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WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee OF WEST VIRGINIA
SECRETARY OF STATE

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May 11, 2000

NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Penny Stafford
Administration, WV Department of
Bldg. 1, Rm. E-119
Charleston, WV 25305

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Rules for Selecting Design - Builders Under Design Build Procurement Act,148CSR11**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

- 1. Authorize the agency to promulgate the Legislative rule
 - (a) as originally filed
 - (b) as modified by the agency
- 2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached.

- 3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.

- 4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.

- 5. Recommends that the Legislative rule be withdrawn; a statement of reasons for such recommendation is attached.

SCANNED

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: West Virginia Department of Administration

Subject: Rules for Selecting Design-Builders Under Design-Build Procurement Act, 148CSR11

PERTINENT DATES

Filed for public comment: November 23, 1999
Public comment period ended: December 24, 1999
Filed following public comment period: March 23, 2000
Filed LRMRC: March 23, 1999
Filed as emergency:

Fiscal Impact: None

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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ABSTRACT

The proposed rule is new. The following is a section-by-section synopsis of the proposed rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule.

Section 2 in all but one instance, sets forth definitions from the Code.

Section 3 states that the rule applies to all agencies except those that are exempt.

Section 4 sets forth minimum qualification requirements for firms providing design-build services. It provides that all design-build projects must comply with prevailing wage requirements and prohibits debarred vendors from bidding on design-build projects.

Section 5 requires the agency to provide public notice of a project requiring design-build services which defines a time frame and procedures for interested, qualified design-builders to apply for consideration.

Section 6 creates a Technical Review Committee to consist of a representative of the agency, the Performance Criteria Developer,

a representative of the facility users, and, at the discretion of the Secretary of Administration, the Secretary of Administration or his or her designee. The Committee has responsibility for rating and scoring Qualitative Proposals.

Section 7 sets forth the factors the Agency is to consider when selecting the Performance Criteria Developer. Factors include education, training and experience.

This section also requires the Agency and the Performance Criteria Developer to prepare a Performance Criteria package. It sets forth minimum requirements for the package including requirements for bonds, detailed material quality standards and sources of funding. The package is to be included with the request for proposal.

Section 8 requires the agency and the Performance Criteria Developer to develop a Request for Proposals (RFP). It states that the purpose for the package and the RFP is to furnish information for Design-Builders to prepare both qualitative and cost proposals. It sets forth information to be contained in the RFP.

Section 9 states that all proposals must comply with W.Va. Code §5-22A-11.

Section 10 states that a proposal is to be segmented into two parts: a Qualitative Proposal and a Cost Proposal, which is submitted in separate sealed packages. The Technical Review Committee is to review each Qualitative Proposal submitted and rate the proposal based upon performance criteria established in the RFP. It sets forth an example of a rating system. Only those firms whose Qualitative Proposals attain a minimum score of 70 out of 100, are eligible to continue the award process.

Section 11 provides that negotiations between the apparent successful bidder and the Awarding Authority prior to the award of a contract may not result in a contract amount which would change the outcome of the original bid.

Section 12 states that the Awarding Authority is to inform bidders of their qualitative scores and that Cost Proposals will be publically opened two days after the opening of the Qualitative Proposals. It provides a method for assigning points based upon the cost proposal. A successful Design-Build proposal is one in which the total score of the qualitative and cost scores is the highest. This section also provides that the Awarding Authority may reject all proposals.

Section 13 states that in the event of public emergency, the exceptions in W.Va. Code §5-22-1 are to be followed.

Section 14 sets forth the manner in which a bidder, adversely affected by the intended decision of the Awarding Authority to award a contract or reject all bids, may protest the intended decision.

AUTHORITY

Statutory authority: W.Va. Code, §5-22A-4 and §5-22A-6, which provide, in part, as follows:

§5-22A-4.

