



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL
RULE**

AGENCY: Highways TITLE-SERIES: 157-14
RULE TYPE: Procedural Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: Contract Administration Purchasing Process
CITE STATUTORY AUTHORITY: W. Va. Code §17-2A-15 and §17-4-19

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

May 6, 2021

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

Yes

Rita A Pauley -- 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 157
PROCEDURAL RULE
DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS**

**SERIES 14
Contract Administration Purchasing Process**

§157-14-1. General.

1.1. Scope. -- This rule details procedures and requirements for submitting contract bids for highway construction projects.

1.2. Authority. -- W. Va. Code §17-2A-15 and §17-4-19.

1.3. Filing Date. -- April 6, 2021

1.4. Effective Date. -- May 6, 2021

§157-14-2. Advertisement.

2.1. The Commissioner of the Division of Highways is required by W. Va. Code §17-4-19 to publish proposals for projects as a Class II legal advertisement in the area of the project and in a newspaper of general circulation in Charleston, West Virginia. Proposals are also advertised on the Department of Transportation, Division of Highways, Contract Administration Division website; electronic bids are authorized and accepted through the Bid Express® site www.bidx.com.

2.2. All prospective bidders interested in submitting bids for WVDOT projects, must establish a subscription to the Bid Express website at www.bidx.com. In addition, a contractor can view the fee schedule, install the bid component AASHTOWare Project Bids™, and create a Digital ID (electronic signature). The AASHTOWare Project Bids™ Bid Component detailed instructions for set up and installation are available at AASHTOWare Project Bids™ Set up instructions. A comprehensive training video is also available for viewing the installation and use of the AASHTOWare Project Bids™ Bid Component.

2.3. During the period of advertisement, the contractor may have questions regarding the contents of the proposal and may submit those questions to the Department using the Bid Express® platform.

157-14-3. Contractor Prequalification

3.1. Contractors must be prequalified to submit a bid. To become prequalified, a contractor must submit a Contractor's Prequalification Statement. The Division uses the prequalification process to ensure bidding firms have the experience, equipment, and resources to deliver the contract work. A contractor will be issued a Certificate of Qualification, the amount of incomplete work they may have under contract at any one time, and the type of work for which they are qualified to perform. The Contractor's Prequalification Statement is available on the Department's website.

3.2. The Department will only accept bids from contractors who are prequalified and eligible to bid. A contractor may request approval to bid in excess of the allotted amount as noted by the Certificate of Qualification. The Department has the discretion to make decisions on the bidder's requests which it deems are in the best interest of the State of West Virginia.

157-14-4. Pre-bid meeting.

4.1. The Contract Administration Division may elect to hold a pre-bid meeting during the advertisement period. The meeting may be mandatory or optional for prime contractors. If the meeting is mandatory, a representative for the prime contractor must attend, otherwise their bid will be rejected.

4.2. The pre-bid meeting must be held sufficiently in advance of the letting to allow the contractors and the Department time to react to the questions and post any responses or amendments to the proposal.

157-14-5. Bidder's responsibility.

5.1. The submitting contractor must carefully examine the plans, specifications, special provisions, contract forms and the work site. When the contractor submits a bid, they are asserting they have made such examinations and agree with the character, quality, and quantity of work to be performed.

5.2. The contractor acknowledges the quantities shown on the plans and the schedule of items are only estimates, and that increases or decreases to the quantities are possible. The contractor further agrees to accept the unit prices for the work performed and accepted, unless otherwise provided for in the contract. The Division will make every effort to provide sufficient information to the bidders. The contractor must carefully follow and comply with all instructions for submitting a bid or they risk having their bid rejected.

157-14-6. Bid opening.

6.1. State and Federal law, rules and regulations require the bid letting to be open to the public, and the submitted bids must be read aloud. They also require the work to be awarded through competitive bidding, which is achieved by having all contractors submit confidential bids no later than the letting date and time.

6.2. The electronic bidding system prevents bids from being submitted after the letting time has expired. The bids which are received prior to the deadline are downloaded and securely decrypted from the Bid Express® website. The Division representative at the bid opening announces the project name and number, the goals for the project and the type of work. The bids are then announced from the lowest price to the highest, including the contractor's name and the total dollar amount of their bid.

157-14-7. Evaluation of Proposals.

7.1. Immediately following the bid opening, the Division begins to assess all the bids to determine which should be accepted. The review process will examine if the bid is considered responsive and if the bid analysis confirms the bid is valid. The Division always reserves the right to reject all bids if it is deemed to be in the best interest of the State of West Virginia.

7.2. The conditions for disqualifying bidders are:

7.2.a. A bidder may only submit one proposal for the work, and submitting more than one proposal by an individual, firm or corporation may result in disqualification.

7.2.b. The bidder is required to provide an affidavit attesting their bid was prepared and submitted without collusion with other bidders. Any evidence of collusion among bidders will likely result in both bidders being ineligible to bid future Department work until reinstated.

