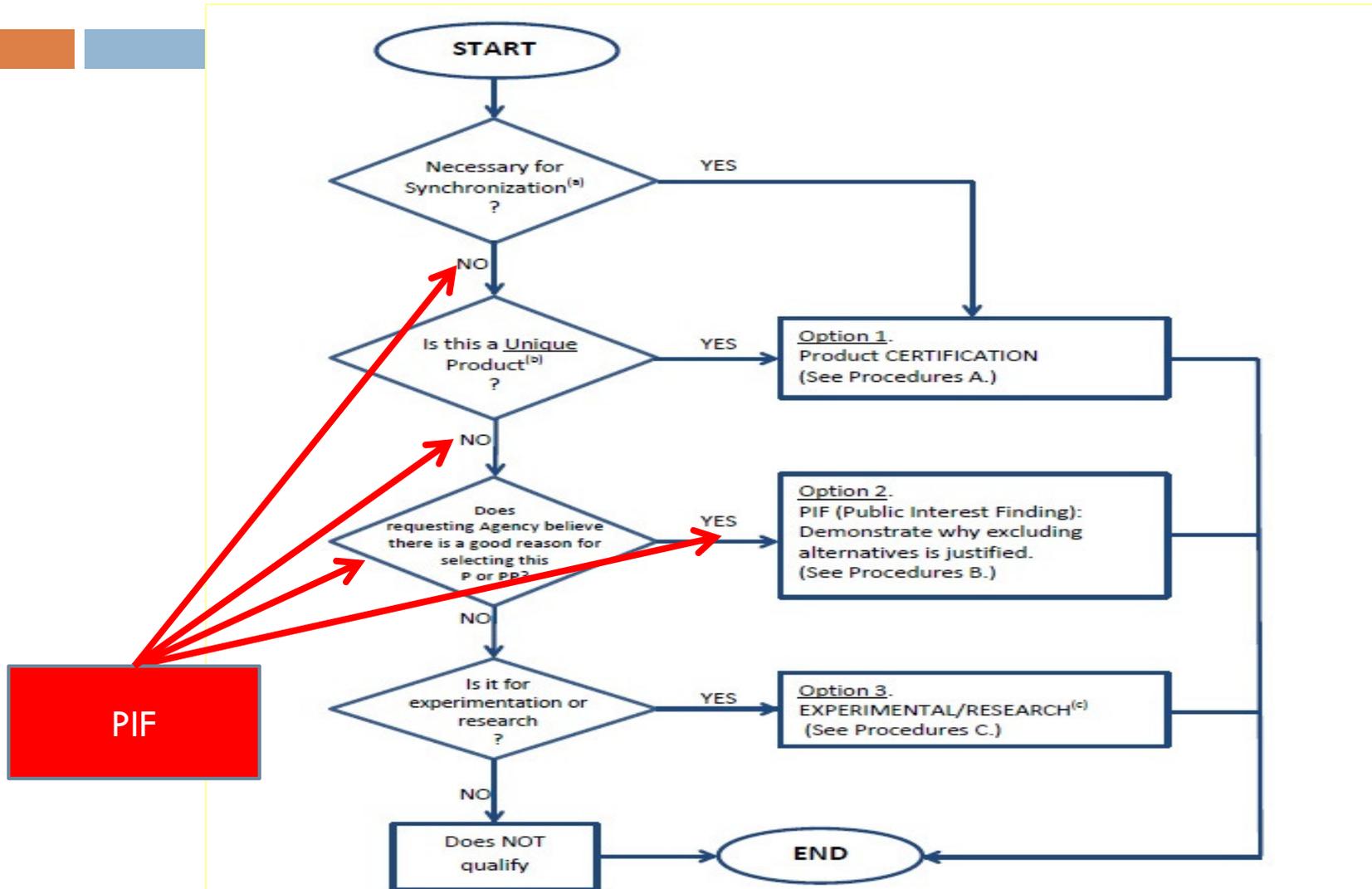
\_\_\_\_\_  
*Signature Date*  
(Required for PODs, Multiple Projects, Locality-wide, District-wide, Statewide, Region-wide, or Programmatic requests)

Comments:

List attached documentation as outlined in Subpart A of the PROCEDURES in the CONSTRUCTION DIVISION (CD) INSTRUCTIONAL AND INFORMATIONAL MEMORANDUM for PROPRIETARY ITEMS AND PROCESSES.