...(d) The board shall promulgate rules to carry out the purposes of this article. Any rules adopted by the board prior to the first day of October, one thousand nine hundred ninety-nine, are exempt from the provisions of article three, chapter twenty-nine-a of this code: *Provided*, That the board shall file a copy of any rule so exempted from the provisions of chapter twenty-nine-a of this code with the legislative rule-making review committee created pursuant to section eleven, article three of said chapter prior to the thirtieth day of November, one thousand nine hundred ninety-nine.

§5-22A-6.

The department of administration shall adopt rules consistent with this article for the award of design-build contracts. Any rules so adopted by the department of administration prior to the first day of October, one thousand nine hundred ninety-nine, are exempt from the provisions of article three, chapter twenty-nine-a of this code: *Provided*, That the department of administration shall file a copy of any rule so exempted from the provisions of chapter twenty-nine-a of this code with the legislative rule-making review committee created pursuant to section eleven, article three of said chapter prior to the thirtieth day of November, one thousand nine hundred ninety-nine. The rules must consist of, but not be limited to:

(1) The procedures to select or designate a performance criteria developer and prepare

performance criteria;

(2) The procedures for the preparation and contents of requests for proposals;

(3) The procedures for preparing and submitting proposals;

(4) The procedures for evaluating proposals;

(5) The procedures for negotiations between the agency and those submitting proposals prior to the acceptance of a proposal, if any such negotiations are contemplated;

(6) The procedures for awarding and executing design-build contracts;

(7) The procedures for awarding design-build contracts in the event of public emergencies as defined in the applicable statutes; and

(8) The procedures for acting on formal protests relating to the solicitation or award of design-build contracts.

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes, Although it may not go far enough to meet the requirements of W.Va. Code §5-22A-6.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISIONS OF THE CODE?

Yes.

VIII. OTHER.

Counsel has technical modifications to suggest.

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: West Virginia Department of Administration

Subject: West Virginia Design Build Review Board, 148C

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

APR 5 10 10 AM '00

FILED

PERTINENT DATES

Filed for public comment: August 24, 1999
 Public comment period ended: September 24, 1999
 Filed following public comment period: December 20, 1999
 Filed LRMRC: December 20, 1999
 Filed as emergency:

Fiscal Impact: None

ABSTRACT

The proposed rule is new. The following is a section-by-section synopsis of the proposed rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule.

Section 2 sets forth statutory definitions.

Section 3 states that the rule applies to the Board.

Section 4 contains statutory provisions regarding the composition of the Board and appointments to the Board.

Section 5 sets forth procedural requirements regarding meetings of the Board.

Section 6 sets forth duties of the Board, many of which are statutory in nature.

Section 7 requires agencies to make a request for the design-build process to be used on a project to the Secretary of Administration.

Section 8 provides that Board members are entitled to travel expense reimbursement.

AUTHORITY

Statutory authority: W.Va. Code, §5-22A-4, which provides, in part, as follows:

...(d) The board shall promulgate rules to carry out the purposes of this article. Any rules adopted by the board prior to the first day of October, one thousand nine hundred ninety-nine, are exempt from the provisions of article three, chapter twenty-nine-a of this code: *Provided*, That the board shall file a copy of any rule so exempted from the provisions of chapter twenty-nine-a of this code with the legislative rule-making review committee created pursuant to section eleven, article three of said chapter prior to the thirtieth day of November, one thousand nine hundred ninety-nine.

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

Yes. The rule states that the Board has the power to amend Board rules for which it has no authority without Legislative approval. The rule also provides for expense reimbursements for Board members which is not authorized by the statute.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes. For the most part, the rule sets forth provisions of the statute.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

No. For the most part, the proposed rule sets forth provisions in the Code. The few remaining provisions, specifically those relating to meetings of the Board, would be more appropriate in a procedural rule. Those provisions relating to duties of the Board, which might be considered Legislative in nature, would be appropriate in the Department of Administration rule, Rules for Selecting Design-Builders Under Design-Build Procurement Act, 148CSR11.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISIONS OF THE CODE?

Yes.

VIII. OTHER.

Counsel suggests that the Agency withdraw its proposed rule and amend its other proposed rule, and promulgate a procedural rule.