



Title: Use of Patented or Proprietary Products

Discipline: General Engineering

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MaineDOT has a certification process in place to review the use of Proprietary Products. Written requests for certification are to be submitted to the Engineering Council and should follow the guidance outlined below.

The specification of a particular product may restrict competition as the pool of available products is reduced to the specific product selected. In some cases, the need for a particular product outweighs the need to procure products competitively.

Code of Federal Regulations: 23 CFR 635.411 provides the regulatory authority for FHWA's participation in the cost of a patented or proprietary product. More detailed information is provided in the related FHWA Questions and Answers website <http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm>

A few major points about Proprietary Products are highlighted below. A patented or proprietary product is defined as: a product, specification, or process identified in the plans or specifications as a "brand" or trade name (e.g. 3M, Corten). However, it may also be a product so narrowly specified that only a single provider can meet the specification.

## REQUEST FOR CERTIFICATION

A request for Proprietary Product Certification is required to be submitted to MaineDOT Engineering Council, stating that the specified proprietary product meets at least one of the following criteria:

- Necessary for **synchronization with existing facilities** - based on ***Function*** (necessary for the satisfactory operation of the existing facility); ***Aesthetics*** (necessary to match the visual appearance of existing facilities); ***Logistics*** (interchangeable with products in an agency's maintenance inventory); or any combination thereof.
- A **unique product** for which there is no equally suitable alternative
- That a proprietary item is to be used for research for a distinctive type of construction on relatively short sections of road on an **experimental basis**.

If a contracting agency requests to use a proprietary product on an **experimental basis**, the request shall include an experimental work plan. The work plan should be developed in coordination with the Transportation Research Division and, at a minimum, answer these four questions:

1. How will the evaluation be done?
2. What resources (people, equipment, and facilities) will be required?
3. What will it cost?
4. When will the evaluation be complete, and how will performance be measured?

The request for Certification should include the brand name and manufacturer of the item in question as well as a detailed discussion of the factors that necessitate the item's use (synchronization with existing facilities, no equally suitable alternative is available, experimental basis, etc.). This information must be supported by relevant figures and documentation, and will be as complete and detailed as possible.

The extent of the Certification (project/location-specific) shall be specified, including PIN(s).

Include information and supporting documentation that substantiates the need for the Certification. Such documentation may include, as appropriate:

- A description of how the proprietary product requirement will benefit the public.
- The unique needs that are being addressed that result in no equally suitable alternative.
- Identified safety locations or critical decision points that would justify a higher standard.
- An evaluation of the pool of potential products, and a description of why these products cannot meet the contracting agency's needs.
- An estimate of additional costs, if any, incurred as a result of this proprietary product requirement.

When a product does have equally suitable alternatives and does not meet any of the other above mentioned criteria, a request for Certification can still be submitted (**Public Interest Finding**). The request shall include: a description of how the proprietary product requirement will benefit the public; an evaluation of the pool of other equally acceptable products; an estimate of additional costs incurred as a result of this proprietary product requirement; description of need, including limitations and conditions (types of roadways, traffic volumes, and other critical factors); and engineering / and economic analysis supporting the requested action. The certification request shall be project-specific.

#### CERTIFICATION LETTER

Once reviewed, a Certification letter will be provided by the Chief Engineer attesting that the proprietary product is essential for synchronization with existing facilities, or that no equally suitable alternative exists, or that that this product is approved for research on an experimental basis (23 CFR 635.411(a)(2)).

In order to ensure that the industry and general public understand the basis for a Certification, FHWA recommends that State Transportation Agencies post their Certifications, as well as those of their LPAs, to a public website, and make supporting documentation available upon request. MaineDOT, through the Transportation Research Division, posts proprietary product Certifications to the American Association of State Highway and Transportation Officials (AASHTO) Product Evaluation Listing (APEL) database so that other agencies may benefit from their experience. The APEL is available on the AASHTO Internet site at:<http://apel.transportation.org/>

Note: It is not necessary to obtain Certification when at least three proprietary product names are listed in the project specifications as possible sources for a specific item necessary to construct the proposed improvement.