TITLE 164
PROCEDURAL RULE
SCHOOL BUILDING AUTHORITY OF WEST VIRGINIA

SUMMARY OF REVISIONS

SERIES 1
POLICY AND PROCEDURES HANDBOOK
OF THE SCHOOL BUILDING AUTHORITY OF WEST VIRGINIA

Since the Legislature approved revisions to our governing Legislative Rules in March 2019, which culminated with the subsequent signatory approval by Governor Justice, the SBA Staff has been working diligently on proposing revisions to the agency's Policy & Procedures Handbook. The proposed changes address three important areas of need as determined by the Members of the Authority and the SBA Staff: 1) the clarification and separation of the SBA's Legislative Rules and Procedural Rules; 2) the organizational arrangement of the content to reflect a sequential, user-friendly experience; and 3) the directives to increase accountability of all parties involved in the execution of an SBA-funded project while simultaneously eliminating unnecessary and over-burdensome tasks. The policies and forms included in this document are meant to guide each user through the development, planning, financing, and construction phases with clarity and ease.

SUMMARY OF PROPOSED CHANGES

REMOVAL OF LEGISLATIVE RULES – The Legislative Rules that govern the School Building Authority are proposed to be removed from the SBA Policy & Procedures Handbook. As stated in the name, these Rules are governed by the Legislature and any change to these rules must be approved by the Legislature. These rules were included originally in the Policy handbook for convenience but should stand independent of this document as they supersede the authority of the Agency's Procedural Rules. The Policy & Procedures Handbook create these Procedural Rules which are intended to facilitate the execution of State Code and the SBA's Legislative Rules relative to the SBA.

MAJOR REORGANIZATION – The most obvious change to the document is the reorganization of all policies, appendices, and forms. In an effort to provide a higher level of understanding and an ease of use, each policy and appendix was relocated in sequential order relative to the five phases of service the SBA provides: 1) Comprehensive Educational Facilities Planning (CEFP) Procedures; 2) Grants, Applications, and Finance Procedures; 3) Educational Planning and Architectural Considerations; 4) Bidding and Construction Procedures; and 5) Project Closeout and Completion Procedures. Chapters have been introduced, policies have been relocated, and all forms have been reorganized, renumbered, and placed in the Appendix. The SBA Staff has provided reference locations in parenthesized italics for all policy language that is reorganized in a new location. If the forms are not listed to be eliminated in the following section, they are placed in a new location with appropriate strike-underline edits shown.

ELIMINATED POLICIES & PROCEDURES – Three existing appendices are proposed for deletion in their entirety while twenty-five forms are proposed to be removed.

<u>Appendix C – CEFP Annual Update</u> – This appendix described the processes for an amendment to the 2010-2020 Comprehensive Educational Facilities Plans (CEFP). The new amendment process is yet to be developed as nearly all of the information that is required in the annual review will be available to local and state officials with real-time data at any given time. There will be some information that needs reviewed annually such as energy use, however, the scope of the annual review as listed is no longer necessary. New language regarding an annual review of the CEFP may be developed in a subsequent policy revision.

Appendix E – Planning Grants – This appendix describes the requirements for the SBA Planning Grants that were awarded to Local Education Agencies (LEAs) every ten years to hire educational planning professionals and/or Architects to develop the CEFP. It was determined in the September 2018 quarterly meeting of the Authority that the SBA is providing the costs for the ongoing management of the digital CEFP while the State Department of Education is giving a professional services stipend to the counties. Because of these two allocations, the current language for Planning Grants is unnecessary and therefore proposed to be removed.

Appendix G – Process for the Development of a Design-Build Project – This appendix is proposed to be removed given the desire of the Authority to not fund projects using the Design-Build project delivery method. In the State of West Virginia, if a project uses the Design-Build method, it is subject to the Design-Build Board's rules, policies, and procedures. Therefore, the SBA's requirements are considered a duplication of unnecessary tasks.

