

Agency: Department of Administration
Design-Build Procurement Act

Rule Type: Legislative

Title Number: 148
Cite Authority: 5-22A-4

STATEMENT OF CIRCUMSTANCE AND BRIEF SUMMARY

The passage of House Bill 2592 during the 2005 legislative session makes substantial changes to the Design-Build Procurement Act. As a result of the passage of this bill the Department of Administration must make changes to the legislative rules. The changes were of such magnitude that it was more efficient to repeal the existing rules and replace them with the modified rules. The modified rules outline the procedures for selection of a performance criteria developer; the application process for approval of a design-build project; procedures for selection of most qualified design-builders; what the Invitations for Qualifications and Invitations for Proposals shall contain; procedures for preparing and submitting proposals and evaluating proposals; the awarding of design-build contracts; and the procedures for protests.

FILED

2005 JUN 27 P 3 37

TITLE 148
LEGISLATIVE RULE
WEST VIRGINIA DEPARTMENT OF ADMINISTRATION
OFFICE WEST VIRGINIA
SECRETARY OF STATE

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 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. --

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.

§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. Procedures for Selection of Performance Criteria Developer and Preparation of the Performance Criteria.

5.1. Selection of Performance Criteria Developer.

5.1.1. 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. and for projects with a construction cost estimated to be one million dollars or less, the Agency may use a licensed architect or engineer who is an employee of the Agency. For projects for which the construction cost is estimated to be more than one million

dollars, the Criteria Developer shall not be an employee of the Agency.

5.1.2. The Agency shall consider the following factors when selecting the Performance Criteria Developer:

5.1.2a. Education, training, general experience; and West Virginia licensure to practice Architect or Engineering.

5.1.2b. Prior experience with projects of similar size, scope, and complexity; and

5.1.2c. Prior experience with Design-Build contracts, as appropriate, or substantially similar experience.

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

5.2a. Preparation of the Performance Criteria

5.2.1. 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:

5.2.1a. Program statements of the facility that describe space needs, design goals, and objectives;

5.2.1b. Requirements for performance bonds, payment bonds, general liability insurance, professional liability insurance, and worker's compensation coverage.

5.2.1c. Applicable codes and material quality standards.

5.2.1d. Other pertinent criteria such as energy efficiency and accommodations for future use or adaptation;

5.2.1e. 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;

5.2.1f. Stated responsibility for fees and permits;

5.2.1g. Stated criteria regarding all site utilities and fees regarding connection those utilities;

5.2.1h. Environmental reports, if any, that have been prepared;

5.2.1i. Project budget parameters, including budget parameters for any and all alternates;

5.2.1j. Sources of funding and available funding;

5.2.1k. The proposed project schedule.

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

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

5.2.3. 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.

5.2.4. 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.

§148-11-6 Application Process for Approval of Design-Build Project.

6.1 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.

6.2 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.

6.3. 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 days from the date the receipt of the Agency's original request for review.

6.4 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.

6.5 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.

§148-11-7. 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 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.

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

7.2. The Agency shall issue an Invitation for Qualification (IFQ), to design-builders. The IFQ shall contain a description of the project; the budget; and a description of the areas of qualification required for performance of the work, the methods by which the most qualified three to five design-builders will be selected; and any other requirements for the submittal of statements of qualifications. 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.

7.3 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.

7.4 The technical review committee shall recommend not less than three, nor more than five, 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.

7.5 In the event the agency receives fewer than three 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.

7.6 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.

7.7. 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.

7.8. 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.

§148-11-9. Preparation and Contents of the Invitation for Qualifications and Invitation for Proposals.

9.1. 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).

9.2 The Agency shall issue an Invitation for Qualifications (IFQ) to design builders. The IFQ shall contain a description of the project; the budget; a description of the areas of qualification required for performance of the work as described in Section 7 of these rules; the method by which the most qualified three to five design-builders will be selected; and any other requirements for the submittal of statements of qualifications. 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.

9.3 The IFP shall consist of, but is not limited to: The Performance Criteria package; instructions to bidders; bid proposal forms; bid security requirements; provisions for contracts; general and special conditions; and the basis for evaluation of proposals.

9.4 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.

9.5. 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-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.

9.6. IFP shall be used in accordance with Section 11.

§148-11-10. The Procedure for Preparing and Submitting Proposals.

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

10.2. 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 holiday when the agency offices are closed, the period shall run until 5:00p.m. of the next day that is neither a Saturday, Sunday, nor holiday.

