

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

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Form #4

**NOTICE OF RULE MODIFICATION OF A PROPOSED RULE**

AGENCY: Department of Administration, Design-Build Board TITLE NUMBER: 148

CITE AUTHORITY: 5A-1-2 and 5A-3-48

AMENDMENT TO AN EXISTING RULE: YES  NO

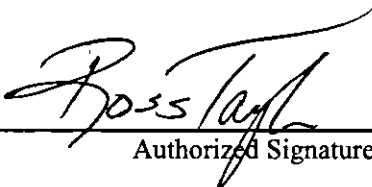
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 11

TITLE OF RULE BEING AMENDED: Rules for Selecting Design-Builders Under the Design-Build  
Procurement Act

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

  
\_\_\_\_\_  
Authorized Signature

TITLE 148  
LEGISLATIVE RULE  
WEST VIRGINIA DEPARTMENT OF ADMINISTRATION

SERIES 11  
RULES FOR SELECTING DESIGN-BUILDERS UNDER THE  
DESIGN-BUILD PROCUREMENT ACT

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WEST VIRGINIA

**§148-11-1. General.**

1.1. Scope. -- This Legislative Rule sets forth the operative procedures for agencies to follow in selecting Design-Builders to provide combined design and construction services for projects authorized as Design-Build projects by the West Virginia Design-Build Board that is constructed and owned, potentially owned or ultimately owned by any agency, as defined in §5-22A-2 of the W.Va. Code.

1.2. Authority. -- W. Va. Code §§5-22A-4 and 6.

1.3. Filing Date. -- May 2, 2006.

1.4. Effective Date. -- July 1, 2006.

1.5 These rules repeal and replace the current rules for selecting design-builders under the Design-Build Procurement Act.

**§148-11-2. Applicability.**

2.1. This legislative rule applies to all Agencies, except those statutorily exempted from its application. The rule also applies to any project being done that is owned, or that will ultimately be owned by an Agency, regardless of the initial funding for the Project.

**§148-11-3. Public Announcement Procedures.**

3.1. Except in emergency situations, an Agency shall obtain by public notice, through any advertising medium the Agency considers advisable, an advertisement setting forth a general description of the Project requiring Design-Build services and defining a time frame and procedures

for interested qualified Design-Builders to apply for consideration.

**§148-11-4. Technical Review Committee.**

4.1. There shall be established by the Agency a Technical Review Committee comprised at a minimum of a representative of the Agency with experience in the requirements of the project, the Performance Criteria Developer as a non-voting member, a representative of the facility use and the Secretary of Administration or his designee. The Technical Review Committee has responsibility for evaluating responses to the Invitation for Qualification as provided in Section 7 of this rule and the Proposals as provided in Section 11 of this rule.

**§148-11-5 Application Process for Approval of Design-Build Project.**

5.1 Prior to an Agency issuing an invitation for qualifications for public projects, the Board must determine that the public project is appropriate as a design-build project.

5.2 Within thirty (30) days of the receipt of an agency's written application, the Board shall meet to render a decision unless a different timetable is agreed to by the Agency. If the Board determines that the Agency has met the criteria enumerated in W.Va. Code §5-22A-1 et seq. and Legislative Rules 148-CSR-11, the Board shall approve the project's use of the design-build process to procure construction of the proposed project.

5.3. If upon review of the documents and information submitted by the Agency in support of its request for authorization by use as a design-

build contract for a specific construction project, the Board concludes that additional information is required to enable the board to reach a determination whether the Agency has met the criteria enumerated in W.Va. Code §5-22A-5, the Board may require the Agency to submit such additional information, in such form as the Board may prescribe. In no event shall the request for additional information extend the review period by more than sixty (60) days from the date the receipt of the Agency's original request for review.

5.4 Any project which an agency desires to have constructed using the Design-Build process, regardless of how the project is originally developed or funded, shall obtain approval of the West Virginia Design-Build Board. The requirement includes projects initially funded, in whole or in part, by a private developer that ultimately will be owned by the Agency. Upon receipt of the Board's determination that the Project is appropriate as a Design-Build project, the Agency shall comply with the provisions of this rule.

5.5 Upon project approval by the Board, the Agency shall submit to the Board monthly reports detailing the progress of the approved project. The reports shall continue until the completion of construction to ensure that the Agency has complied with all requirements established by the Board approval of the project.