Appendix J, Part I – SBA Criteria for Selection of Lowest Qualified Bids (*Commonly referred to as the 18 Points*) – The elimination of this section stems from the governable aspects of WV Code §5-22-1 et seq.– The Fairness and Competitive Bidding Act. Because of the caveat at the end of the section that states "*No single criteria will be considered the controlling factor in determining whether a bid is or is not the 'best' bid*" the SBA Staff and Policy Consultant believe this invites ambiguity in the evaluation process. These points as written could empower the SBA and/or the Grant Recipient to award a contract in a manner that was described by the WV Supreme Court as "irrationally based on an ambiguous 'requirement' set forth in the bidding documents that is of no consequence." This language was used in the 2015 West Virginia Supreme Court Case *Wiseman Constr. Co v. Maynard C. Smith Constr. Co. et al.*, (Case No. 15-0635) to describe the award of the contract to the second-low bidder where the low bidder was determined by the state agency to be unqualified and irresponsible. Because the Agency's rules were determined to be ambiguous and arbitrary by the Court, the monetary significance of spending additional taxpayer dollars to award the contract to the second-low bidder was determined by the Supreme Court to be in violation of the law; therefore the "18 Points" section as described is proposed to be removed. The SBA Staff has, however, worked eleven of the eighteen points into the bidding requirements and project evaluation for each Contractor to follow and be aware of on an SBA-funded project. The major difference is that this list will not disqualify a prospective Contractor from bidding unless they have been placed on probation for a minimum of one year by the Authority for displaying an undeniable pattern of non-compliance or non-conformance on a prior SBA project. The SBA Staff's Policy Consultant has given the advice that the most effective case against a contractor(s) who does not perform acceptably on a job is to have a consistent program of compliance documented by notices and/or reports issued by the project's Architect of Record. This new program is described in the New Policies & Procedures section.

Form 104 A-1 – Grant Contract Project Description and Finance Plan – This form has been rolled into the actual Grant Contract as a proposed change rather than having a separate form.

Form 104 C – SBA Grant Contract Finance Plan Amendment Form – The process that this form attempted to capture is far more burdensome than the actual practice. The SBA Finance Staff determined that this form is no longer necessary.

Form 105 – Contractor Qualification Statement – Because of the aforementioned 2015 West Virginia Supreme Court Case *Wiseman Constr. Co v. Maynard C. Smith Constr. Co. et al.*, (Case No. 15-0635) where it was determined by the Court that a West Virginia state agency did not exercise reasonable discretion when awarding a construction contract to the second-low bidder because a Contractor Qualification Contract (similar to the SBA's) was not submitted by the low bid contractor, the SBA Staff, Policy Consultant, and more importantly, attorneys from the WV Attorney General's Office who unsuccessfully argued for the State Agencies, suggest this Form is an unenforceable requirement. Furthermore, the Staff and Policy Consultant believe that if kept in the project requirements, this would become an unnecessary project cost and a duplication of information deemed sufficient by the receipt of a performance bond and the signing of the state purchasing affidavit.

Form 124 – Contractor Evaluation Form – The SBA Staff will now be overseeing the ongoing evaluation of Contractors using the information gathered during the project. The evaluation that this form facilitates from the Owner is too subjective, and due to the time associated with its submission at the end of the project, feelings of excitement regarding the opening of a new building often overshadow the actual items of concern.

Form 138 – Architect / Engineer Evaluation Form – Similar to the reasons described in the Contractor Evaluation form, the A/E Evaluation form is no longer a necessary task of the Owner.

Form 143 – Maintenance & Custodial Care Site Visit Report – This is a WVDE Office of School Facilities & Transportation task, therefore the WVDE OSF&T should guide the policies and processes related to the task this form addresses.

Form 146 – SBA Occupancy Report – The SBA Staff feels this is an unnecessary requirement that could potentially be confused with the WV Fire Marshal's Certificate of Occupancy, which is of much greater importance to the occupancy of a school. Furthermore, this form could potentially be a liability.

Form 148 – Proposed Building Use and Capital Improvements – The SBA Staff believes this is an unnecessary duplication of current CEFP tasks.

