

Construction and Maintenance – Promoting Innovation in Use of Patented and Proprietary Products

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Final rule.

EFFECTIVE: October 28, 2019

SUMMARY: The FHWA is revising its regulations to provide greater flexibility for States to use proprietary or patented materials in Federal-aid highway projects. This final rule rescinds the requirements limiting the use of Federal funds in paying for patented or proprietary materials, specifications, or processes specified in project plans and specifications, thus encouraging innovation in transportation technology and methods.

Executive Summary

The FHWA is revising its regulations at 23 CFR 635.411 to provide greater flexibility for States to use patented or proprietary materials in Federal-aid highway projects. Based on a century- old Federal requirement, the outdated requirements in 23 CFR 635.411(a)–(e) are being rescinded to encourage innovation in the development of highway transportation technology and methods. *As a result, State Departments of Transportation (State DOTs) will no longer be required to provide certifications, make public interest findings, or develop research or experimental work plans to use patented or proprietary products in Federal-aid projects. Federal funds participation will no longer be restricted when State DOTs specify a trade name for approval in Federal-aid contracts.* In addition, Federal-aid participation will no longer be restricted when a State DOT specifies patented or proprietary materials in design-build Request-for- Proposal documents.

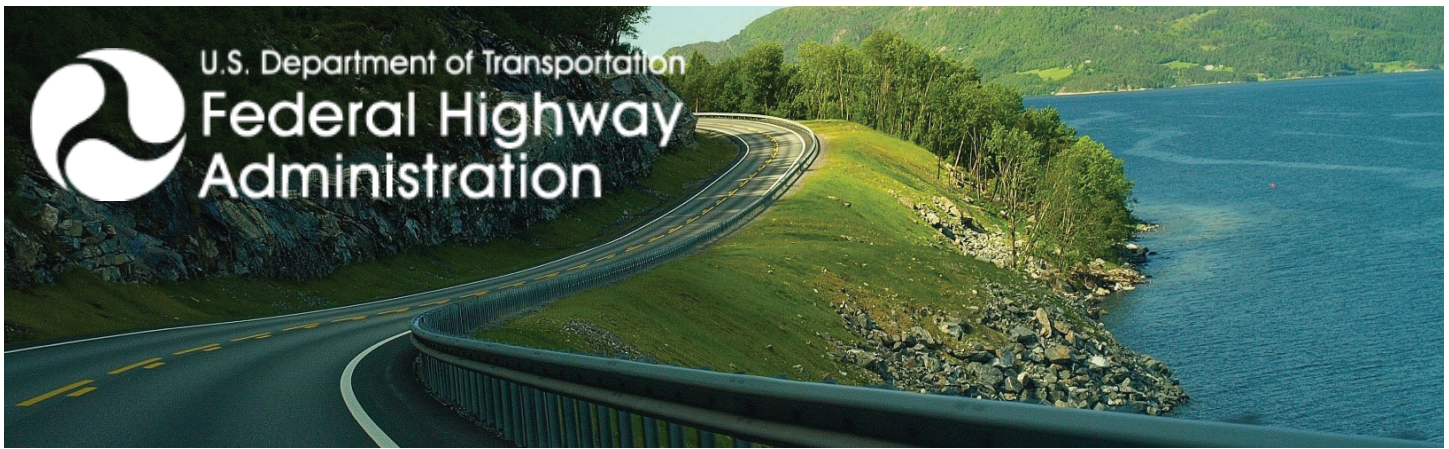
Construction Program Guide

Patented and Proprietary Products

On September 27, 2019, FHWA issued a [final rule](#) in the Federal Register rescinding the long-standing regulatory provisions for patented or proprietary products in 23 CFR 635.411(a)-(e). This rule provides greater flexibility and encourages innovation in the selection of proprietary or patented materials. It eliminates the requirements limiting the use of Federal funds in paying for patented or proprietary materials, specifications, or processes. In the final rule, FHWA also changed the title of section 635.411 to "Culvert and Storm Sewer Materials Types." Under its new title, the former paragraph (f) of section 635.411 will be retained to fulfill the mandate of section 1525 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) for States to retain autonomy for the selection of storm sewer material types. Rulemaking documents to revise FHWA policy for 23 CFR 635.411

Material or Product Selection

- Final Rule
 - [Proprietary Products Final Rule Rollout Questions and Answers \(09/27/2019\)](#)
 - [Section 1525 of MAP-21 - State Autonomy for Culvert Pipe Selection \(09/27/2019\)](#)
- [Notice of Proposed Rulemaking 83 FR 56758 - November 14, 2018](#)
- [Docket FHWA-2018-0036](#)



Proprietary Products Final Rule Rollout Questions and Answers

What is the purpose of the final rule?

The FHWA is revising its regulations by rescinding 23 CFR 635.411(a)-(e). This will provide greater flexibility for States to use proprietary or patented materials in Federal-aid highway projects. Rescinding the requirements limiting the use of Federal funds in paying for patented or proprietary materials, specifications, or processes specified in project plans and specifications will encourage innovation in transportation technology and methods.

When will the final rule be effective?

The final rule is effective on October 28, 2019

How will the repeal of 23 CFR 635.411(a)-(e) affect FHWA participation in the cost of patented or proprietary products?

Project sponsors may procure patented or proprietary products (proprietary products) for Federal-aid Highway Construction contracts. State Departments of Transportation (State DOTs) will no longer be required to provide certifications, request public interest findings (PIFs), or develop research or experimental work plans to use patented or proprietary products in Federal-aid projects.

Federal participation will no longer be restricted when:

- State DOTs specify a proprietary product in Federal-aid contracts,
- State DOTs reference single trade name materials in specifications and on plans.
- State DOTs specify proprietary products on their Approved Product List or Qualified Product List,
- State DOTs use AASHTO or ASTM specifications where only one manufacturer can meet the requirements, or
- State DOTs specify proprietary products in design-build Request-for-Proposal documents.

The costs associated with premiums or royalties for proprietary products are eligible for Federal-aid participation.

See [2 CFR 200.448](#) Intellectual Property.

What product selection policies will be used by contracting agencies?

Consistent with this final rule:

- Under [2 CFR 200.317\(a\)](#), State DOTs will follow their own procurement procedures.
- Under [2 CFR 1201.317](#), local public agencies will follow State DOT-approved procedures for procurement.

As per Q&A 3 above, FHWA approval is no longer required.

Can States require (or provide an administrative preference for) in-State or local products?

No. Nothing in this rulemaking repeals the FHWA prohibition on in-State preference for materials selection, pursuant to [23 CFR 635.409\(a\)](#).