CC: State Construction Contract Officer

# Option 2 - Proprietary Process Flowchart - PIF



- (a) Should address at least one of the following: Function, Aesthetics or Logistics
- (b) For which there is no equally suitable alternative
- (c) Relative short section of road or small scale

## Option 2: Public Interest Finding (PIF)

- It is in the public interest to allow the contracting agency to require the use of a specific material or product even though other equally acceptable materials or products are available
- ✓ When locality believes there is good reason to require a patented or proprietary product, it may request a PIF
- ✓ Must be submitted in writing
- ✓ Demonstrate why excluding acceptable alternatives is justified

# PIF Request Form – Page 1

Exhibit 2

Form C-98b  
10-14-14

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF TRANSPORTATION  
PATENTED OR PROPRIETARY ITEM

## PUBLIC INTEREST FINDING REQUEST FORM

*A specific patented or proprietary material, specification, or process shall not be required on a contract except as permitted in 23 CFR 635.411. Use this form to obtain approval of the use of a proprietary feature on a project or group of projects.*

### SUBMIT TO FEDERAL SUBMISSIONS OFFICER

Name of Requestor

Title

Requesting Agency

Date Submitted

State Project No.

UPC

Federal Project No  
Project Description

### Extent of Approval

Project Specific

Locality-wide,   
District-wide or   
Region-wide

Programmatic

Statewide

**Proprietary Product(s) or Process(es)**

**Manufacturer Information (Name, Address, Phone Number, & Website)**

**For a corridor, locality-wide, district-wide, region-wide, or statewide request, the public interest finding will have a term of:** (Check only one)

Term

Start Date

End Date

Duration

# PIF Request Form – Page 2

Form C-98b  
10-14-14

UPC: \_\_\_\_\_  
Date: \_\_\_\_\_

\_\_\_\_\_ *Requestor or Locality Representative (Print)*  
\_\_\_\_\_  
*Title*  
\_\_\_\_\_ *agency*

of the  
request approval of the Public Interest Finding (PIF) based on the following information:  
\_\_\_\_\_  
*Signature* *Date*

Comments:

I concur with this Request \_\_\_\_\_  
*VDOT Project Manager / Project Coordinator (Print)*  
\_\_\_\_\_  
*Signature* *Date*

This request  Meets  Does Not Meet  Additional Information Required  
FHWA & State Procurement Requirements

Approved  
 Not Approved  
this Request

\_\_\_\_\_ *VDOT Federal Submissions Officer*  
\_\_\_\_\_  
*Signature* *Date*  
(May act on requests on any Federally Eligible non-PODs)

Approved  Not Approved  Additional Information Required

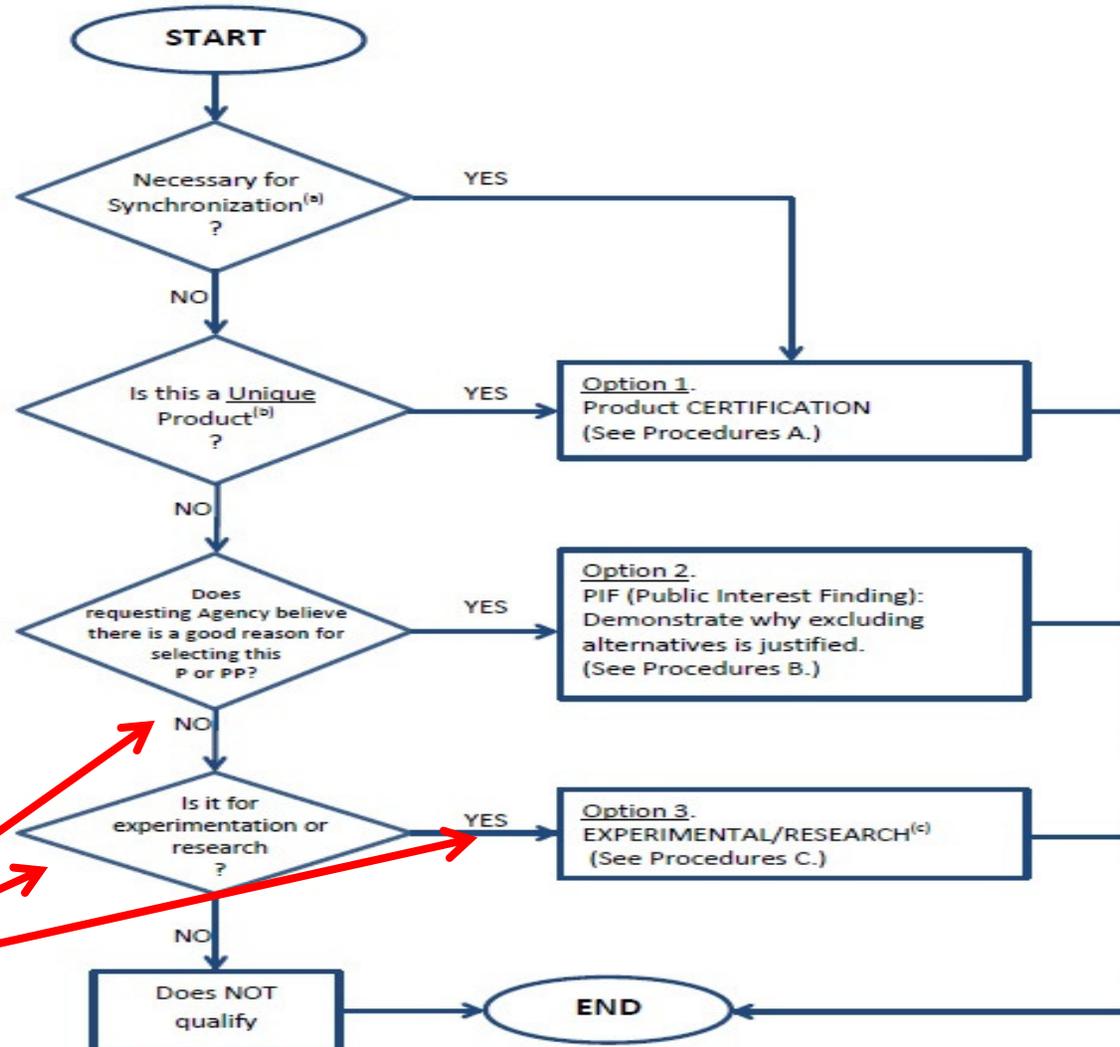
\_\_\_\_\_ *FHWA Engineer*  
\_\_\_\_\_  
*Signature of FHWA Engineer* *Date*  
(Required for PODs, Multiple Projects, Locality-wide, District-wide, Statewide, Region-wide, or Programmatic requests)