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

10.4 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.

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

11.1. The Technical Review Committee shall segment all proposals received from Design-Builders in response to an IFP into two 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.

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 13, 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.

11.2. 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. 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. Side 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 Requirements¹
2. Project-Specific Management Plan
Maximum Score: 15
- 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
Maximum Score: 25
- 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: 15
- Total Maximum Score: 100

11.3. 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.

11.4. Prior to opening the cost proposal, the Technical Review Committee shall total and submit the weighted score of each design-builders qualitative proposal to the Agency.

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

10.5 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 to reject all Proposals

§ 148-11-12. Negotiations Prior to Acceptance of a Proposal.

¹
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 more heavily weighted.

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(5).

§148-11-13. Award of Design Build Contract.

13.1. 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.

13.2. 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:

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

13.3. 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.

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

13.5. The Agency shall submit to the Design-Build Board the evaluations and scoring of the qualitative proposals for approval of the process within 24 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.

13.6. Design-builder's who have submitted proposals may request copies of the qualitative scores and may submit questions, clarifications, and make comments on the procedures to the Agency and the Design-Build Board for

consideration within 48 hours of the public announcement of the qualitative scores. The Design-Build Board, at its discretion, may schedule a public meeting within 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 hours of the public meeting, or if no public meeting is held, the announcement shall be within 48 hours of the information provided to the Design-Build Board from the Agency.

13.7. 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.

13.8. 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.

§148-11-14. Monitoring by the Design-Build Board

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

14.2 The Design-Build Board may terminate their approval of a project after written notice, and discussions with the Agency, if the four criteria established in 5-22A-5C of the Design-Build Procurement Act are not being properly addressed.

§148-11-15. Public Emergencies.

15.1 In the event of public emergency,, the exceptions enumerated in the W. Va. Code §5-22-1 shall be followed.

§148-11-16. Protests.

16.1. 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 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.

16.2. 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.

16.3. 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.

16.4. 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.

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

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

16.7. 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 holiday when the Agency offices are closed, the period shall run until 5:00p.m. of the next day that is neither a Saturday, Sunday, nor holiday.

FISCAL NOTE FOR PROPOSED RULES

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

Type of Rule: X Legislative Interpretive Procedural

Agency: Department of Administration

Address: 1900 Kanawha Boulevard, East
Capitol Complex, Building 1, Room E-119
Charleston, WV 25305

Phone Number: 304-558-4331 Email: dlipscomb@wvadmin.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The rule changes are being proposed due to the passage of HB2592 during the 2005 legislative session which made major modifications to the Design-Build Procurement Act. The costs that were estimated for the passage of HB 2592 were estimated at \$19,068.00. The budget bill that passed the legislature for FY 2006 provided funding for the costs associated with the passage of the bill within the Secretary of Administration's budget. Therefore, there should be no additional fiscal impact to the State of West Virginia as a result of the proposed rule modifications.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	2005 Increase/Decrease (use "-")	2006 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	-0-	-0-	-0-
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Equipment			
Other			
2. Estimated Total Revenues	-0-	-0-	-0-

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

3. **Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

As mentioned above, the Department of Administration does not anticipate any adverse fiscal impact to the State of West Virginia as a result of the adoption of the proposed rule modifications.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: 6-27-05

Signature of Agency Head or Authorized Representative

Mark A. Matelan, Chairman



JOE MANCHIN III
GOVERNOR

STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
OFFICE OF THE CABINET SECRETARY

ROBERT W. FERGUSON, JR.
CABINET SECRETARY

June 27, 2005

Via Hand-Delivery

The Honorable Betty Ireland
Secretary of State
Building 1, Suite 157K
1900 Kanawha Boulevard, East
Charleston, WV 25305

Re: Legislative Rules

Dear Secretary Ireland,

I am enclosing an original and one copy of the documents listed below for filing. The proposed rules are being filed in regard to the Design-Build Procurement Act. I will provide a copy of the enclosed documents to the Legislative Rule Making Review Committee once they are marked filed by your office.

The documents enclosed consist of the following:

1. Notice of Comment Period on a Proposed Rule,
2. Statement of Circumstance and Brief Summary,
3. Proposed Rules, and
4. Fiscal Note for Proposed Rules.

Thank you very much for your assistance. If you have any questions, or need any additional information, please do not hesitate to give me a call.

Sincerely,

Donna M. Lipscomb
Executive Coordinator

Enclosures