

**Before the
FEDERAL HIGHWAY ADMINISTRATION
Washington, D.C. 20590**

In the Matter of)	
)	
Notice of Proposed Rulemaking on)	Docket No. FHWA-2018-0036
Construction and Maintenance—)	
Promoting Innovation in Use of)	83 Fed. Reg. 56,758
Patented and Proprietary Products)	
)	

**COMMENTS OF
THE COMPETITIVE ENTERPRISE INSTITUTE**

January 14, 2019

Prepared by:

Marc Scribner

Senior Fellow

Competitive Enterprise Institute

1310 L Street N.W., 7th Floor

Washington, D.C. 20005

(202) 331-1010

marc.scribner@cei.org

Introduction

On behalf of the Competitive Enterprise Institute (“CEI”), I respectfully submit these comments in response to the Federal Highway Administration’s (“FHWA”) Notice of Proposed Rulemaking on Construction and Maintenance—Promoting Innovation in Use of Patented and Proprietary Products (“NPRM”).¹

CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective.² This comment letter responds to questions posed in the NPRM, where responses below are numbered to correspond to the NPRM’s numbered questions.

Responses to NPRM Questions

Question 1.³

For years, there has been widespread acknowledgement that the public interest finding (“PIF”) exemption at 23 C.F.R. § 635.411(c) has proven too onerous and resource-intensive to be of practical use for many state department of transportation, which FHWA attempted to address in revised 2013 guidance.⁴ Unfortunately, this has failed to meaningfully increase the flexibility of the PIF process for contracting state agencies, as evidenced by the continued dearth of PIF requests and approvals in the years that followed.⁵

Question 2.⁶

One glaring example of the current rule failing the general public is in the context of the Mobile Barriers MBT-1 device. The MBT-1 is a mobile barrier trailer that is attached to a standard heavy truck tractor. It allows rapid barrier deployment to improve the safety of

-
1. Construction and Maintenance—Promoting Innovation in Use of Patented and Proprietary Products, *Notice of Proposed Rulemaking*, FHWA-2018-0036, 83 Fed. Reg. 56,758 (Nov. 14, 2018) [hereinafter NPRM].
 2. See About CEI, <https://cei.org/about-cei> (last visited Jan. 8, 2019).
 3. NPRM, *supra* note 1, at 56,760.
 4. “Questions and Answers Regarding Title 23 CFR 635.411,” Office of Preconstruction, Construction and Pavements, Federal Highway Administration, U.S. Department of Transportation (revised Apr. 11, 2013), *available at* <https://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm>.
 5. “FHWA Approvals of Patented and Proprietary Products from November 30, 2011 to October 5, 2016,” Office of Preconstruction, Construction and Pavements, Federal Highway Administration, U.S. Department of Transportation, *available at* <https://www.fhwa.dot.gov/construction/contracts/pnpapprovals/approvals.cfm>.
 6. NPRM, *supra* note 1, at 56,760.

personnel in active roadway construction and maintenance areas, among other potential uses in the field. Its ease of movement also reduces the costs of preparing safe work zones due to the time- and personnel-intensive nature of manually moving competing barrier devices and traffic control, and can thus speed the overall delivery of a highway project.

Research commissioned by the California Department of Transportation found that a similar truck-trailer mobile barrier produced a savings of \$1.9 million per year per barrier when compared with traditional coned-off lane closures.⁷ Unfortunately, while MBT-1 has been accepted by FHWA for use on the National Highway System, the cumbersome and costly requirements of 23 C.F.R. §§ 635.411(a)–(e) have unnecessarily arrested its use across the country. As a result, the existing rule has not enabled the realization of the large potential resource and safety benefits of MBT-1 to procuring state agencies, road workers, road users, and taxpayers.

Question 4.⁸

A clean rescission of the rule—Option 2⁹—without Option 1’s vague “fair, open, and transparent”¹⁰ language is preferable. The imprecision of those terms, and the uncertainties in the approval process that are likely to result therefrom, will lead to slower adoption of superior products.

To be sure, completely eliminating 23 C.F.R. §§ 635.411(a)–(e) would carry some risk associated with temporary monopoly provision and selection. This is why FHWA should instead collect and publish detailed information on these projects and products in order for governmental and non-governmental watchdogs to ensure potential contracting abuses and other unintended consequences can be identified and corrected.

Question 6.¹¹

FHWA should rely on the government-wide standard found in the Office of Management and Budget’s Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (“Uniform Guidance”).¹² With respect to patented and proprietary products, states should be permitted to follow the Uniform Guidance

7. Mary Arico & Bahram Ravani, A RISK ASSESSMENT AND COST BENEFIT ANALYSIS FOR THE BALS BEAM MOBILE WORK ZONE CRASH PROTECTION SYSTEM (FINAL REPORT) at 59 (2008), available at <https://www.mobilebarriers.com/media/docs/Cost%20Benefit%20Analysis%20w%20FEMA-DHS%20Justification%20re%20Mobile%20Barriers%20MBT-1%20rev%20170605.pdf>.

8. NPRM, *supra* note 1, at 56,760.

9. *Id.* at 56,763.

10. *Id.* at 56,762.

11. *Id.* at 56,760.

12. 2 C.F.R. Part 200.

provision at 2 C.F.R. § 200.317, which states, “When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds.”

Conclusion

For the reasons given, CEI urges FHWA to adopt Option 2 in this rulemaking. We appreciate the opportunity to submit comments to FHWA on this matter and look forward to further participation.

Respectfully submitted,

Marc Scribner
Senior Fellow
Competitive Enterprise Institute