5.6 If any requirement imposed by the Board is not satisfied, the Board may withdraw its approval of the project at any time prior to the start of construction. If the Board withdraws its approval, the Agency may not proceed with the project as a design-build project until the requirements set forth in the Board's approval and the requirements of this article are met, as determined by the Board.

**§148-11-6. Procedures for Selection of Performance Criteria Developer and Preparation of the Performance Criteria.**

6.1. Selection of Performance Criteria

Developer.

6.1.1. Upon receipt of the Design- Build Board's approval that a project is appropriate as a Design-Build Project the Agency shall employ a registered architect or engineer, to be known as the Performance Criteria Developer. The Performance Criteria Developer shall be selected in accordance with W.Va. Code §5G-1-1, et. seq. unless the agency uses a licensed architect or engineer who is an employee of the Agency for projects with a construction cost estimated to be one million or less. For projects for which the construction cost is estimated to be more than one million dollars (\$1,000,000), the Performance Criteria Developer shall not be an employee of the Agency.

6.1.2. In addition to the provisions of W.Va. Code §5G-1-1, the Agency shall consider the following factors when selecting the Performance Criteria Developer:

6.1.2.a. Education, training, general experience and West Virginia licensure to practice Architectural or Engineering services.

6.1.2.b. Prior experience with projects of similar size, scope, and complexity; and

6.1.2.c. Prior experience with Design-Build contracts, as appropriate, or substantially similar experience.

6.2 Preparation of the Performance Criteria.

6.2.1 The Agency shall prepare a Performance Criteria package with the aid of the Performance Criteria Developer. The Performance Criteria package shall set forth the Agency's needs with sufficient clarity to assure that there is a comprehensive understanding of program requirements, project scope and business requirements. The Performance Criteria package shall include, at a minimum:

6.2.1.1. Program statements of

the facility that describe space needs, design goals and objectives;

6.2.1.2 Requirements for performance bonds, payment bonds, general liability insurance, professional liability insurance and worker's compensation coverage;

6.2.1.3 Applicable codes and material quality standards;

6.2.1.4 Other pertinent criteria such as energy ~~efficiency~~ efficiency and accommodations for future use or adaptation;

6.2.1.5 When a site is being developed, a site survey and soil boring report describing subsurface conditions or stated criteria in sufficient detail so that accurate foundation designs can be developed;

6.2.1.6 Stated responsibility for fees and permits;

6.2.1.7 Stated criteria regarding all site utilities and fees regarding connection of those utilities;

6.2.1.8 Environmental reports, if any, that have been prepared;

6.2.1.9 Project budget parameters, including budget parameters for any and all alternates;

6.2.1.10 Sources of funding and available funding;

6.2.1.11. The proposed project schedule; and

6.2.1.12. Seal requirements of the design professionals to be included in the proposal.

6.2.2. The Performance Criteria package shall be included as part of the contents of the Invitation for Proposals.

6.2.3. The basis of scoring and any restrictions on the proposals submitted in response to the Performance Criteria package shall be part of the Invitation for Proposals.

6.3. Once selected, the Agency shall retain the Performance Criteria Developer through final completion of the Project to monitor adherence to the Performance Criteria.

6.4. The Performance Criteria Developer or his or her employer, company, partners, joint venturers, affiliates or consultants may not submit a proposal to enter into a design-build contract and may not perform services under a design-build contract on any project wherein they are the Performance Criteria Developer on that specific contract.

**§148-11-7. Procedures for Selection of Most Qualified Design-Builders Prior to the Release of the Invitation for Proposals.**

7.1. Architects, contractors and engineers shall satisfy qualification requirements as defined by W. Va. Code §5-22A-1, et seq., and the applicable rules.

7.1.1. All Design Builders shall be reviewed by the contracting agency for the following qualification factors/performance areas:

a. Licensing, insurance, bonding and evidence of good standing with the State of West Virginia and the Agency;

b. Experience and technical expertise with projects of similar size and scope;

c. History (minimum of five (5) years if available) of past performance with similar projects, including owner's names, owner contact, project type, location, floor area, time to complete and final cost;

d. Qualifications, experience and licenses of key management and professional staff;

e. Staffing capabilities;

f. Capacity to accomplish work in required time to include disclosure of present workload;

g. Quality control and quality assurance policies and programs;

h. Safety record to include the safety and drug testing policies and programs;

i. Subcontracting plan(s) including the qualifications and capabilities of known subcontractors; and

j. Architects and engineers of record and their West Virginia seals.

7.2 The technical review committee shall determine the relative ability of each design-builder to perform the services required for the project. Determination of ability shall be based upon the design-builder's qualifications as described in these rules.

