

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Department of Administration TITLE NUMBER: 148

RULE TYPE: Legislative; CITE AUTHORITY W.Va. Code § 5 - 22A - 1, et seq

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 11

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

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON December 24, 1999 AT 10:00 AM

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Joseph F. Markus, Cabinet Secretary
WV Department of Administration
1900 Kanawha Blvd., East
Bldg. 1, Rm E119
Charleston, WV 25305
(304) 558-4331

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

\$4.40

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Rules for Selecting Designs-Builders Under the Design-Build Procurement Act

Type of Rule: X **Legislative** **Interpretive** **Procedural**

Agency WV Department of Administration

Address 1900 Kanawha Blvd., East

Bldg. 1, Rm E119

Charleston, WV 25305

(304) 558-4331

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$ N/A	\$	\$	\$	\$
PERSONAL SERVICES	N/A				
CURRENT EXPENSE	N/A				
REPAIRS & ALTERATIONS	N/A				
EQUIPMENT	N/A				
OTHER	N/A				

2. Explanation of above estimates: N/A

3. Objectives of these rules: The rule sets forth the operative procedures for governmental agencies to follow in Selecting Designs-Builders to provide constructive services for projects authorized by the West Virginia Designs-Build Board.

Rule Title: Rules For Selecting Design-Builders Under The Design-Build
Procurement Act

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

N/A

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

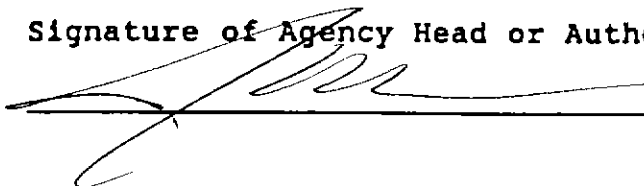
N/A

C. Economic Impact on Citizens/Public at Large.

N/A

Date: _____

Signature of Agency Head or Authorized Representative



**TITLE 148
SERIES 11**

**RULES FOR SELECTING DESIGN-BUILDERS UNDER THE
DESIGN-BUILD PROCUREMENT ACT**

§ 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 are constructed and owned, potentially owned or ultimately owned by any Agency.
- 1.2. Authority.- W.Va. Code § 5-22A-1, et seq.
- 1.3. Filing Date.
- 1.4. Effective Date.

§ 148-11-2. Definitions.

2. 1. "Agency" means all state departments, agencies, authorities, quasi-public corporations and all political subdivisions, including cities, counties, boards of education and public service districts and the individual representative of the Agency appointed to oversee or supervise the Project.
- 2.2. "Awarding Authority" means the entity having authority to issue and sign the purchase order for the construction or lease-purchase of the Project.
- 2.3. "Board" means the Design-Build Board established pursuant to § 5-22A-4 of the West Virginia Code, whose purpose is to determine whether a public project can be constructed under the Design-Build method of construction.
- 2.4. "Design-Build" is defined as providing responsibility within a single contract for design, construction or alteration of a building or buildings, together with incidental approaches, structures and facilities to be constructed, where services within the scope of the practice of professional engineering or architecture, as defined by the laws of the State of West Virginia, are performed by an engineer or architect duly registered in the State of West Virginia; and where services within the scope of construction contracting, as defined by the laws of the State of West Virginia, are performed by a contractor qualified and licensed under the applicable statutes. The Design-Build method of construction may not be used for any other construction projects, such as highway, water or sewer projects.
- 2.5. "Design-Build Contract" means the contract between an agency and a Design-Builder to furnish the architecture, engineering, and related services as required for a given public project, and to furnish the labor, materials and other construction of services

for the same public project. A Design-Build contract may be conditional upon subsequent refinements in scope and price, and may permit the Agency to make changes in the scope of the project without invalidating the Design-Build contract.

