

Proprietary Products Current Policy

**2013 Midwest Bridge Preservation
Partnership Meeting
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Office of Infrastructure**



References

- CQIT Page – Patented & Proprietary Products:
<http://www.fhwa.dot.gov/construction/cqit/propriet.cfm>
- Revised Q&A – 23 CFR 635.411:
<http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm>
- FHWA Approvals of Patented & Proprietary Products:
<http://www.fhwa.dot.gov/construction/contracts/pnpapprovals/approvals.cfm>
- December 2011 FOCUS article: **FHWA Releases New Guidance on Patented and Proprietary Products**
<http://www.fhwa.dot.gov/publications/focus/11dec/11dec04.cfm>
- FHWA 11/14/2012 Memorandum: ACTION: Patented & Proprietary Products: Database of FHWA Approvals
<http://www.fhwa.dot.gov/construction/contracts/pnpapprovals/121114.cfm>
- APEL All Certified Products:
http://apel.transportation.org/all_certified_products.aspx



Competition

- **23 USC 112 – “...construction ... shall be performed by contract awarded by competitive bidding”**
- Extends to the individual bid items in a contract.
- Experience shows that competition leads to lower bids >> more efficient use of taxpayer dollars



Competition

- **FHWA requires a justification to deviate from the competitive process**



Competition

- Allowable deviations from the competitive process
 - Other Methods (with FHWA approval)
 - Emergencies
 - 23 CFR 635.411



23 CFR 635.411

- Allows Federal Participation for Proprietary products when:
 - Bid competitively with equally suitable non-proprietary products
 - State certifies:
 - Essential for synchronization
 - No equally suitable alternative exists
 - Experimental Use
 - FHWA makes Public Interest Finding even though other suitable alternatives exist



Current Guidance

(as of November 30, 2011)

- Clarifies differences between Certifications and Public Interest Findings
- Clarifies approval authorities for States and FHWA
- Clarifies experimental use when participating in certain programs
- Provides transparency



Certifications vs. PIFs (old process)

- Certification = Public Interest Finding
 - No difference in process
 - de facto process – Everything treated as a PIF
 - State DOTs had to request approval to use proprietary products, even with certifications
- **Problem – Process did not conform to language of regulation.**



Certifications vs. PIFs (old process)

- **Problem** – Process did not conform to language of regulation.
- Industry complaint – process too restrictive
 - Asserted that regulation kept innovative products from use
 - Attempted legislative remedies that would have prevented FHWA from contesting certifications



Certifications vs. PIFs

(New process)

- Certification \neq PIF



Certifications vs. PIFs

(New process)

- Guidance = regulation language
- Certification
 - Essential for synchronization
 - No suitable alternative
- Public Interest Finding
 - Other alternatives exist



Requirements

- Certifications
 - Certified by State DOT
 - **No** FHWA approval required
 - FHWA can contest the certification
 - Local Public Agencies (LPAs) can certify
- Public Interest Findings
 - FHWA Division Administrator approval required
 - May be delegated to State DOT via Stewardship Agreement
 - Cannot be redelegated to LPAs.

Approval Requirements

- Direct Recipients (TIGER grantees & other specific agencies)
 - FHWA cannot delegate approval authority to DRs (PIFs)
 - Must come to FHWA
 - DRs can certify



Certifications

- **Must** include:
 - Statement by the appropriate State official certifying that the proprietary product is:
 - Essential for synchronization, or
 - That no equally suitable alternative exists
- **Should** include supporting documentation.
 - Unique need being addressed
 - Why other products cannot meet the need



Public Interest Findings

- Public Interest Finding includes:
 - Request from State DOT, including supporting information
 - Approval by FHWA, considering:
 - Evaluation of equally acceptable products
 - Benefit to public
 - Additional costs, if any
 - Duration and extent of approval
 - Approval may be delegated to State DOT



Experimental Use

- Clarifies that proprietary products approved under special funding/evaluation programs do not require additional certifications or approvals under 23 CFR 635.411
- Examples:
 - Highways for Life
 - Innovative Bridge Research and Deployment Program
 - Innovative Pavement Research and Deployment Program



Experimental Use

- However, additional use of these products on other Title 23-funded projects not funded under these special funding/evaluation programs must comply with 23 CFR 635.411.



Transparency

- FHWA posts all “Public Interest Findings” and Experimental Products on its website
- Sortable by:
 - State
 - Basis of approval
 - Product name
 - Product type
 - Extent (project, statewide)
 - Approval date
 - Expiration Date
- Many of these “Public Interest Findings” could have/should have been Certifications
- FHWA will retain this legacy data on website.