7.3 The technical review committee shall recommend not less than three (3), nor more than five (5), design-builders deemed to be most qualified to respond to the Invitation for Proposals. The committee will report its recommendation of most qualified design-builders to the Agency for selection by the Agency.

7.4 In the event the Agency receives fewer than three (3) proposals, the Board shall, in consultation with the Secretary of Administration, determine whether the Agency may proceed or shall start the Invitations for Qualifications process over.

7.5. Due to their public project nature, all Design-Build projects shall comply with the prevailing wage requirements of W. Va. Code §21-5A-1, et seq.

7.6. Under the state's vendor debarment program, agencies shall not solicit bids, award contracts or consent to subcontracts with debarred vendors. Design-Builders must disclose all subcontractor relationships in the bid process.

#### **§148-11-8. Preparation and Contents of the Invitation for Qualifications and Invitation for Proposals.**

8.1. After the Agency and the Performance Criteria Developer develops the Performance Criteria Package, the Agency and the Performance Criteria Developer shall develop an Invitation for Proposals (IFP) and an Invitation for Qualifications (IFQ).

8.2 The Agency shall issue an IFQ to interested Design Builders. The IFQ shall comply with W.Va Code § 5-22A-9a(a). Design-Builders desiring to submit proposals on the design-build projects shall submit a statement of qualifications setting forth the qualifications of the firm's involved in the design-build team and providing any other information required by the IFQ.

8.3. The purpose of the Performance Criteria package and the IFP is to furnish sufficient information so that Design-Builders may prepare both qualitative and cost proposals. The Design-Builders to whom the contract is awarded is responsible for development of a detailed design based on the criteria in the Performance Criteria package and for construction of the facility in compliance with the Performance Criteria Package.

8.4 The IFP shall comply to ~~WV~~ W.Va. Code § 5-22A-10 and also contain: The Performance Criteria package; instructions to bidders; bid proposal forms; bid security requirements; provisions for contracts; general and special conditions; the basis for evaluation of proposals; methods of substantiation to be used during the design process; and the construction process to verify that the design and construction comply with the performance criteria.

8.5 The IFQ will be issued to all who qualify.

#### **§148-11-9. The Procedure for Preparing and Submitting Proposals.**

9.1. All proposals must comply with W.Va.

Code §5-22A-11.

9.2. Design-Builders shall submit their proposals to the Agency offices by the date established in the IFQ. If that date is Saturday, Sunday or a legal holiday, the period shall run until 5:00p.m. of the next day that is not a Saturday, Sunday or legal holiday.

9.3. Design-Builders shall complete all necessary forms provided by the agency and include the completed forms with their proposals.

9.4 Design-Builders may submit written questions and comments to the Agency concerning the requirements of the IFP. The Agency shall prepare and make available to the Design-Builders addenda that respond to their questions and comments.

**§148-11-10. The Procedures for Evaluating Proposals.**

10.1. The Technical Review Committee shall segment all proposals received from Design-Builders in response to an IFP into two (2) parts:

a. Qualitative Proposal. A qualitative proposal shall include response to the IFP, except the cost proposal, as set forth in subdivision (b) of this subsection. The qualitative proposal shall remain sealed until the Technical Review Committee is assembled and ready to review and score the proposals.

b. Cost Proposal. The cost proposal shall be submitted in a separate sealed package that is clearly labeled as a cost proposal. The package shall clearly identify the Design-Builder's name, project description, or any other information required by submission of proposals. The cost proposal shall be secured until the time provided in the IFP. Cost proposals shall include one(1) cost for all design and construction of the proposed project. An original signature raised seal bond for five (5) percent bid security shall be attached to the cost proposal.

10.2. The Technical Review Committee shall

review the qualitative proposal submitted by each Design-Builder and shall establish a rating for each Design-Builder's proposal based upon the performance criteria established in the IFP for the project. The criteria may utilize the following format, but shall be adjusted for the particular characteristics of the Project which shall clearly be set forth in the IFP.

10.3 A maximum score will be determined for these categories and will be adjusted to reflect the particular characteristics of a project and the considerations involved in its construction. Provided that, the technical criteria must be in the range of 40 -50 % of the total maximum score, the Project-Specific Management Plan must be in the range of 10 - 20 % of the total maximum score, the Project Schedule must be in the range of 20 - 30 % of the maximum score and that Design Creativity and Originality must be in the range of 10 - 20 % of the maximum score.