7.3. During the bid review process, the Division will confirm if the contractor is on the debarment list by checking the System for Award Management and the West Virginia Debarred and Suspended Vendor List. Contractors that are currently debarred are not allowed to submit a bid. The State may not award or renew contracts with vendors which are not in good standing. The Division will confirm with the Tax Department if outstanding debts are owed to the State.

7.4 The law requires a proposal guaranty or bidder's bond to accompany and be submitted with each bid. The proposal guaranty is set at an amount equal to no more than 5% of the bid, and not less than \$500.00.

7.4.a. Failure to submit a proposal guaranty is cause for rejection of a bid. Electronic bonds are preferred; the Department will accept a cashier's or certified check up until 4:00 PM the day prior to the bid opening.

7.4.b. The contractor will forfeit their proposal guaranty if they are determined to be the low bidder, and they fail to execute the contract or agreement.

7.4.c. The other bidders' proposal guaranties are released once the Division has secured a fully executed contract or agreement. A contractor may withdraw their bid prior to bid opening without fear of forfeiture.

157-14-8. Lowest responsible bidder.

8.1. The Division is required to accept the lowest responsible bidder. The bids are opened and compared based on the total price, which reflects the sum of the contractor's unit price per item and the estimated quantities. The contractor submitting the lowest overall cost is declared the low bidder.

8.2. A responsible bidder is defined as a contractor that is ready, able and willing to furnish the labor and materials required to complete the contract, complies with all the applicable laws of West Virginia, and has supplied a valid bid bond or proposal guaranty (W. Va. Code §5-22-1). It is not enough to just submit the lowest price - the bidder must also be considered responsible as defined by these statutes.

157-14-9. Tied bids.

9.1. In the event there is a tie between the low bidders, where the total price submitted is identical for two or more bidders, the low bidder will be decided by lot, which is described as follows. The Division will place the names of the contractors in a container and have the State Highway Engineer draw a name. The drawing will be witnessed by at least three persons, and if time permits, the contractors should be given an opportunity to attend the drawing.

9.2. The Division may consider whether each tied bidder is responsive and has complied with all other State and Federal requirements, including labor laws and business concerns, before drawing lots. The Division may remove a bidder from the lot if the bidder is determined unresponsive or out of compliance.

157-14-10. Disadvantaged business enterprises (DBE).

10.1. When a proposal contains the requirement for participation by DBEs, the participation goal the contractor submits will be compared to the project goals contained in the proposal. If the contractor's goal meets or exceeds the stated goals in the proposal, the bid is considered responsive (with respect to the DBE special provision) and may be accepted. If the contractor's goals do not meet the stated goals in the proposal, the contractor may be asked to demonstrate that a good faith effort was made to subcontract work to DBE firms, but the efforts were unsuccessful. If the contractor's goals do not meet expectations and the contractor cannot demonstrate a good faith effort, the bid may be rejected and awarded to the next lowest bidder.

10.2. The Division considers the DBE goals for a project to be an essential component of the work and contractors who fail to make a reasonably good faith effort risk having their bids rejected.

157-14-11. Bid analysis.

11.1. The evaluation of the proposals must also include a bid analysis. This requires a thorough and comprehensive bid analysis, and the Division must examine the unit bid prices for reasonable conformance with the Engineer's estimate. If extreme variations exist, the bid must be thoroughly evaluated. Where obvious unbalancing exists, the Division must provide written justification to accept or reject the bid. The bid analysis is the tool to detect whether collusion or bid rigging is occurring, whether the Division has received a fair price for the work, and if any unbalancing of the bids may result in a windfall for the contractor and corresponding disadvantage to the Division.

11.2. The Division may scale the level of scrutiny provided by the bid analysis to be commensurate with the complexity and value of the project. The Division is more likely to expend more effort on the bid analysis for projects of significant value or risk, complex projects, and projects with limited competition.

11.3. A mathematically unbalanced bid means the bid contains unit prices for items of work that do not reflect reasonable actual costs plus a reasonable proportionate share of profit, overhead and other indirect costs. The contractor may still be the lowest bidder, with the lowest total cost, but how they distributed the costs to the pay items is mathematically incorrect. For example, a contractor that bids one penny as unit price for an item of work has placed the cost for that work in other items. A mathematically unbalanced bid is an acceptable bid provided the result of the unbalancing does not result in a windfall for the contractor and a corresponding increase in cost to the Division.

11.4. A materially unbalanced bid means a bid which generates a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the Division. The contractor has shifted the costs between items of work anticipating a potential windfall from doing so. For example, a contractor believes the quantity of a specific item of work is likely to overrun, so they add money to the unit price above the true cost of performing the work. The overrun in actual work performed and corresponding inflation of the price, result in a windfall for the contractor. In some situations, the increased cost to the project is large enough it would change who the low bidder is, if the

proposal included the correct quantity of work. In this situation, the bid may be declared materially unbalanced and rejected.