FHWA Approvals of Patented and Proprietary Products

<http://www.fhwa.dot.gov/construction/contracts/pnpapprovals/approvals.cfm>

FHWA Headquarters Contact: John Huyer, 202-366-1937

The screenshot shows the FHWA website interface. At the top, there is a navigation bar with the FHWA logo and the text "U.S. Department of Transportation Federal Highway Administration". Below this is a "Construction" header with several tabs: "Quality", "Management & Coordination", "Details", "Safety", "Materials", and "Contract Administration". The current page is titled "FHWA Approvals of Patented and Proprietary Products from November 30, 2011 to present". There are sorting and filtering options, including checkboxes for "Tracking Number", "State", "Basis of Approval", "Product/Material", "Product Category", "Extent", "Submittal Date", "Approval Date", "Expiration Date", and "Comments". Below these options is a table with 10 columns: Tracking Num, State, Basis of Approval, Product/Material, Product Category, Extent, Submittal Date, Approval Date, Expiration Date, and Comments. The table contains 6 rows of data, all for products from Indiana. At the bottom of the page, there is a status bar with "Trusted sites | Protected Mode: Off" and a zoom level of "100%".

Sort by:

- Tracking Number
- State
- Basis of Approval
- Product/Material
- Product Category
- Extent
- Submittal Date
- Approval Date
- Expiration Date
- Comments

Filter by:

Tracking Number:

State:

Basis:

Product/Material:

Product Category:

Extent:

[Update Table](#)

[Remove Sort/Filter](#)

Tracking Num	State	Basis of Approval	Product/Material	Product Category	Extent	Submittal Date	Approval Date	Expiration Date	Comments
2011-IN-001	Indiana	Public Interest Finding	Nortel AVAYA Ethernet Routing Switch (ERS) 8800	ITS Computer Hardware/Software	Multiple Projects	11/16/2011	11/22/2011	10/01/2014	
2011-IN-002	Indiana	Public Interest Finding	Nortel AVAYA Ethernet Routing Switch (ERS) 8300	ITS Computer Hardware/Software	Multiple Projects	11/16/2011	11/22/2011	10/02/2014	
2011-IN-003	Indiana	Public Interest Finding	Nortel AVAYA Ethernet Routing Switch (ERS) 8600	ITS Computer Hardware/Software	Multiple Projects	11/16/2011	11/22/2011	10/03/2014	
2011-IN-004	Indiana	Public Interest Finding	Nortel AVAYA Ethernet Routing Switch (ERS) 8530	ITS Computer Hardware/Software	Multiple Projects	11/16/2011	11/22/2011	10/04/2014	
2011-IN-005	Indiana	Public Interest Finding	Nortel AVAYA Ethernet Routing Switch (ERS) 4500	ITS Computer Hardware/Software	Multiple Projects	11/16/2011	11/22/2011	10/05/2014	
2011-IN-006	Indiana	Public Interest Finding	Nortel AVAYA Ethernet Routing Switch (ERS) 2500	ITS Computer Hardware/Software	Multiple Projects	11/16/2011	11/22/2011	10/06/2014	

Transparency

(as of 10/31/2013)

- Proprietary Products will be posted on
 - FHWA website (FHWA approvals only) = 308
 - Experimental products = 25
 - Public Interest Findings = 283
 - AASHTO website (APEL) (voluntary basis)
 - Certifications = 26
 - State DOT websites (voluntary basis)
 - Certifications = 3 (TN, WY)
 - Experimental Products (State Delegated) = 0
 - Public Interest Findings (State Delegated) = 0



Transparency

- AASHTO APEL Site – Certified Products
 - http://apel.transportation.org/all_certified_products.aspx

The screenshot shows a Windows Internet Explorer browser window displaying the AASHTO Product Evaluation List website. The page title is "AASHTO Product Evaluation List" and the date is "Monday, August 20, 2012". The website header includes the AASHTO logo and the tagline "THE VOICE OF TRANSPORTATION". Below the header, there is a search bar and a navigation menu. The main content area is divided into two columns. The left column contains a "MY APEL LOGIN" section with fields for "E-Mail Address" and "Password", a "Login" button, and a "Get Password" link. Below this is an "APEL" navigation menu with links for "HOME", "MY APEL", "COMPLETED EVALUATIONS", "CERTIFIED PRODUCTS", "REGISTER", and "FAQ". The right column is titled "APEL ALL CERTIFIED PRODUCTS" and contains a "CERTIFIED PRODUCTS" section. This section includes a paragraph explaining that the results of all certified products handled by APEL can be accessed here. Below this are two dropdown menus: "CERTIFICATIONS" with "By Area" selected, and "AGENCY" with "Maine Department of Transportation" selected. There is also an "Area" dropdown menu with "All" selected. The page footer shows "Internet | Protected Mode: On" and a zoom level of "125%".

Questions and Comments



For further information please contact

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