Form 163 – CEFP Progress Report #1 – The information on this form is gathered in the electronic database and immediately accessible to the SBA and WVDE staff. This does not replace the information required in CEFP Progress Report #2.

Form 167 – SBA Maximum Class Sizes – This form is a summarized list of items described in WVDE Policy 6200 and subject to outside Agency's changes, as well as a conflict if the Agency does change the square footage requirements.

Form 171 – Design Build Services, Form 172 – Design Build: Educational Facilities Planner, and Form 173 – Design Build: Performance Criteria Developer – The tasks in these forms are governed procedurally by WV Design Build Board, and therefore, proposed to be removed.

Form 174 – Anti-Bullying Audit – This is a WVDE enforcement task, therefore an unnecessary SBA requirement.

Form 176e – SBA Project Submission Form: American Recovery & Reinvestment Act Funds – This is a submission form for a now defunct Federal Fund.

Form 177 – Affidavit of Debts Paid – This is a now redundant form that is superseded by the State of West Virginia Purchasing Affidavit.

WVDE BP13-A – Certificate of Project Completion – This WVDE form is removed from SBA Policy. The tasks associated with this are listed on the new SBA Form 500 – Project Closeout Procedures Checklist.

Form 185 – State of West Virginia Purchasing Affidavit – This is a form that belongs to an outside agency. While it is a vital piece to the bid documents, projects should be using the actual state affidavit.

Form 186 – Monthly Anticipated Adverse Weather Delays – The task associated with this form are described in the SBA Construction Schedule requirements, and the items on this form are no longer relevant or necessary to the process.

Form 187 – SBA Construction (CPM) Schedule – This is not actually a form with information to be filled out by the Contractor. The guidelines from this form were enrolled and amended in Section 410.

Form 188 – Drug Free Workplace Affidavit – For similar reasons as described in the State Purchasing Affidavit, this Form belongs to an outside agency, and therefore, is proposed to be removed.

Form 189 – Contract Services Responsibility Matrix – This is a summarized list of SBA policy items, which is subject to inaccuracy and conflict in this edition and future revisions.

Form 190 – Building Information Modeling (BIM) Guidelines & Standards – This was not actually a form. The guidelines this form set received tremendous push-back from the design and construction industry partners as well as our end-users – the Counties. Rather than amending this policy, language was added that states *"Any use of, or reliance on, all or a portion of a building information model must be approved in advance by Owner and will only be permitted if the Parties have agreed upon and executed written documents to memorialize protocols governing the use of, and reliance on, the information contained in the model."*

Form 191 – Building Information Modeling (BIM) Execution Plan – Given the above change, each project where BIM is desired, the project team must first create their own agreed upon BIM execution plan. The SBA standard is no longer necessary.

Form 192 – Construction Manager Evaluation Form – Similar to the reasons described in the Contractor Evaluation form, the CM Evaluation form is no longer a necessary task of the Owner.

REVISED POLICIES & PROCEDURES – Nearly every section, appendix, form, and policy was amended. Major revisions are described below.

Series 1 (Opening Pages of the Document) – Senate Bill 672 of the 2019 Legislative session removed Series 1 as a Legislative Rule and placed it as a Procedural Rule. This former Legislative Rule described the CEFP process that is governed by the WV Board of Education in Policy 6200. Rather than having CEFP requirements listed in Series 1 procedurally, this Series now incorporates the SBA Policy & Procedures Handbook–as a whole–into Procedural Rule. CEFP execution language that responds to the WVDE Policy 6200 requirements is listed in Chapter 1 of the Policy & Procedures Handbook.

SBA Procedures for School Construction "Needs" Grant Funds, Major Improvement Project (MIP) Funds, Three Percent Grant Funds, and Emergency Funds – These sections were amended to reflect present day practices. These were previously described in Appendices F, B, and D.

Economies of Scale Requirements – After a short study of recent projects and associated costs, this section was revised to lower the requirements to meet EOS guidelines based on current funding practices and the high number of waiver requests that are received annually.