**EXAMPLE OF RATING SYSTEM**

1. Technical Criteria
  - a. Structural System
  - b. Exterior Finish Materials
  - c. Roofing Systems
  - d. Site Layout and Features
  - e. Landscape Provisions
  - f. Mechanical System
  - g. Plumbing System Materials
  - h. Interior Finish Materials
  - i. Interior Hardware and Fixtures
  - j. Interior Door Units/Wall Systems
  - k. Floor and Ceiling Systems
  - l. Lighting Systems

- m. Power Systems
  - n. Data Systems
  - o. ADA Compliance
  - p. Building Code Compliance
  - q. Any Other Requirements
2. Project-Specific Management Plan
- a. Management plan and organization
  - b. Resumes of key professional and managerial personnel
  - c. Craft training and staffing capabilities
  - d. Quality assurance plan
  - e. Safety plan for project and safety record
  - f. Experience of individual members of the team
  - g. Experience of the team
  - h. Address of Home Office of Design-Builder
  - i. Address of Home Office of Architects(s) and/or Engineer(s)
3. Project Schedule
- a. Construction schedule and ability to meet schedule
  - b. Architecture/Engineering design schedule and ability to meet schedule
  - c. Length of construction and design schedule
4. Design Creativity and Originality

10.4. The maximum unweighted score for the Qualitative Proposal is 100. A Design-Builder must achieve a minimum unweighted score of 70 in order to continue in the evaluation process by the Technical Review Committee.

10.5. Prior to opening the cost proposal, the Technical Review Committee shall total and submit the weighted score of each Design-Builder's qualitative proposal to the Agency.

10.6. Points for the qualitative proposal shall not be awarded on a fractional basis.

10.6 The Agency shall notify all parties submitting proposals of the outcome of the scoring process and the Agency's intent to enter into a contract with the successful Design-Builder. The Awarding Authority may reject all Proposals

**§ 148-11-11. Negotiations Prior to Award of Contract.**

Negotiations between the apparent successful bidder and the Agency prior to award of a contract may not result in a contract amount which would change the outcome of the original bid. See W. Va. Code §5-22A-6(7) and §5-22A-11(e) .

**§148-11-12. Award of Design Build Contract.**

12.1. The Agency shall set a date to inform the bidders of their weighted qualitative scores and shall simultaneously notify them of the date to publicly open the cost proposals, which shall be within five (5) working days after the public announcement of the weighted qualitative proposals.

12.2. The Agency shall publicly open and read aloud the sealed cost proposals that met the minimum qualitative proposal score of 70. The lowest cost proposed shall be assigned a score of 100. Other cost scores shall be arrived at by the following formula:

$$(\text{Lowest Cost Proposed divided by Cost being evaluated}) \times 100 = \text{Cost Score}$$

12.3. To determine the successful design-build proposal, the total of the weighted qualitative and cost scores shall be added to arrive at a total score.

12.4. The Agency is not required to submit duplicate bids or proposals to the Auditor's office.

12.5. The Agency shall submit to the Design-Build Board the evaluations and scoring of the qualitative proposals for approval of the process within ~~24~~ twenty-four (24) hours of the scoring of the qualitative proposals. If the process is approved by the Design-Build Board, the Agency may proceed with the opening of cost proposals. If the process is not approved the Design-Build Board, the Agency may not proceed with the opening of the cost proposals.

12.6. Design-Builder's who have submitted proposals may request copies of the qualitative scores and may submit question and, clarifications, and make comments on the procedures to the Agency and the Design-Build Board for consideration within ~~48~~ forty-eight (48) hours of the public announcement of the qualitative scores. The Design-Build Board, at its discretion, may schedule a public meeting within ~~96~~ ninety-six (96) hours of the public announcement of the qualitative scores for the discussion of these questions and comments. A decision by the Design-Build Board shall be publicly announced with ~~24~~ twenty-four (24) hours of the public meeting, or if no public meeting is held, the announcement shall be within ~~48~~ forty-eight (48) hours of the information provided to the Design-Build Board from the Agency.

12.7. Unless all proposals are rejected, the Agency shall approve and award the project to the Design-Builder with the highest total score. The Agency shall notify all parties submitting proposals of the outcome of the scoring process and the Agency's intent to enter into a contract with the successful design-builder. The Agency may reject all proposals.

12.8. The Agency has final authority to

approve or reject the recommended award based upon due process, legal, fiduciary, financial or policy considerations, but may not substitute its judgment on the qualitative evaluation for that of the Technical Review Committee.

