



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

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Office of West Virginia  
Secretary Of State

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-  
MAKING REVIEW COMMITTEE**

AGENCY: School Building Authority Of WV TITLE-SERIES: 164-05  
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No  
RULE NAME: 164-05 School Building Authority Contracts and Agreements; Post-Project Evaluation;  
Suspension of Right to Bid

**PRIMARY CONTACT**

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CITE STATUTORY AUTHORITY: §18-9D-20

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

W. Va. Code §18-9D-20 authorizes the Authority to promulgate rules; gives legislative authorization; sets effective date of rules; and allows for technical deficiencies to be waived.

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 11/4/2019

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 12/4/2019

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

N/A

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

This rule proposes to increase accountability standards on SBA-funded school construction projects that meet the desires of the Authority. This rule adds evaluation criteria for the determination of the Lowest Qualified Responsible Bidder. The list of proposed subcontractors and equipment & material suppliers is changed from two hours to 24 hours to align with the West Virginia Fairness in Competitive Bidding Act. A process for a Post-Project performance evaluation of the Architect / Engineer, Contractor, and Construction Manager (where applicable) by the SBA staff is introduced. The power of the Authority to suspend the right of an Architect / Engineer, Contractor, and Construction Manager (where applicable) to bid is introduced.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

The Authority has determined that these changes are prudent and necessary to increase accountability standards in the school construction market in West Virginia.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

N/A

B. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

N/A

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2019 Increase/Decrease (use "-")	2020 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs and Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
<b>2. Estimated Total Revenues</b>	0.00	0.00	0.00

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

N/A

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

**Yes**

**Benjamin Ashley -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.**

TITLE 164  
LEGISLATIVE RULE  
SCHOOL BUILDING AUTHORITY OF WEST VIRGINIA

SERIES 5  
SCHOOL BUILDING AUTHORITY CONTRACTS AND AGREEMENTS; POST-PROJECT  
EVALUATION; SUSPENSION OF RIGHT TO BID

**§164-5-1. General.**

1.1. Scope. -- This legislative rule establishes the guidelines and procedures related to requirements for School Building Authority contracts and agreements.

1.2. Authority. -- W. Va. Code §18-9D-20.

1.3. Filing Date. -- ~~April 30, 2019~~

1.4. Effective Date. -- ~~April 30, 2019~~

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect upon the expiration of ~~April 30, 2029~~.

**§164-5-2. School Building Authority Contracts and Agreements.**

2.1. Grant Agreement.

2.1.a. In order for SBA funds to be utilized for any project, a grant agreement between the educational agency and the SBA must be enacted.

2.1.b. New school designs in West Virginia shall comply with applicable codes and standards as adopted by the State of West Virginia in accordance with §18-9E-3.

2.2. Construction Agreement

2.2.a. ~~Qualified e~~Contractors bidding on SBA projects ~~will shall~~ present ~~acceptable liability insurance levels and~~ a completed "Contractor's Qualification Statement" to the Owner, Architect, and SBA for review prior to the award of the construction contracts. ~~A financial statement shall be required of the lowest qualified bidder(s) being considered for award of the contract. These documents are to be treated in highest confidentiality and are to be reviewed only by those involved with the selection of the contractor.~~ The "Contractor Qualification Statements" including subcontractors shall be submitted to the ~~School Building Authority office~~ Owner, Architect, and the SBA by low bid contractors ~~within 72 hours of the completion of~~ by 4:00 PM the third business day following the bid opening. The Owner, Architect, and SBA shall use the information gathered on the Contractor Qualification Statement to determine the lowest qualified responsible bidder. No single criterion will be considered the controlling factor in determining the lowest qualified responsible bidder. The criteria on the statement used in the contractor evaluation shall include:

2.2.a.1. The relevant experience and years of experience the bidder has in the construction, renovation or building repair business.

2.2.a.2. The continuity, experience and skill of the bidder's work force and that of the bidder's designated subcontractors.

2.2.a.3. The bidder's performance on similar construction projects.

2.2.a.4. The bidder's ability to successfully complete projects within the proposed schedules and deadlines.

2.2.a.5. The bidder's history of compliance with Worker's Compensation and Unemployment Compensation laws.

2.2.a.6. The bidder's history of compliance with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) requirements.

