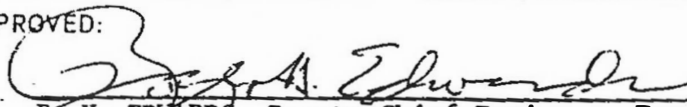


TO: SUPERSEDED BY EI 94-014 EFFECTIVE 10/20/94	ENGINEERING INSTRUCTION	
	NEW YORK STATE DEPARTMENT OF TRANSPORTATION	
	SUBJECT: PROPRIETARY SPECIFICATIONS POLICY AND PROCEDURE	
	Subject Code: 7.26-2-21.03	
Distribution:	31 Main Office 33 Regions 34 Special	Code: <u>84-49</u>
APPROVED:	 <u>R. H. EDWARDS, Deputy Chief Engineer, Fac. Des. Div.</u>	Date: <u>Oct. 3, 1984</u>
		Supersedes:

A recent audit by the FHWA of our Certificate Acceptance process indicated that there is some confusion regarding the manner that proprietary specifications are approved. The intent of this instruction is to reaffirm our policy regarding proprietary specifications and to establish a review and approval procedure.

A specification is said to be proprietary if:

- A. It mentions, either directly or by reference that as a requirement for acceptance a product or process be that of certain named manufacturers. However, if at least three are mentioned and the words, "or equal as approved by _____" are added, the specification may be treated as though it were a generic specification.
- B. While not mentioning manufacturer's names, its structure, language and detailed requirements are such that only a very limited number of manufacturers can furnish products meeting the specification requirements. This will usually happen when the manufacturer's guide specification is copied into the specification or unnecessary requirements are called out.

Because putting a limit on the number of competitors can potentially lead to higher prices, the policy of both the federal government and the State is to not use proprietary specifications. It is recognized, however, that there will be a limited number of special cases where exceptions to this policy are appropriate. These are indicated in the attached, which is taken from the Federal Highway Program Manual 6-4-1-16 (FHPM 6-4-1-16). They shall apply equally to federally aided construction and state funded work. They do not apply to city funded work or other work in which no federal or state funds are involved.

To get approval to use a proprietary specification, it is necessary that a justification be prepared showing how the request is in compliance with one or more of the points indicated in the attached FHPM. This approval may be obtained only on a project-by-project basis.

The following is the procedure to be followed when a proprietary specification is to be used:

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1. The designer sends the justification to the Main Office Final Plan Review Bureau thirty days prior to PS&E.
2. The Final Plan Review Bureau reviews the justification to see if it adequately addresses one or more of the required points. On non-federal aid projects and on certificate acceptance federal aid projects the Final Plan Review Bureau may approve satisfactory justifications. On N.C.A. projects, approval by the FHWA is required and will be requested by the Final Plan Review Bureau.
3. The Final Plan Review Bureau documents the decision to approve the justification. They send one copy to the Region and retain one for the project files.
4. The Final Plan Review Bureau will approve or submit to the FHWA for approvals, as necessary, structures related proprietary specifications on the basis of favorable recommendation of the Structures Division.

This instruction supersedes page 21-28 of the Highway Design Manual except for its first and last paragraph.

The contents of this instruction will be incorporated into the next revision of the Highway Design Manual.

8. MATERIAL OR PRODUCT SELECTION

- a. Federal funds shall not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the plans and specifications for a project, unless
- (1) such patented or proprietary item is purchased or obtained through competitive bidding with equally suitable unpatented items,
 - (2) the State highway agency certifies either that such patented or proprietary item is essential for synchronization with existing highway facilities, or that no equally suitable alternate exists, or
 - (3) such patented or proprietary item is used for research or for a distinctive type of construction on relatively short sections of road for experimental purposes.
- b. When there is available for purchase more than one nonpatented, nonproprietary material, semifinished or finished article or product that will fulfill the requirements for an item of work of a project and these available materials or products are judged to be of satisfactory quality and equally acceptable on the basis of engineering analysis and the anticipated prices for the related item(s) of work are estimated to be approximately the same, the PS&E for the project shall either contain or include by reference the specifications for each such material or product that is considered acceptable for incorporation in the work. If the State highway agency wishes to substitute some other acceptable material or product for the material or product designated by the successful bidder or bid as the lowest alternate, and such substitution results in an increase in costs, there will not be Federal-aid participation in any increase in costs.
- c. A State highway agency may require a specific material or product when there are other acceptable materials and products, when such specific choice is approved by the Division Administrator as being in the public interest. When the Division Administrator's approval is not obtained, the item will be nonparticipating unless bidding procedures are used that establish the unit price of each acceptable alternative. In this case Federal-aid participation will be based on the lowest price so established.

- d. Attachment 1 of this directive sets forth the FHWA requirements regarding (1) the specification of alternative types of culvert pipes; and (2) the number and types of such alternatives which must be set forth in the specifications for various types of drainage installations.
- e. Direct reference to patented or proprietary material, specifications, or processes of any nature should not be included in standard or supplemental specifications since they are subject to change without notice to or acceptance by the States or the Federal Highway Administration. In specific circumstances where the State's certification in accordance with 8a(2) above is approved, the complete specification or such parts as are applicable should be incorporated in the standard or supplemental specifications.
- f. The use of trade names in specifications and on plans should be avoided. Instead, specifications should be formulated that will obtain the desired results and at the same time assure full opportunity for competition among equivalent materials, equipment and methods. Reference in specifications and on plans to single trade name materials will not be approved on Federal-aid contracts. In exceptional cases, however, where satisfactory specifications cannot be developed by the highway agencies or obtained from organizations maintained for the specific purpose of developing specification requirements based on laboratory tests or other performance requirements, there will be no objection to the use of trade name designations provided all, or at least a reasonable number, of acceptable materials or products are listed. The foregoing procedure will be permitted for a reasonable period while specifications based on performance requirements are being developed. These requirements are not intended to limit the development of new materials, equipment or methods or to discourage ingenious utilization of them. New materials, equipment or methods that show sufficient promise may be included and evaluated in experimental construction in accordance with the provisions of Volume 6, Chapter 4, Section 2, Subsection 4 of this Manual.