Educational Planning and Architectural Considerations – This Chapter is a revision / reorganization of the current Appendix I – Architectural / Engineering and Construction Regulations. Changes of significance in this section include:

- A new caveat to the A/E procurement steps that states that while the decision on which A/E design team remains solely the responsibility of the Local Education Agency (LEA), the LEA may not dictate which firm(s) the A/E will use as a consultant.
- The project team shall determine the use of the following: Clerk of the Works or Construction Manager (CMa); Construction Analyst; Single-Prime or Multiple-Prime Construction Delivery; if Building Information Modeling (BIM) will be used; an independent Testing Adjusting and

Balancing (TAB) contractor or a Commissioning Agent; or if the project will be part of an Energy Savings Performance Contract.

- The determination on the necessity of a CMa on a project is to be made at by the project team – LEA and Architect / Engineer. If a CMa is deemed necessary, the SBA shall approve the LEA's procurement of the CMa.
- Construction contingency allowances on renovation projects has been increased from 4% to 6%.
- Revising the LEAs duties to require the Contractor(s) to meet the WV Jobs Act (when applicable) by submitting weekly payroll information to the WV Division of Labor.
- Educational Specification requirements were revised to streamline the creation of this required document and empower the LEA to obtain approval from the WVDE and SBA if desired spaces exceed the SBA funding formula.
- The Clerk of the Works section was revised to require a qualified, experienced individual, and the duties were revised to observe, report, and aid in information gathering while clearing themselves of any Architect's duties and Contractor's means and methods.

<u>Bidding and Construction Procedures</u> – This chapter includes revisions to the former Appendix J – Parts I and II, as well as Construction Schedule Requirements that were formerly SBA Form 187. Changes of significance in this section include:

- SBA Supplemental Instructions to Bidders to AIA A701 (2017) – This section now requires the following:
  - List of Major Subcontractors (approx. 5-8) to be submitted **at the time of bid** in Envelope #1. The two-hour window that was allowed in the past awards all savings gained in that two hours to the Prime Contractor at the detriment of the Owner. The removal of the two-hour requirement should allow the Owner, and ultimately the SBA, to realize project savings.
  - The Complete List of Subcontractors & Equipment / Materials Suppliers to be submitted **to the SBA, Owner, and Architect by 4:00 PM EST the day immediately following** the opening of bids. This requirement facilitates meeting the WV Fairness in Competitive Bidding Act.
  - The SBA's Bid Checklist and Bid Certification Forms were combined into a single form. This new form called the "SBA Bid Checklist & Certification Form 401" shall be submitted in Envelope #3 at the time of bid.
  - As previously mentioned, the requirement for a Contractor Qualification Statement is proposed to be removed. Contractors shall be deemed qualified by the SBA upon the review and acceptance of all required submission information by the appropriate parties at the time of bid.
  - Probationary status procedures were clarified to reference the SBA's new documented compliance records. Bids from Contractors on probationary status with the SBA shall not be accepted by the Owner.
  - A Performance Bond and Payment Bond are now due to the Owner via the Architect before signing the Contract within the Owner.
- SBA Supplemental General Conditions to AIA A201 (2017) – This section was merged with all relative language as listed in the West Virginia Division of Purchasing's Supplemental General Conditions. Nearly all changes – unless described below – were vetted by the joint CAWV-AIAWV task force and approved by the WVAGO. In addition, the revisions to this document now require the following information:
  - An Owner approved CPM Schedule must be in place **10 business days prior to** the submission of the first pay application. In addition, the Contractor shall provide the Owner a Cash Flow Projection schedule at the beginning of the project.
  - The Contractor shall submit a revised CPM Schedule along with a schedule of values showing percentages of completion **with each** payment application.
  - The SBA Affidavit of Debts Paid is no longer a bidding or Closeout requirement. The State Purchasing Affidavit that is required offers broader coverage for the Owner.

