

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: West Virginia Department of Administration TITLE NUMBER: 148

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

AMENDMENT TO AN EXISTING RULE: YES NO

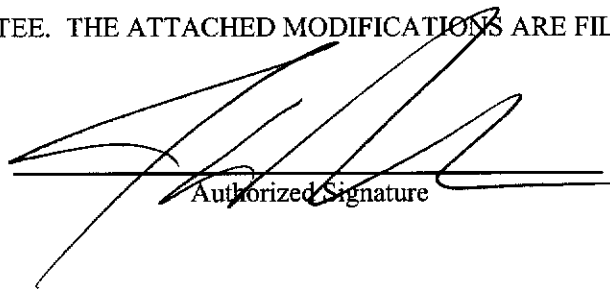
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 11

TITLE OF RULE BEING AMENDED: Rules for Selecting Design-Builder Under 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

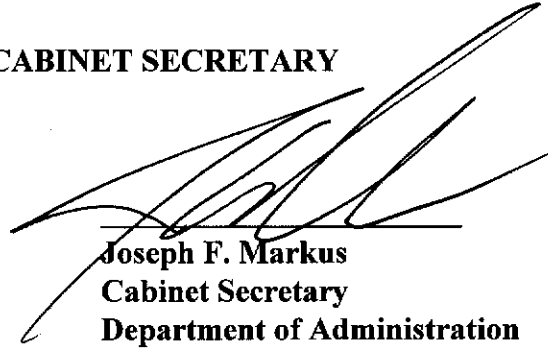
LEGISLATIVE RULE

148 CSR 11

**TITLE 148
DEPARTMENT OF ADMINISTRATION**

SERIES 11

APPROVAL OF FILING BY CABINET SECRETARY



**Joseph F. Markus
Cabinet Secretary
Department of Administration**

TITLE 148
SERIES 11

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

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§ 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.
- 1.2. Authority.-W.Va. Code § 5-22A-4 and 6.
- 1.3. Filing Date.
- 1.4. Effective Date.

§ 148-11-2. Applicability.

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

**§ 148-11-3. Minimum Qualification Requirements for Firms Providing
Design-Build Services and Qualification for Design-Build Projects.**

- 3.1. Architects, contractors, and engineers shall satisfy qualification requirements as defined by W.Va. Code § 5-22A-1, et seq., and the applicable rules.
 - 3.1.1. All Design Builders shall be reviewed by the contracting agency for the following twelve (12) qualification factors/performance areas:
 - (a) Licensing and bonding capacity;
 - (b) Financial strength and capabilities;
 - (c) Experience and technical expertise with projects of similar size and scope;
 - (d) Past performance-a five (5) year minimum review of all public and private projects, including all relevant quality, schedule, and cost data;
 - (e) Law compliance/Business Integrity-a five (5) year minimum review of all projects;
 - (f) Qualifications and experience of key management and professional staff;
 - (g) Programs and Resources for craft training and staffing capabilities;
 - (h) Capacity to accomplish work in required time to include disclosure of present workload;
 - (i) Quality control and quality assurance policies and programs;
 - (j) Safety Record to include the safety and drug testing policies and programs;
 - (k) Equipment including technical resources and information technology; and
 - (l) Subcontracting plan(s) including the qualifications and capabilities of subcontractors.

- 3.2. Any project which an Agency desires to have constructed using the Design-Build process shall obtain 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, the agency shall comply with the provisions of this rule.
- 3.3. 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.
- 3.4. 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.

§ 148-11-4. Public Announcement Procedures.

- 4.1. 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.

§ 148-11-5. Technical Review Committee.

- 5.1. There shall be established by the Department of Administration 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 use, and, at the discretion of the Secretary of Administration, the Secretary of Administration or his designee. The Technical Review Committee has responsibility for rating and scoring Qualitative Proposals as provided in Section 10 of this rule.

§ 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 architect or engineer may be an employee of the Agency. In the event the architect or engineer is not an employee of the Agency, he or she shall be selected in accordance with W.Va. Code § 5G-1-1, et seq.
 - 6.1.2. The Agency shall consider the following factors when selecting the Performance Criteria Developer:
 - 6.1.2a. Education, training and general experience;
 - 6.1.2b. Prior experience with projects of similar size, scope and complexity; and

- 6.1.2c. Prior experience with Design-Build contracts, as appropriate, or substantially similar experience.
- 6.2. Once selected, The Agency shall retain the Performance Criteria Developer through final completion of the Project to monitor adherence to the Performance Criteria.
 - 6.2a. 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:
 - 6.2.1a. Program statements of the facility that describe space needs, design goals, and objectives;
 - 6.2.1b. Requirements for performance bonds, payment bonds and insurance;
 - 6.2.1c. Detailed material quality standards;
 - 6.2.1d. Other pertinent criteria such as energy use or accommodations for future use or adaptation;
 - 6.2.1e. 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;
 - 6.2.1f. Stated responsibility and fees for all permits, if any;
 - 6.2.1g. Stated criteria regarding all site utilities and fees regarding connection those utilities;
 - 6.2.1h. All environmental reports, if any, that have been prepared;
 - 6.2.1i. Specific project budget parameters, including budget parameters for any and all alternates;
 - 6.2.1j. Sources of funding and available funding; and
 - 6.2.1k. The project schedule.
 - 6.2.2. The Performance Criteria package shall be included as part of the contents of the Request 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 Request for Proposals.