#### **§148-11-13. Monitoring by the Design-Build Board**

13.1 The Agency shall report, at a minimum of a monthly interval, to the Design-Build Board as to the progress of the project.

13.2 The Design-Build Board may terminate their approval of a project after written notice, and discussions with the Agency, at any time prior to the start of construction if any requirement of the project is not satisfied.

#### **§148-11-14. Protests.**

14.1. Any Design-Builder adversely affected by the intended decision of the Agency to award a contract or to reject all bids shall file a notice of protest and bond with the Agency within seventy-two (72) hours after the posting of the intent to award. A formal written protest shall be filed with the Agency within ten (10) days after filing the notice of protest with the Agency, stating with particularity the facts and law upon which the protest is based.

14.2. Any Design-Builder who files a notice of protest in a bid rejection or an award pursuant to this section shall post with the Agency, at the time of filing the notice of protest, a bond payable to the Agency in an amount equal to one percent (1%) of the lowest bid submitted, or \$5,000, whichever is greater.

14.3. All protest bonds shall be made payable to the Agency and shall be signed and sealed by the protestor and surety. The bonds shall bind the protestor and surety and be conditioned upon the satisfaction of any cost and charges included in any final order of judgement or appellate proceedings, in the event that the Agency prevails. In lieu of a bond, the protestor may submit a cashier's check or bank money order made



payable to the Agency, the monies shall be held in trust by the Agency. Protest bond forms may be obtained from the Agency.

14.64. All notices of protest and formal protests shall be filed with the Agency.

14.75. A protest is not timely filed unless both the notice of protest and the formal protest are received by the Agency within the required time limits. A written notice of protest which is filed by 5:00p.m. on the date on which the seventy-two(72) hours expires is timely. If such a date is Saturday, Sunday or a legal holiday, the period shall run until 5:00p.m. of the next day that is not a Saturday, Sunday or a legal holiday.

14.6. The Agency has the sole authority to review the protest and render a decision. The Director of the Agency, or his/her designee, shall review the protest and issue a written decision. A hearing may be conducted at the option of the Director or assigned designee.

14.7. If the Design-Builder is not satisfied with the Agency's decision, they may take appropriate legal action through the West Virginia court system.

14.38. If the protesting party prevails after completion of the protest and any appellate court proceedings, it shall be entitled to recover from the Agency all costs and charges included in the final order or judgement, excluding attorney's fees. If the Agency prevails it shall recover all costs and charges included in the final order or judgement excluding attorney's fees. Upon payment of such costs and charges by the protestor, the bond shall be returned. The entire amount of the bond shall be forfeited if the hearing officer determines that a protest was filed for a frivolous or improper purpose including, but not limited to, the purpose of harassing, causing unnecessary delay or causing needless expense for the Agency or successful Design-Builder.

~~14.4. All protest bonds shall be made payable to the Agency and shall be signed and sealed by the protestor and surety. The bonds shall bind the~~

~~protestor and surety and be conditioned upon the satisfaction of any cost and charges included in any final order of judgement or appellate proceedings, in the event that the Agency prevails. In lieu of a bond, the protestor may submit a cashier's check or bank money order made payable to the Agency, the monies shall be held in trust by the Agency. Protest bond forms may be obtained from the Agency.~~

14.59. The Agency shall be considered the prevailing party if the protestor withdraws the protest at any time before the entry of the final order.

~~14.6. All notices of protest and formal protests shall be filed with the Agency.~~

~~14.7. A protest is not timely filed unless both the notice of protest and the formal protest are received by the Agency within the required time limits. A written notice of protest which is filed by 5:00p.m. on the date on which the seventy-two(72) hours expires is timely. If such a date is Saturday, Sunday, or a legal holiday, the period shall run until 5:00p.m. of the next day that is not a Saturday, Sunday, or a legal holiday.~~

#### §148-11-15 Public Emergencies.

15.1. If an application for a Design-Build proposal is filed which indicates a public emergency, the Design-Build Board shall take immediate action to determine if the project meets the criteria for a Design-Build project.

15.2. If the criteria are satisfied, the Board shall meet to approve or disapprove the application. If this situation occurs, the Board shall file a notice of emergency meeting with the Secretary of State in accordance with the Open Governmental Meetings Act.

15.3. A Design-Build project application may not indicate a public emergency if the emergency indicated is the result of self-imposed hardships, such as, neglect, poor planning or a lack of organization by the applicant.