

January 11, 2019

Ms. Brandye L. Hendrickson  
Deputy Administrator  
Federal Highway Administration  
1200 New Jersey Avenue S.E.  
Washington, DC 20590

Re: Docket No. FHWA-2018-0036, “Construction and Maintenance–Promoting Innovation in Use of Patented and Proprietary Products”

Dear Deputy Administrator Hendrickson:

The American Association of State Highway and Transportation Officials (AASHTO) is pleased to provide comments to the Federal Highway Administration (FHWA) regarding a Notice of Proposed Rulemaking (NPRM) entitled “Construction and Maintenance–Promoting Innovation in Use of Patented and Proprietary Products” issued on November 6, 2018. Representing all 50 states, the District of Columbia, and Puerto Rico, AASHTO serves as a liaison between state departments of transportation and the federal government.

The NPRM offered two options for modifying the current process for approving patented and proprietary products for use on the National Highway System (NHS), which are referenced below. Under Option 1, the existing regulatory requirements of 23 CFR 635.411(a) through (e) would be removed and replaced with general federal certification requirements to ensure competition in the selection of materials and products. This change would require a state DOT to (1) implement procedures and specifications that provide for fair, open, and transparent competition awarded only by contract to the lowest responsive bid submitted by a responsible bidder pursuant to 23 USC 112, and (2) certify that it adheres to those procedures and specifications. Under Option 2, FHWA would rescind the current proprietary and patented materials requirements contained in 23 CFR 635.411(a) through (e), leaving the states to determine their own processes.

Our response below is compiled from discussions among a working group of 14 state DOT representatives and two surveys of the state DOTs. In addition to the two options proposed in the NPRM, we have provided input on the current process, which is supported by many states. In gathering information from the state DOTs, there were several recurring themes that we request FHWA consider when making its final decision. The salient points from these discussions are summarized herein.

## **The Current Process**

The working group discussed both the advantages and challenges of the current process and rules. One argument for keeping the regulations as they exist is that they, in theory, provide a nationwide, uniform framework for accepting patented and proprietary products. Of the states that expressed a desire to keep the regulations as is, they see the process as a filter. The federal regulations encourage salespeople and manufacturers to promote products for which a serious attempt has been made to test and use the proper channels to gain entry into states' approved products listings.

Without the regulations, states anticipate increased pressure from manufacturers potentially contacting state legislators directly, asking them to require the use of specific products through state legislation. An example was given of a product mandated by a state legislature that was approved for federal participation through a public interest finding (PIF); five years later, after sufficient research was conducted, the product was found to be deficient in comparison to similar products, and was removed from the DOT's approved products list. In another state, a manufacturer worked with the legislature to gain an advantage in the state's bidding process due to its products being manufactured in that state. The state DOT relied on the federal process in order to ensure greater competition.

A common challenge states expressed about the current process is the variability among the states in dealing with the FHWA Division Offices. Although there has been improvement in recent years, it seems that not all Division Offices recognize the state's prerogative to certify patented and proprietary products and may, in fact, discourage them to do so. Many states described regulations that seem to be interpreted differently from state to state, with more leeway given to some states than others. One state described neighboring agencies that have been given blanket approval for specific synchronization issues statewide, while the initial state struggled to get approvals or had to repeat the exact same request for multiple projects.

About half of the working group participants stated that the existing documentation and administrative processes are not onerous and only require "a little extra" research; the PIF process requires more paperwork and is used less often. However, the other half of the participants said that the paperwork is difficult and lengthy, and the outcome is unpredictable. In providing certifications and PIFs, several states have had difficulty: a) proving to the Division Offices that there are, or are not, competitive products available; b) that there is a benefit to using a given product over other products; and c) performing a reasonable cost analysis.

## **Option 1**

A benefit of Option 1 is that FHWA would be the entity to create the regulations establishing a general framework for the state processes, which would provide for greater consistency across the country compared to Option 2. This option will also likely provide more transparency about decisions and competition than Option 2, and manufacturers might understand the protocols better since there will be a national framework. It is assumed that Option 1 would lift some current restrictions and limitations, but the question remains as to whether this option will end up being any easier for the states than the existing process, given the as-yet-to-be-determined federal requirements that would be imposed on the state-developed processes.

