

**Michigan Department of Transportation
Local Agency Programs**

**Procedure for Approving Sole Source Pay Items
(Applicable to Federally Funded Projects)**

August 2012

A local agency occasionally needs to request a specific or sole source product for use on a construction project using federal funds. The item is typically utility related, or when a similar product is used in other locations within the agency's jurisdiction. This sole source specification process allows the local agency to maintain a uniform inventory, and helps ensure the efficient repair or replacement of the item.

Title 23 of the Code of Federal Regulations establishes the allowance criteria for sole source specifications, in section 23CFR 635.411.

The MDOT Local Agency Program (LAP) procedure for reviewing and approving such requests for sole source specifications is as follows:

- 1) The local agency will provide a written request for the sole source approval to the LAP staff engineer, including the following documentation:
 - a) Local agency's justification for the request, supported by 23CFR and the attached FHWA clarification. The justification could include, but is not necessarily limited to:
 - i. A description of how the proprietary product will benefit the public.
 - ii. The unique needs that are being addressed that result in no equally suitable alternative.
 - iii. Identified safety locations or critical decision points that would justify a higher standard.
 - iv. An evaluation of the pool of potential products, and a description of why these products cannot meet the contracting agency's needs.
 - v. An estimate of additional costs, if any, incurred as a result of this proprietary product requirement.
 - b) A draft special provision indicating which manufacturer(s) will be acceptable for the project, and include the proposed specialty pay items associated with the work.
 - c) A certification statement by the appropriate local agency official attesting that the proprietary product is essential for synchronization with existing facilities; or that no equally suitable alternative exists (23 CFR 635.411(a)(2)), such as:
 - i. *"I (name of certifying official), (position title), of the (Name of contracting agency), do hereby certify that in accordance with the requirements of 23 CFR 635.411(a)(2), that this patented or proprietary item is essential for synchronization with existing highway facilities,*
 - or*
 - ii. *"I (name of certifying official), (position title), of the (Name of contracting agency), do hereby certify that in accordance with the requirements of 23 CFR 635.411(a)(2), that that no equally suitable alternative exists for this patented or proprietary item.*
 - d) Certification or verification that the requested item will comply with current Buy America requirements.

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- 2) The LAP staff engineer will review the justification request and the proposed special provision. If required, the staff engineer will request modifications in the special provision to comply with the federal guidance. If the sole source request is not or cannot be approved, the LAP staff engineer will notify the local agency in writing, indicating the disapproval. An email message to the local agency contact, with a copy to its consultant if applicable, is an acceptable response method.
- 3) Once all documentation is complete and meets federal regulations, the LAP staff engineer will reply to the local agency in writing indicating the sole source specification request is approved. An email message to the local agency contact, with a copy to its consultant if applicable, is an acceptable response method.
- 4) The approved sole source special provision will then be included in the final proposal. The local agency will include the specialty pay items from the special provision and the appropriate "7000" pay item code in the final construction cost estimate.
- 5) The local agency will provide the LAP staff engineer with its estimated price for the specialty items, as part of its final construction cost estimate.

FHWA policy prohibits contracting agencies from requiring the use of a patented or proprietary material, specification, or process, unless:

- The item is purchased or obtained through competitive bidding with equally suitable proprietary and non-proprietary products from multiple manufacturers unpatented items, or
- The contracting agency certifies either that the proprietary or patented item is either essential for synchronization with the existing highway facilities or that no equally suitable alternative exists, or
- The item is used for research or for a special type of construction on relatively short sections of road for experimental purposes. In such cases, the contracting agency should follow FHWA's Construction Projects Incorporating Experimental Features.

The following is from "Questions and Answers Regarding Title 23 CFR 635.411", taken from the FHWA website, at <http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm>

13. Could you describe hypothetical situations where the use of a proprietary product could be based on synchronization?

Yes. Synchronization is defined under Question and Answer #1. It may be best demonstrated by the following examples:

- A Federal-aid construction project in City A includes the replacement or addition of traffic signals and controllers in the downtown area. The City's existing signal control system is compatible with only a single brand and model of controller. If the city already has significant percentage of its intersections operating with a brand and model of signal controller that is dictated by compatibility with an existing system, and both the system and these controllers are within their life cycle, then it may be appropriate to purchase that brand and model of controller using a sole-source

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acquisition on the basis of functional synchronization. This could be justified by use of a statement from the City justifying its decision to specify a particular brand and model (functional synchronization with control system). However, if the city has a small number of the proposed devices and wishes to procure hundreds this may not be appropriate. Since traffic signal controllers and software are ITS products, the requirements of 23 CFR 940.11 would apply and this analysis could provide documentation supporting the certification for functional synchronization.

- As part of its Downtown Beautification Plan, the City has specified a specially designed and patented Signal Pole Y for all intersections in the downtown area. On a Federal-aid contract in the downtown area, the city would like to use Signal Pole Y. To ensure FHWA participation, the City should provide sufficient documentation to support both functional and aesthetic synchronization. These documents could include a statement from the State Historic Preservation Officer requiring that new light poles be similar in appearance to Signal Pole Y, or a planning document stating that Signal Pole Y has been required on previous projects in the vicinity and that Signal Pole Y is necessary for compatibility with those previously-constructed projects.
- A Federal-aid construction project includes the replacement of existing substandard guardrail end terminals with those conforming to Manual for Assessing Safety Hardware (MASH) requirements. Upon project completion, the County will be responsible for the maintenance of the project. End Terminal T, which is MASH-compliant, has been constructed on other County-maintained routes in the vicinity. Due to scarce financial and labor resources, it desires to stock only one type of MASH-compliant end treatment. To ensure FHWA participation, the County should address these logistical issues in its supporting documentation.