11.5. The Federal Highway Administration (FHWA) provides guidance on bid analysis in their publication "Guidelines on Preparing Engineer's Estimate, Bid Reviews and Evaluation" (Guidelines). The guidelines provide direction regarding the factors the Division will use during the bid analysis. These factors include:

11.5.a. Comparison of the bids against the Engineer's estimate.

11.5.b. The number of bids submitted.

11.5.c. The distribution or range in price of bids received.

11.5.d. The identity and geographic location of the bidders.

11.5.e. The potential for savings if the project is re-advertised.

11.5.f. The bid prices for the project under review versus bid prices for similar projects in the same letting.

11.5.g. The urgency of the project.

11.5.h. The current market conditions and workload.

11.5.i. If there is evidence of any unbalancing of bids.

11.5.j. Any large variances in bid prices compared with the Engineer's estimate and the other bids.

11.5.k. Is there justification for the variance in pricing?

11.5.l. Any other factor the Department deems important.

11.6. The bid analysis begins by tabulating the bid item detail for at least the three lowest responsive bids and includes the total bid amount for all remaining bidders. The bid item detail reflects the unit price bid for each pay item, extended by the estimate of quantities, for a line item total and project total. The tabulation is generated from the contractor's electronic bid.

11.7. The Division uses proprietary software and expert knowledge to perform the bid analysis. This is investigative work where answers to the bid analysis factors described above, are only indicators of potential problems, and that professional judgement must be applied when processing the findings. Any single finding on its own may not raise a concern, but collectively, several indicators may indicate a trend, or a need for more in-depth analysis. The opposite is also true, such that one indicator does not prove there is a problem with the bid, and the analyst must be able to reason why the contractor priced the work the way they did, or if there is a potential risk for the Division.

11.8. The results of the bid analysis are presented to the Award Committee at the Award Meeting.

157-14-12. Clarification.

Seeking clarifications from the contractor is an acceptable tool to use when appropriate and may provide the Department with valuable insight. However, negotiating with the contractor during the period following the opening of the bids and before the award is expressly prohibited by federal law. There can be no change to the terms or pricing of the contract at this time.

157-14-13. Award.

13.1. The Division holds an Award Meeting to consider the information from the bid analysis, to confirm the bid is responsive, that the contractor is eligible to bid and that the contractor is in good standing. The award meeting results in a recommendation to the State Highway Engineer, or designee, to accept or reject the bid. The State Highway Engineer, or designee, carefully considers all information and reaches the final decision.

13.2. The Award Committee is led by the State Highway Engineer (or designee), and comprised of the Deputy State Highway Engineer – Construction, the Contract Administration Division Director, the Contract Administration Division Assistant Director(s), the Contract Administration Division Contract Analytics Coordinator, the Contract Administration Division Procurement Section Manager (or designee), the Engineering Division Director (or designee), the Traffic Engineering Division Director (or designee) and the Programming Division Director (or designee). The majority of these members must be present in order for the meeting to be held. Other interested parties or invited guests may also attend the meeting.

13.3. The award meeting is the venue for the decision makers to consider all the information and determine the most appropriate course of action. The options include, perform additional analysis of the bid documents and supporting information, seek clarifications from the contractor regarding their pricing or information contained in the supporting bid documents, to accept the bid as submitted, or to reject the bid. The committee documents the decision and when the decision is to reject the bid, senior management and the FHWA (for a full oversight project according to the Stewardship and Oversight Agreement) will be briefed prior to taking formal action. The decision to reject a bid is not taken lightly and senior management should always be consulted during the process.

13.4. If the committee decides to reject a bid, the bid process may repeat itself with the next bidder until an award is made, or until all bidders are exhausted. Should the Division decide to reject all bids for a Federal-aid project, the FHWA should be consulted for concurrence.

13.5. The Division may choose to accept a bid which is both mathematically and materially unbalanced but may risk federal participation in the project and therefore must consult FHWA as part of the decision to award such a bid.

13.6. The Division retains the right to cancel the award of any contract at any time before the contract is executed by all parties without assuming any liability.

13.7. The successful bidder will be notified within 30 calendar days from the bid letting, that their bid has been accepted. The Division is limited to 30 days unless they reach an agreement with the contractor to extend the award period; any extension should be agreed to in writing. The contractor is provided the contract documents package to sign and return.

13.8. The contractor has 20 days from the date of award to execute the contract and furnish a performance bond. Failure to execute the contract and supply the bond is just cause for annulment of the award and forfeiture of the proposal guaranty .

13.9. The contractor provides the Division with a fully executed contract, a certificate of insurance and the performance bond. The documents are carefully reviewed by the Division and if acceptable, the contract is presented to the Commissioner for signature.

13.10. The Division provides notification of the fully executed contract to the contractor, and appropriate staff. The notification triggers the District to issue a notice to proceed allowing the contractor to begin work on the project.