- 2.6. "Design-Builder" means the entity (whether natural person, partnership, joint venture, corporation, professional corporation, business association or other legal entity) that proposes to design and construct any public project governed by the procedures of W. Va. Code §§ 5-6-7 and 5-22A-1, et seq., and all rules promulgated thereunder .
- 2.7. "Firm" means any individual, firm, partnership, corporation, limited liability company, limited liability partnership, association, joint venture, or other legal entity permitted by law to practice engineering, architecture or construction contracting in the State of West Virginia.
- 2.8. "Performance Criteria" means the requirements for the public project, including as appropriate, aesthetics, capacity, durability, production standard, ingress and egress requirements, or other criteria for the intended use of the public project, expressed in performance-oriented drawings and specifications suitable to allow the Design-Builder to make a proposal.
- 2.9. "Performance Criteria Developer" means an architect or engineer duly licensed and registered in accordance with the laws of this State, including any state employee having such certification, and such architect's or engineer's employer, company, partners, joint venturers, affiliates or subcontractors retained by the Agency to develop performance criteria.
- 2.10. "Project" means that Project described in the public announcement.
- 2.11. "Proposal" means an offer to enter into a Design-Build contract, as further defined in W. Va. Code § 5-22A-1, et seq.
- 2.12. "Request for Proposals" means the document or publication whereby an agency solicits proposals for a Design-Build contract.
- 2.13. "Substantial completion" means the stage in the progress of the work when the work or designated portion thereof is sufficiently complete in accordance with the Design-Build contract so that the agency can occupy or utilize the work for its intended use.
- 2.14. "Work" means the construction and services required by the Design-Build contract, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Design-Builder to fulfill the Design-Builder's obligations. The Work may constitute the whole part or a part of the project.

§ 148-11-3. Applicability.

3. 1. This legislative rule applies to all agencies, except those statutorily exempted from its application.

§ 148-11-4. Minimum Qualification Requirements for Firms Providing Design-Build Services and Qualification for Design-Build Projects.

- 4.1. Architects, contractors, and engineers will satisfy qualification requirements as defined by W.Va. Code § 5-22A-1, et seq., and the applicable regulations.
- 4.2. Any project which an Agency desires to have constructed using the Design-Build process must first receive the approval of the West Virginia Design-Build Board. Upon receipt of the Board's determination that the Project is appropriate as a Design-Build project, then the following procedures will be followed.

§148-11-5. Public Announcement Procedures.

- 5.1. Except in emergency situations, the Agency shall obtain by public notice, through any advertising medium the Agency deems advisable, an advertisement setting forth a general description of the Project requiring Design-Build services and defining time frame and procedures for interested qualified Design-Builders to apply for consideration.

§ 148-11-6. Technical Review Committee.

- 6.1. There shall be a Technical Review Committee comprised at a minimum of a representative of the Agency, the Performance Criteria Developer as a non-voting member, a representative of the facility user (s), and, at the discretion of the Secretary of Administration, the Secretary of Administration or his/her designee. The Technical Review Committee will have responsibility for rating and scoring Qualitative Proposals as provided in Section 10 of these regulations.

§ 148-11-7. Procedures for Selection of Performance Criteria Developer and Preparation of the Performance Criteria.

- 7.1. Selection of Performance Criteria Developer.
 - 7.1.1 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. Such architect or engineer may be an employee of the Agency. In the event said architect or engineer is not an employee of the Agency, he shall be selected in accordance with W.Va. Code § 5G-1-1, et seq.
 - 7.1.2 The Agency shall consider the following factors when selecting the Performance Criteria Developer:

- 7.1.2a Education, training and general experience;
- 7.1.2b Prior experience with projects of similar size, scope and complexity; and
- 7.1.2c Prior experience with Design-Build contracts, as appropriate, or substantially similar experience.
- 7.1.2d Once selected, the Performance Criteria Developer shall be retained by the Agency through final completion of the Project to monitor adherence to the Performance Criteria.
- 7.2 Preparation of the Performance Criteria.
 - 7.2.1 A Performance Criteria package shall be prepared by the Agency 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 comprehensive understanding of program requirements, project scope and business requirements. The Performance Criteria shall include, at a minimum:
 - 7.2.1a Program statements of the facility that describe space needs, design goals, and objectives.
 - 7.2.1b Requirements for performance bonds, payment bonds and insurance.
 - 7.2.1c Detailed material quality standards.
 - 7.2.1d Other pertinent criteria such as energy use or accommodations for future use or adaptation.
 - 7.2.1e When a site is being developed, site survey and soil boring report describing subsurface conditions or stated criteria in sufficient detail such that accurate foundation designs can be developed.
 - 7.2.1f Stated responsibility and fees for all permits, if any.
 - 7.2.1g Stated criteria regarding all site utilities and fees regarding connection of same.
 - 7.2.1h All environmental reports, if any, that have been prepared.
 - 7.2.1i Specific project budget parameters, including budget parameters for any and all alternates.
 - 7.2.1j Source of funding and available funding.
 - 7.2.1k Project schedule.