Comments:

List attached documentation as outlined in Subpart B of the PROCEDURES in the CONSTRUCTION DIVISION (CD) INSTRUCTIONAL AND INFORMATIONAL MEMORANDUM for PROPRIETARY ITEMS AND PROCESSES :

CC: State Construction Contract Officer

# Option 3 - Proprietary Process Flowchart - Experimental



Experimental

- (a) Should address at least one of the following: Function, Aesthetics or Logistics
- (b) For which there in no equally suitable alternative
- (c) Relative short section of road or small scale

# Option 3: 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

# Experimental Request Form – Page 1



Exhibit 3

Form C-98c  
10-14-14

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF TRANSPORTATION  
*PATENTED OR PROPRIETARY ITEM*

## EXPERIMENTAL USE REQUEST FORM

*A specific patented or proprietary material, specification, or process shall not be required on a contract except as permitted in 23 CFR 635.411. Use this form to obtain approval of the use of a proprietary feature on a project or group of projects.*

**SUBMIT TO FEDERAL SUBMISSIONS OFFICER**

Name of Requestor	Title
Requesting Agency	Date Submitted
State Project No.	UPC
Federal Project No.	
Project Description	

**Proprietary Product(s) or Process(es)**

**Manufacturer Information (Name, Address, Phone Number, & Website)**

Document the reasons for experimental use of the proprietary item(s) or process(es). Include a work plan that describes how research or experimental feature will be used and evaluated. Attach additional pages and documentation as necessary. See FHWA guidance for "Construction Projects Incorporating Experimental Features": <http://www.fhwa.dot.gov/programadmin/contracts/expermnt.cfm>.

# Experimental Request Form – Page 2

Form C-98c  
10-14-14

of the \_\_\_\_\_  
*Requestor or Locality Representative (Print)*  
\_\_\_\_\_ *Title*  
\_\_\_\_\_ *Agency*

do hereby certify that in accordance with the requirements of 23 CFR 635.411(a)(3), that the product or process will be used for research or experimental purposes on short sections of road.  
*(Such use on VDOT projects must be coordinated with Materials Division)*

I concur with this Request \_\_\_\_\_  
*Signature Date*  
\_\_\_\_\_ *VDOT Project Manager / Project Coordinator*

\_\_\_\_\_ *Signature Date*

This request  Meets  Does Not Meet  Additional Information Required  
FHWA & State Procurement Requirements

Approved  
 Not Approved  
this Request

\_\_\_\_\_ *VDOT Federal Submissions Officer*

\_\_\_\_\_ *Signature Date*  
(May act on requests on any Federally Eligible non-PODs)

Approved  Not Approved  Additional Information Required

\_\_\_\_\_ *FHWA Engineer*

\_\_\_\_\_ *Signature Date*  
(Required for PODs, Multiple Projects, Locality-wide, District-wide, Statewide, Region-wide, or Programmatic)

Comments:

List attached documentation as outlined in Subpart C of the PROCEDURES in the CONSTRUCTION DIVISION (CD) INSTRUCTIONAL AND INFORMATIONAL MEMORANDUM for PROPRIETARY ITEMS AND PROCESSES:

CC: State Construction Contract Officer

# Proposed New Procedures – Next Steps



- Next Steps:

- Finalize Guidance Document
- Present to VDOT/FHWA Executive Team
- Share with VDOT and Locality Staff
- Implement

- Schedule:

- Fall 2014

# 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?