2.2.a.7. The bidder's history of compliance with Federal Prevailing Wage as well as Fair Labor Standards and Wage Payment laws.

2.2.a.8. The bidder's subcontractors' compliance with state regulatory agencies.

2.2.a.9. The bidder's local hiring plan and history of compliance with the West Virginia Jobs Act, (W.Va. Code, Chapter 21, Article 1C) regarding use of the local labor market.

2.2.a.10. The bidder's participation as a party in any legal action where an awarded liability could negatively impact the ability of the bidder to complete this project.

2.2.a.11. Response from bidder's references and recommendations of other owners for whom the bidder has worked.

2.2.b. All bid documents prepared shall require that the lowest qualified bidder(s) submit a completed list of Subcontractors and Major Equipment and Material Suppliers. This information must be submitted by the lowest qualified bidder(s) to the Owner, Architect, and SBA office within two hours after the completion of by 4:00 PM the next business day following the bid opening. Bid openings shall not occur after 2:00 p.m. local prevailing time. Failure to submit the list of subcontractors and major material suppliers within the ~~two-hour~~ time limit will result in the rejection of the bid.

2.2.c. Work Based Learning Opportunities. -- To the extent practical, the constructing contractor on projects involving the new construction and renovations of Vocational, Technical and Adult Education facilities should work cooperatively with the county board of education or Administrative Council to establish work-based learning experienced to introduce county vocational students to construction work practices.

### **§164-5-3. Post-Project Evaluation**

#### 3.1. Post-Project Evaluation.

3.1.a. In order to establish and maintain a high level of accountability on all SBA-funded projects, the evaluation of the performance of all parties to an SBA project shall be performed by the SBA. 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. The following standard tasks related to accountability shall be completed at the appropriate time and, among all other required Contract Documents, shall be used in the SBA performance evaluations:

3.1.a.1. Architect/Engineer Evaluation – The SBA staff shall, at the conclusion of the project, perform evaluations of all Architects / Engineers performing work on each SBA project. The

Architect/Engineer shall be evaluated based on meeting design timelines, adherence to the project budget, the 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.

3.1.a.2. Contractor Evaluation – The SBA staff shall, at the conclusion of the project, perform an evaluation of all Contractors performing work on each SBA project. 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 the Contract Documents including, but not limited to, the following:

3.1.a.2.a. Completion within the time specified in the Contract Documents

3.1.a.2.b. Performance of the Work in conformance with the Contract Documents

3.1.a.2.c. Project Closeout in a timely manner in compliance with the Contract Documents

3.1.a.3. Construction Manager Evaluation (Where Applicable) – The SBA Staff shall, at the conclusion of the project perform an evaluation of the Construction Manager performing work on each SBA project. 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.

#### **§164-5-4. Suspension of Right to Bid**

4.1. Power to suspend right to bid -- If any of these issues found in the Post-Project evaluations fail to meet the requirements of the Contract Documents, the SBA staff will review the project documentation to ascertain the responsibility for the failure(s).

4.2. If the review finds the Architect / Engineer, Contractor(s), or Construction Manager fail to comply with the conditions of the Contract and/or the review finds a failure of performance the Work in conformance with the Contract Documents has been the major contributor to the Project deficiencies, the SBA shall notify the Architect / Engineer, Contractor, or Construction Manager in consideration for suspension of the reasons for the proposed suspension in sufficient detail to describe the conduct upon which the proposed suspension is based. The SBA shall show the causes relied upon for proposed suspension, procedures governing the suspension decision-making, and the potential effect(s) of the proposed suspension.

4.3. Within thirty days of receipt of the notice, the Architect / Engineer, Contractor, or Construction Manager in consideration for suspension shall have the right to submit in writing and/or request to appear before the Authority to give information and argument in opposition to the proposed suspension.

4.4. The Authority shall make a suspension decision. In any suspension decision, the Authority shall make a specific finding, based on the substantial record, whether the public interest requires that the suspension decision extend to all commodities and services of the Contractor and/or Subcontractor, or whether the public interest allows the suspension decision to be limited to specific commodities or services. The SBA may suspend the responsible party from bidding or applying for work on SBA-funded projects for a period of not less than one (1) year or more than two (2) years.