One state compared the patented and proprietary rules to the design exception process. The design exception process is well defined, and it was suggested that it could be used as a model if Option 1 is selected.

A shortcoming of Option 1 is that it might take a great deal of effort to enact, while for some states, Option 2 could be implemented immediately.

## **Option 2**

By essentially removing the regulations, Option 2 would provide the most flexibility to the states. With this new freedom, several states voiced that Option 2 promotes innovation. They do not want to be forced to consider lesser products in the name of competition, and Option 2 would allow this. With that said, Option 2 may lead to all 50 states having different requirements and processes, which could make it more difficult for manufacturers to understand the various processes for gaining product approvals.

An alternate interpretation of 23 USC 112, from at least one state, was that while requiring competitive contracts, the code does not disallow the use of sole-sourced products. Thus, in theory, Option 2 still supports 23 USC 112 while repealing the existing patented and proprietary product regulations.

## **Competition**

Regarding competitive bidding, a case could be made that all bidders are bidding on an equal footing regardless of whether the contract specifies a proprietary product or not, since 23 CFR 635.104 and the corresponding section of US Code do not address materials selection. Another opinion was given that the rules for competitive project bidding do not state that every element of the project has to be low bid. Some states and Division Offices seem to be interpreting this differently. However, one state found that even after obtaining approval for a sole-source selection process, some contractors could not get quotes from the supplier of the product, thus making the competitive bid a moot point.

## **Better Definitions**

Regardless of the option selected, the states felt that better definitions are needed for “synchronization” and “competitive bidding.” Some states felt that they had been denied approvals for synchronization when it was very clear to the state DOT that it met the definition. Several times it was expressed that using new, innovative products for experimental use was difficult because the Division Office would not accept the evaluation plan. Either the state DOT or the Division Office may need better definitions to make the process work more smoothly. Regardless of the outcome of this proposed rulemaking, it is requested that these definitions be clarified to provide for a more streamlined process for approving patented and proprietary products. It is also a good time to revise the regulations to give greater flexibility in approving Intelligent Transportation System (ITS) and Connected and Automated Vehicle (CAV) components that will assuredly incorporate more proprietary and patented components than traditional highway products.

### **AASHTO's Product Evaluation List**

The intent of AASHTO's Product Evaluation List (APEL) program (<http://apel.transportation.org>) is to provide a repository of findings from the evaluation and testing of new, innovative, and/or proprietary engineered transportation products and materials, including certifications made by States for synchronization and for products without equally suitable alternatives. Thus, this site is a one-stop shop for both agencies and manufacturers to see how patented and proprietary products perform and are being used by others. It was suggested that these certifications could be used by other agencies to fulfill the requirements for federal participation. In addition, vendors can gain access to the APEL site to see what products are being certified, allowing more opportunities for competitive products to be introduced, which would take some of the burden off the states for researching equivalent products.

Another option to make the process easier would be to allow an agency to specify a desired product while also incorporating language in the contract documents stating that an approved equivalent product would be allowed. Another suggestion is that product inclusion on a state DOT's approved product list would constitute "certification," therefore making its use eligible for Federal participation.

Possibly a registry for manufacturers and their products could be developed. With enough populated data, this site could be used for researching equivalent products. It may reduce the states' burden of having to prove a negative (that equivalent products do not exist) if all or most products are listed in one place.

### **Conclusion**

Ultimately, the states were divided in selecting a single option. There is a group of states that prefers to keep the regulations as they currently are, but there is also a group that supports Option 2. The first group generally relies on the Federal Regulations for state contracting as well as federal contracts, or already has a stricter policy in place for state contracts. The second group has the commonality of having difficulty in completing the current process's paperwork to the satisfaction of the Division Office, and thereby successfully obtaining Federal participation for patented or proprietary products. Should additional streamlining and consistency be provided from state to state, the general structure of the existing process would likely be amenable to most state DOTs.

AASHTO welcomes the opportunity to further explore the concerns of the states with FHWA and requests that the comments provided herein be considered as the final decision is made regarding changes to 23 CFR 635.411.

Thank you for the opportunity to provide comments on this proposed rule.

Sincerely,



Carlos M. Braceras, P.E.

President, American Association of State Highway and Transportation Officials  
Executive Director, Utah Department of Transportation