

March 2020 ABC-UTC Webinar Featured Presentation - Proprietary Products Regulation: FHWA Rescission and MaineDOT Implementation

#	Questions	Responses
	General	
1	Will there be any required federal documentation of project-level use of proprietary products?	No.
2	Are State DOTs still permitted to prohibit the specification and use of proprietary products if that has been their past policy?	Yes. With the rescission of the Proprietary Product requirements, State DOTs would follow their own procurement procedures, and LPAs (local public agencies) would follow State-DOT-approved procedures.
3	Can states still impose old rules or reject single-source products?	Yes. With the rescission of the Proprietary Product requirements, State DOTs would follow their own procurement procedures, and LPAs would follow State-DOT-approved procedures.
4	Are there any similar state laws about patented or proprietary items that were not rescinded? How many states have such laws?	At this point we don't know. Each State DOT has its own procurement requirements. Based on the poll question during our presentation, government agencies in 18 states (including 17 State DOTs) responded that they specify proprietary products for highway construction.
5	Are there any example patented and proprietary product (PPP) special provisions or specs under the new FHWA PPP rescission?	These would vary from State to State. At this point, we don't know of any such provisions.
6	How about the Buy America clause for research? Any clarifications on it?	The Buy America requirements were unaffected by the rescission of the Proprietary Product requirements. See https://www.fhwa.dot.gov/construction/cqit/buyam.cfm .
7	How has this change affected designs?	Not sure. If state regs allow it, there could be more flexibility on using alternative design options. For example, Maine DOT allows innovative bridge technologies to compete against more traditional design options. But this was done prior to rescission as well.

8	How many states have adopted policies open to proprietary products so far?	We don't have that information, but based on the poll question during our presentation, government agencies in 18 states (including 17 State DOTs) responded that they specify proprietary products for highway construction.
9	How will this change affect all the specs and regulations?	These would vary from State to State. State DOT standard specifications may need to be edited to remove language about proprietary products.
10	I heard that rescinding the rule has no effect on state laws in place, so the rescission would have no effect.	John - The rescission of the proprietary products regulation removes FHWA restrictions on the use of proprietary products on FHWA-funded projects. However, State DOT requirements (regulations, policies, etc.) would be unaffected by the rescission. State DOTs generally have different requirements for projects using FHWA funds and those using State DOT or LPA funds. Dale - Possibly. However, it does lift a potential barrier to using innovative products.
11	Is it up to the states to guard against issues (costs, availability, etc.) with what is possibly sole-sourcing?	Both the State DOTs and FHWA are responsible for ensuring competition. Even though the Proprietary Product regulations have been rescinded, FHWA still has the statutory responsibility, under 23 U.S.C. 112 (b), (https://www.govinfo.gov/content/pkg/USCODE-2018-title23/pdf/USCODE-2018-title23-chap1-sec112.pdf) , to ensure competition.
12	What is the impact to present and future projects? Is there an approval process to use proprietary items?	FHWA no longer restricts the use of proprietary products on Federal-aid highway construction projects. Many states continue to follow approval process from before rescission.
13	Is there a timeline for state DOTs to implement this ruling and, if so, what is that timeline?	Effective October 28, 2019, FHWA has rescinded its proprietary product regulations. Projects will be administered under the requirements in effect at the time of contract award.
14	How do DOTs view this decision, and how will it affect their decision making?	Can't speak for all states, but Maine was supportive of rescission. Our decision making remains the same.
	Specific Products	

15	Does this new policy have an influence on the use of UHPC materials?	Certainly makes it clear that UHPC with the proprietary component is eligible for federal funds. Whether a State DOT actually specifies proprietary UHPC materials is dependent upon their own procurement policies.
16	Are there any initiatives to use stay-in-place-fascia-forms (precast) to reduce project delivery time?	ABC-UTC: Partial-depth precast concrete deck panels are used by a number of states as both stay-in-place forms to eliminate deck forming and as part of the composite deck to reduce the volume of onsite concrete placement, with both benefits reducing onsite construction time.
17	Please address the issue of using stainless steel rebar in bridge decks.	ABC-UTC: Multiple vendors are available for stainless steel rebar. Therefore, we're not clear what the issue is related to its use in bridge decks.
Questions during Webinar		
18	Regarding the poll, in the case of performance specifications, if the contractor uses a proprietary product (UHPC, for example), is that considered as specifying a proprietary product as far as the agency is concerned?	Dale - Not in my agency, but state regulations may vary. John - There are a number of brand name specifications for UHPC, including: Ductal® (LaFarge-Holcim); Cor-Tuf® (USACE), BCV®, BSI®, CRC®, and Densit®. There are no longer any FHWA restrictions on the use of brand-name products.
19	The ABC-UTC has several proprietary products such as the Folded Steel Plate Girder System (FSPGS) with extended length up to 100-ft spans. More than 12 FSPGS projects with length less than 60-ft spans are in service in several states. Why are the states not proactive? Is it because these products are not presented to the states well, or are there other reasons?	John - A State DOT may decline to use a particular product for a number of reasons: 1. Procurement policies that restrict the use of proprietary products. 2. Unsatisfactory results when the product is tested. 3. Reluctance to change from existing practices. 4. Fear of the consequences of product failure, including the possibility of public backlash.
20	Does Maine DOT have a person or section dedicated to evaluating products, or is it a committee made of people in different sections who contribute as an add-on to their everyday job duties?	Yes to both. We have one person that manages the new products program and QPL, and have three subject matter expert committees that provide oversight. These committees meet quarterly or less often based on need.

21	<p>What do you think about providing generic specifications allowing both proprietary and non-proprietary products bid together to allow a selection where a performance guarantee is used to level the playing field?</p>	<p>John - Due to the rescission, this is no longer required on FHWA-funded projects. However, State DOTs may decide to continue this practice.</p> <p>Dale - A generic "performance" specification is a good idea from my perspective. The guarantee or warranty(?) to level the playing field tells me that a proprietary product has a higher initial cost. Sounds intriguing and worth consideration. Warranty might need some type of insurance or bonding?</p>
22	<p>For use documentation, are failure modes and causes documented? Failure is the best teacher.</p>	<p>Our product evaluations do try to capture causes of poor performance.</p>
23	<p>Why is Life Cycle Cost Analysis (LCCA) not used in material selection? Lower total life cost of structures is a more sustainable method for the future.</p>	<p>LCCA is often used to select bridge type (steel versus concrete, for example). If there are products that will only add a small percentage of total bridge cost and will extend service life, then it becomes more desirable. Initial overall project cost is important because of the need to address the state bridge inventory conditions and generally lack of adequate funding.</p>