§ 148-11-7. Preparation and Contents of the Request for Proposals.

- 8.1. After the Agency develops the performance criteria package, the Agency and the Performance Criteria Developer shall develop 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 the basis for evaluation of Proposals.
- 7.2. 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 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.
- 7.3. RFP shall be used in accordance with Section 10 below.

§ 148-11-8. The Procedure for Preparing and Submitting Proposals.

- 8.1 All Proposals must comply with § 5-22A-11 of the West Virginia Code.
- 8.2 Design-Builders shall submit their proposals to the agency offices within 30 days of the release of the RFP. If such date is Saturday, Sunday, or a holiday when the agency offices are closed, the period shall run until 5:00 p.m. of the next day that is neither a Saturday, Sunday, nor holiday.
- 8.3 Design-Builders shall complete all necessary forms provided by the agency and include the completed forms with their proposals.

§ 148-11-9. Evaluation of Proposals.

- 9.1. The Technical Review Committee shall segment all proposals received from Design Builders in response to an RFP into two parts:
 - (a) Qualitative Proposal. A qualitative proposal shall include response to the RFP, except the cost proposal, as set forth in subdivision (b) of this subsection.
 - (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 Section 12, paragraph (1). Cost proposals shall include one cost for all design and construction of the proposed Project. A five (5) percent bid security shall be attached to the cost proposal.
- 9.2. 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 RFP 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 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
 - b. Resumes of key professional and managerial personnel
 - c. Craft training and staffing capabilities
 - d. Quality assurance plan
 - e. Safety plan
 - f. Experience of individual members of the team
 - g. 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 satisfactory and timely manner

Total Maximum Score: 100

- 9.3. 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 continue in the evaluation process by the Technical Review Committee.

- 9.4. Prior to opening the cost proposal, the Technical Review Committee shall total and submit the scores of each Design-Builder's qualitative proposal to the Awarding Authority.

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

§ 148-11-10. Negotiations Prior to Acceptance of a Proposal.

Negotiations between the apparent successful bidder and the Awarding Authority 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(5).

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

- 11.1. The Awarding Authority shall set a date to inform the bidders of their qualitative scores and shall 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.
- 11.2. The Awarding Authority shall publicly open and read aloud the sealed cost proposals which met the qualitative proposal criteria. The lowest cost proposed shall be assigned a score of 100. Other cost scores shall be arrived at by the following formula:
$$\frac{\text{Lowest cost proposed}}{\text{Cost being evaluated}} \times 100 = \text{Cost Score}$$
- 11.3. To determine the successful Design-Build proposal, the total of the qualitative and cost scores shall be added to arrive at a total score.
- 11.4. The Awarding Authority is not required to submit duplicate bids or proposals to the Auditor's Office.
- 11.5. Unless all proposals are rejected, the Awarding Authority shall approve and award the project to the Design-Builder with highest total score. The Awarding Authority shall notify all parties submitting proposals of the outcome of the scoring process and the Awarding Authority's intent to enter into a contract with the successful Design-Builder. The Awarding Authority may to reject all Proposals.
- 11.6. Unsuccessful Design-Builders may not lodge protests until after the final qualitative and cost proposals have been publicly opened. Protestors must lodge protests within 72 hours of public opening of the cost proposals.
- 11.7. The Awarding Authority 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.
- 11.8. The Secretary of Administration of the Awarding Authority may at his or her discretion waive any inconsistencies or infractions of this process, provided that a) it is considered to be in the best interests of the state, and b) it does not give any party a cost or score advantage.

§ 148-11-12. Protests.

- 12.1. Any Design-Builder 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 the intent to award. A formal written protest shall 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.

- 12.2. Any Design-builder who files a notice of protest in a bid rejection or an award pursuant to this section shall post with the 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.
- 12.3. If the protesting party prevails after completion of the protest and any appellate court proceedings, it shall be entitled to recover from the Awarding Authority all costs and charges included in the final order or judgment, excluding attorneys' fees. If the Awarding Authority prevails 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. 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 Awarding Authority or successful Design-Builder.
- 12.4. All protest bonds shall be made payable to the Awarding Authority 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 judgment or appellate proceedings, in the event that the Awarding Authority prevails. In lieu of a bond, the protestor may submit a cashier's check or bank money order made payable to the Awarding Authority, the monies shall be held in trust by the Awarding Authority. Protest bond forms may be obtained from the Awarding Authority.
- 12.5. The Awarding Authority shall be considered the prevailing party if the protestor withdraws the protest at any time before entry of the final order.
- 12.6. All notices of protest and formal protests shall be filed with the Awarding Authority.
- 12.7. 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 is 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.