



Montana Department of Transportation

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Memorandum

To: Distribution

From: Dwane Kailey, P.E. *Dwane E. Kailey 11/1/2019*
Chief Engineer

Date: November 1, 2019

Subject: Proprietary Products

This memo is being distributed to address the new Federal Register Notice (FR 2019-20933) rescinding 23 CFR 635.411(a)-(e), allowing greater flexibility regarding Patented and Proprietary Products. Effective October 28, 2019, states will no longer be required to provide FHWA approved public interest findings or certifications to use proprietary products on Federal Aid projects. The design memo titled *Public Interest Finding/Certification Process*, dated March 28, 2014 is hereby rescinded.

Effective immediately, document proposed proprietary products to be used in each project in the next project milestone report by adding a section titled "Proprietary Products". Products with an existing public interest finding do not need to be documented in project milestone reports. If the project does not yet have an approved Scope of Work, then by inclusion of the item in the "Proprietary Products" section, the product will be approved for use on the project once the Scope of Work has been approved. If the project already has an approved Scope of Work, then the project manager will send the notice of proposed product via email to all respective scope of work signers for their approval. Once approval is received from signers, the product will be approved for use in the project. The approval documents will follow current record retention policies.

The philosophy of the Department is still to maximize competition for cost control. This should be taken into account when considering use of a proprietary product. A description of how the proprietary product requirement will benefit the public will be required in the "Proprietary Products" section of the approval document. Benefits to the public may include but are not limited to 1. Necessity to suit project specific needs and conditions, 2. Economic analysis supporting a specific product, 3. Expected in-service performance, 4. Long-term maintenance, etc..

A copy of the approval document is to be forwarded to the Specifications Engineer to be presented to the Standards Committee. The Standards Committee will review each use of a proprietary product and compile a recommendation to the Highways Engineer of how this product should be used in future projects, i.e. should it be incorporated into all projects and how this will be done, be used only on a case-by-case method, or should not be allowed in future projects, etc.

An Experimental Feature may include proprietary products that are intended to be tested and evaluated under service conditions for acceptance. Experimental Features should be treated per current guidance for Experimental Projects.

It is important to note Buy America requirements still apply. Reference standard specification 106.09 in contract special provisions that may provide for inclusion of proprietary items.

If an item already has an approved Public Information Finding, no further documentation is needed.

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