- 7.2.2 The Performance Criteria package shall be included as part of the contents of the Request for Proposals.
- 7.2.3 The basis of scoring and any restrictions on the proposals submitted in response to the Performance Criteria package shall be part of the Request for Proposals.

§ 148-11-8. Preparation and Contents of the Request for Proposals.

- 8.1 The Agency shall then develop along with the Performance Criteria Developer a Request for Proposals [RFP]. The RFP shall consist of, but is not limited to: the Performance Criteria package; a description of the areas of qualification to be evaluated, including experience, management resources and financial capability; and instructions to bidders, bid proposal forms, bid security requirements, provisions for contracts, general and special conditions and basis for evaluation of Proposals.
- 8.2. The purpose of the Performance Criteria package and the RFP is to furnish sufficient information so that Design-Builders may prepare both qualitative and cost proposals. The Design-Builder to whom the contract is awarded will be 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.
- 8.3. The RFP will address: the Performance Criteria package, instructions to bidders, bid proposal forms, bid security requirements, provisions for contracts, general and special conditions, and basis for evaluation of Proposals. The RFP will be used in accordance with Section 10 below.

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

All Proposals must comply with § 5-22A-11 of the West Virginia Code.

§ 148-11-10. Evaluation of Proposals

- 10.1 A response to an RFP received from Design-Builders will be segmented into two parts:
- (a) Qualitative Proposal. A qualitative proposal will include response to the RFP, except the cost proposal, as set forth in subparagraph (b) below.
 - (b) Cost Proposal. The cost proposal will be submitted in a separate sealed package. The package will indicate clearly that it is the cost proposal and will clearly identify the Design-Builder's name, Project description, or any other information required by submission of Proposals. The cost proposal will be secured until the time provided in Section 12, paragraph (1). Cost

proposals will include one cost for all design and construction of the proposed Project. Attached to the cost proposal shall be a five (5) percent bid security.

- 10.2 The Technical Review Committee will review the qualitative proposal submitted by each Design-Builder and will establish a rating for each Design-Builder's proposal based upon the performance criteria established in the RFP for the Project. Such criteria may utilize the following format, but shall be adjusted for the particular characteristics of the Project which will clearly be set forth in the RFP. An example of the criteria and rating system format is as follows:

EXAMPLE OF RATING SYSTEM*

1 .	Technical Criteria	Maximum Score: 45
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	

* Maximum Score is for illustrative purposes ONLY. Quantity of any of these categories may be adjusted to reflect the particular characteristics of a project and the considerations involved in its construction. For example, the construction of a memorial statuary garden might need aesthetic criteria to be more heavily weighted; the construction of a storage shed might need utilitarian criteria to be more heavily weighted.

2. Project-Specific Management Plan Maximum Score: 10
 - a. Management plan and organization
 - a. Resumes of key professional and managerial personnel
 - b. Quality assurance plan
 - c. Safety plan
 - d. Experience of individual members of the team
 - e. Experience of the team

3. Project Schedule Maximum Score: 10
 - 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 Maximum Score: 25

5. Qualifications Maximum Score: 10
 - a. Experience with comparable projects
 - b. Financial bonding capacity
 - c. Managerial resources
 - d. Recent and current workload
 - e. Ability to complete project in a satisfactorily and timely manner

Total Maximum Score: 100

- 10.3. The Total Criteria Score for the Qualitative Proposal will be 100 in all instances. A Design-Builder must achieve a minimum score of 70 in order to advance in the competition.

- 10.4. Prior to opening the cost proposal, the Technical Review Committee will total and submit the scores of each Design-Builder to the Awarding Authority.

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

§ 148-11-11. The Procedures for Negotiations Prior to Acceptance of a Proposal.