    - Performance Bond and Payment Bond requirements were moved to the Instructions to bidders because of the new required timeline associated.
    - On projects where the WV Jobs Act is applicable, Contractors shall use the WV Division of Labor's Jobs Act Weekly Payroll Forms in lieu of the standard AIA certified payroll forms. **Copies of each shall be submitted weekly** to the WV Division of Labor.
    - A Compliance and Performance section relative to the Contract Documents was added.
- SBA Construction Schedule Requirements – formerly SBA Form 187, this section describes scheduling requirements of the Contractor. Much of this section was cut to provide a simplified direction for serviceability of the Contractor and usability of the Owner and Architect.

<u>Bid Checklist & Certification Form</u> – The SBA's Bid Checklist form and Bid Certification forms were combined to aid in the streamlining of tasks.

<u>Architecture / Engineering Fee Schedule</u> – Projects with a construction cost of less than $3 million have been assigned a maximum fee that the SBA will reimburse. This was a major gap in the serviceability of this form, and under this new proposal, only A/E fees on projects that include a construction cost of less than $300,000 may be negotiated.

<u>List of Proposed Major Subcontractors (Form 403-A) and Complete List of Subcontractors & Equipment / Materials Suppliers (Form 403-B)</u> – These two now-distinct forms are independent versions of the previous SBA Form 123 List of Proposed Subcontractors & Equipment / Materials Suppliers. The list of Proposed Major Subcontractors is due with the Contractor's bid and by close of business the following day, the Complete List of Subcontractors & Equipment / Materials Suppliers is due to the SBA, Owner, and Architect. The necessary categories on the List of Proposed Major Subcontractors form must be determined in the Construction Document bid package by the Architect, and the Contractor must acknowledge what entity will be performing work or providing services in each category listed. The Complete List of Subcontractors & Equipment / Materials Suppliers must include all firms performing more than $25,000 worth of work or equipment/materials.

<u>Square Foot Cost Analysis Report</u> – This form is the former WVDE-P-1 Application for Project Approval, which provides enhanced project cost reporting at the time of project completion. This form is to help the SBA Staff track current project costs and will aid in projecting future project costs.

NEW POLICIES & PROCEDURES – This section describes policy language that is new to this Fifth Edition of the SBA Policy & Procedures Handbook.

<u>Comprehensive Educational Facilities Planning (CEFP) Procedures</u> – This section describes the SBA requirements to facilitate the development and maintenance of a CEFP as required by WVDE Policy 6200. This section pulls language from the former Rule 1 section and lists steps relative to the current practice with the 2020 digital CEFP project.

<u>Annual Energy Usage Reporting Requirements</u> – Per a series of discussions with the WV Office of Energy and the local American Society of Heating Refrigerating and Air-Conditioning Engineers (ASHRAE) chapter, each school's Energy Usage Index (EUI) shall be reported annually to the WVDE and SBA as a part of a CEFP update. This is to help local and state administrators see an "apples to apples" comparison of utility costs from district to district and statewide.

<u>Grants Applications & Finance Procedures – Grants Overview</u> – This section sets standard rules applicable to all SBA grant funds.

<u>Three Percent Grant Funds</u> – A section is introduced to give procedural language to the eligibility and application process related to the three percent grant fund. This fund is described in the SBA's Legislative Rules, however specific procedural language did not address policies related to this project.

Distressed County Emergency Funds – This section is introduced to formally house the SBA Staff's policies relative to the Distressed County Emergency Fund, which was created in the 2016 Legislative Session.

SBA Funding Formula Procedures – This section is introduced to provide clarity and specific direction on how the SBA funding formula is to be calculated. Currently, the information is found in four different locations.

SBA Grant Contract Procedures – This section is introduced to provide additional direction regarding the SBA's Grant Contracts that are entered into by the LEA and the SBA after a project is awarded.

Requirements for Grants to Supplement Energy Performance Savings Contracts – This section is introduced to provide fair, open requirements for the procurement, development, and construction phases related to ESCO projects where SBA funds are proposed to be a part of the overall project. A procurement review team is established and the scope of services that are to be publicly bid and subcontracted shall be clearly defined and justified. A sample Request for Proposals (RFP) template has been provided as a new SBA Form to be used where SBA funds are proposed for all or a portion of the work associated with an ESCO project.