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

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

- 12.1 The Awarding Authority will set a date to inform the bidders of their qualitative scores and will simultaneously notify them of the date to publicly open the cost proposals, which shall be two working days after the opening of the qualitative Proposals.
- 12.2 The Awarding Authority will publicly open and read aloud the sealed cost proposals which met the qualitative proposal criteria. The lowest cost proposed will be assigned a score of 100. Other cost scores will be arrived at by the following formula:

$$\frac{\text{Lowest cost proposed}}{\text{Cost being evaluated}} \times 100 = \text{Cost Score}$$

To determine the successful Design-Build proposal, the total of the qualitative and cost scores will be added to arrive at a total score.

- 12.3 There is no requirement for the Awarding Authority to submit duplicate bids/Proposals to the Auditor's Office under the provisions of the governing Code section.
- 12.4 Unless all Proposals are rejected, the Awarding Authority will approve and award to the Design-Builder with highest total score and notify all proposing parties of intent to enter into a contract with the Design-Builder selected as provided above. The Awarding Authority reserves the right to reject all Proposals.
- 12.5 No protests may be lodged until such time as the final qualitative and cost proposals have been publicly opened, and may not be lodged at any time later than 72 hours following the public opening of the cost proposals.
- 12.6 The Awarding Authority will have final authority to approve or reject the recommended award based upon due process, legal, fiduciary, financial or policy considerations, but will not substitute its judgment on the qualitative evaluation for that of the Technical Review Committee.
- 12.7 The Secretary of Administration or the Awarding Authority may at their discretion waive any inconsistencies or infractions of this process, provided that a) it is deemed in the best interests of the state, and b) it does not give any party a cost or score advantage.

§ 148-11-13. Public Emergencies.

- 13.1 In the event of a public emergency, the exceptions enumerated in W.Va. Code § 5-22-1 shall be followed. See W.Va. Code § 5-22A-6(7).

§ 148-11-14. Protests.

- 14.1 Any bidder adversely affected by the intended decision of the Awarding Authority to award a contract or to reject all bids shall file a notice of protest and bond with the Awarding Authority within seventy-two (72) hours after the posting of intent to award. A formal written protest must be filed within ten (10) days after filing the notice of protest with the Awarding Authority, stating with particularity the facts and law upon which the protest is based.
- 14.2 Any bidder who files a notice of protest in a bid rejection or an award pursuant to this section shall post with the Awarding Authority, at the time of filing the notice of protest, a bond payable to the Awarding Authority in an amount equal to one percent (1%) of the lowest bid submitted, or \$5,000, whichever is greater.
- 14.3 If the Awarding Authority prevails after completion of the protest and any appellate court proceedings, it shall recover all costs and charges included in the final order or judgment, excluding attorneys' fees. Upon payment of such costs and charges by the protester, the bond shall be returned. If the protesting party prevails, it shall be entitled to recover from the Awarding Authority all costs and charges included in the final order or judgment, excluding attorneys' fees. 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 cost for the Awarding Authority or parties.
- 14.4 All protest bonds, to be acceptable, must be made payable to the Awarding Authority and must be signed and sealed by the protesting party and surety. Such bonds must bind the protesting party and surety and be conditioned upon the satisfaction of any cost and charges included in any final order of judgment or appellate proceedings, in the event that the Awarding Authority prevails. In lieu of a bond, the protester may submit a cashier's check or bank money order made payable to the Awarding Authority, which monies will be held in trust by the Awarding Authority. Protest bond forms may be obtained from the Awarding Authority.
- 14.5 The Awarding Authority shall be deemed the prevailing party if the protesting party withdraws the protest at any time before entry of the final order.
- 14.6 All notices of protest and formal protests shall be filed with the Awarding Authority.
- 14.7 A protest is not timely filed unless both the notice of protest and the formal protest are received by the Awarding Authority within the required time limits. A written notice of protest which is filed by 5:00 p.m. on the date on which the seventy-two (72) hours expires shall be timely. If such date is Saturday, Sunday, or a holiday when the Awarding Authority offices are closed, the period shall run until 5:00 p.m. of the next day that is neither a Saturday, Sunday, nor holiday.