Architectural / Engineering Supplemental Requirements to AIA B101 (2017) – This new supplemental language is a combination of the SBA's supplemental requirements to Architects Contracts and the West Virginia Division of Purchasing's Supplemental Requirements. Nearly all changes – unless described below – were vetted by the joint CAWV-AIAWV task force and approved by the WVAGO. In addition, the revisions to this document now require the following information:

- The Architect shall gather all bidding information for each project.
- The Architect shall provide a bid tabulation and post-bid budget showing the project balance to the SBA within 72 hours of the close of bids.
- The Architect shall issue standard Notices of Non-Compliance / Non-Conformance to Contractors when the terms of the Contract Documents have not been adhered to or the quality of the Work is not sufficient.
- The Architect shall create and give access to a File Transfer Protocol (FTP) site to allow the Owner and SBA representative access to all project communication including, but not limited to, Requests for Information, Shop Drawings, Data Samples, or Proposed Changed Orders.

Project Closeout Procedures – This section is introduced to provide direction on how projects are to be completed and the flow of money is to occur. A closeout coordination meeting involving the Architect, Contractor, Owner, and SBA Staff is to take place, and additional project cost reporting from the Architect is required.

Evaluation Criteria for Architects / Engineers, Contractors, and Construction Managers – This section was added to establish a consistent, well-documented program of compliance and accountability. The performance of each party to a contract that is executed with the use of SBA funds shall receive a documented, ongoing evaluation of all required tasks.

- The SBA Staff shall establish and implement a program that tracks Architect / Engineer, Contractor, and Construction Manager accountability using standard notices and/or reports to be issued by the project's Architect of Record or the Owner. If the number of severe notices or reports of non-conformance or non-compliance reaches an amount determined by the SBA to be excessive, the SBA Staff may recommend to the Authority to vote to place a Contractor, Architect, or Construction Manager on probation and bar the firm from bidding or applying to work on an SBA funded project for a minimum period of one year.
- At the conclusion of the project, the SBA Staff shall gather information necessary to perform complete and thorough performance evaluations for the Architect / Engineer, Contractor, and Construction Manager (where applicable). The SBA Staff will, as a team, review all project

documents and written communication as well as information provided by the Owner. Using objectively defined data points, where significant and severe deficiencies of the party evaluated are found, the SBA Staff shall recommend to the Authority placing the under-performing contractor on probation.

- The Architect/Engineer shall be evaluated based on meeting design timelines, adherence to the project budget, clarity of the Contract Documents, the issued standard notices of non-conformance or non-compliance issued to the Contractor when necessary, and the overall quality and performance of the Contract Documents.
- The Contractor's performance, including the performance of all Subcontractors under the Contractor's surety for a project, shall be evaluated based on specific factors relating to the conformance and compliance of to the Contract Documents, including, but not limited to, the following: (a.) Quality of Construction relating to the number and severity of non-conformance notices received during Construction, (b.) Project documentation tasks as outlined in the Contract Documents relating to the number and severity of non-conformance notices received during Construction, (c.) Compliance with West Virginia Division of Labor reporting requirements, and (d.) Adherence to the project schedule including milestone and completion dates
- Where applicable, the Construction Manager shall be evaluated based on the management of the project, accuracy of the project budget and schedules, the documented assurances that the Contractor is in compliance with the Contract Documents, and the value the team brings to the project.

<u>Three Percent Grant Application</u> – Currently there is no standard application form for Three Percent Project proposals.

<u>Notice of Defective or Non-Conforming Work</u> – New standard reporting form that demands conformity to the Contract Documents within a given time frame or empowers the Owner to deduct the associated cost of remediation to the Contractor.

<u>Resolution of Defective or Non-Conforming Work</u> – This is a formal notice that memorializes to all parties that the Notice of Defective or Non-Conforming work has been resolved.