



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

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Office of West Virginia  
Secretary Of State

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

AGENCY: Highways TITLE-SERIES: 157-01

RULE TYPE: Procedural Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: RULES RELATING GENERALLY TO VARIOUS  
FUNCTIONS OF THE COMMISSIONER OF  
HIGHWAYS

CITE STATUTORY AUTHORITY: W. Va. Code §17-2A-4b and 8

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

November 12, 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 1  
RULES RELATING GENERALLY TO VARIOUS  
FUNCTIONS OF THE COMMISSIONER OF HIGHWAYS**

**§157-1-1. General.**

1.1. Scope. -- This procedural rule addresses various functions of the office of the Commissioner of Highways and is submitted pursuant to the provisions of W. Va. Code §29A-3-3.

1.2. Authority. -- W. Va. Code §17-2A-4b and 8.

1.3. Filing Date. -- October 12, 2021

1.4. Effective Date. -- November 12, 2021

**§157-1-2. Commissioner's Orders.**

2.1. Purpose. The purpose of this section is to establish a system by which all orders of the Commissioner of Highways are permanently recorded and maintained a manner that is conveniently accessible.

2.2. Scope of Commissioner's Order. The orders of the Commissioner of Highways are official determinations or decisions which relate to the internal management and organization of the Division of Highways, or to a specific person or group of persons, or to the public in general.

2.3. Commissioner's Order Database. The Commissioner of Highways maintains in his office a record of all orders issued by him or her, designated as the Commissioner of Highways' Order Database. All orders issued by the Commissioner during each day shall be entered therein, and all orders shall be formatted and archived in a way which affords access to each order issued by the Commissioner.

2.4. Effective Date. Each order of the Commissioner of Highways filed in the Commissioner's Order Book as provided in the preceding section, is effective immediately upon filing, unless provided by law or in the order.

2.5. Copies of Commissioner's Orders; Distribution. The Commissioner of Highways shall provide a certified copy of any Commissioner's Order, upon request to any person who is directly affected by an order. In addition to any person requesting a copy of an order, the Commissioner may furnish copies to any governmental agency, person, firm, or organization to provide the effective notice of the order.

**§157-1-3. Hearing Procedures.**

3.1. Purpose. The purpose of this section is to provide standards of conduct for all hearings by and before the Commissioner of Highways.

3.2. Scope. This section applies to hearings conducted by the Commissioner of Highways

concerning the rights of citizens which may be adversely and directly affected by an action of the Commissioner except as provided in §3.2.a of this rule. A hearing may be initiated by the Commissioner or a citizen.

3.2.a. This section does not apply to claims heard and determined by the West Virginia Legislative Claims Commission. Nor does it apply to hearings and public meetings held by the Commissioner for purposes of acquiring information, making findings, and determining courses of action and procedure relative to the location of any road or proposed road, or to the advancement and improvement of the state road system.

3.2.b. This section will be applied in harmony with applicable state statutes and in case of conflict, state statutes shall prevail.

3.3. Records Pertaining to Hearings. The Commissioner of the Division of Highways or his or her designee shall be the presiding officer and shall be responsible for all administrative and clerical duties relating to hearings and for all records and pleadings pertaining to hearings. The presiding officer shall receive all applications, petitions, protests, claims or other written documents relating to a hearing before the Division of Highways. The presiding officer will, upon request, advise any party as to the form or condition of any paper to be filed in any proceeding before the Commissioner. He or she will maintain a docket book in which shall be entered each formal case on complaint, claim, application or petition, investigation, or protest, with a file number corresponding to the number of the case together with brief chronological notations of the proceedings had in the case. He or she shall also maintain the Commissioner's Order Book, in which shall be recorded, on the day of their filing, any orders made or passed by the Commissioner of Highways in the performance of his or her statutory duties.

3.3.a. All papers or documents, of whatever character, which are received or filed with the Division of Highways, shall be stamped showing the date of receipt or filing thereof.

3.4. Complaints, Claims, Applications, Petitions, Protests. Claims, complaints, or applications may be either informal or formal.

3.4.a. Informal Pleadings and Procedures. Informal claims, complaints or applications may be made by letter or other writing addressed to the WV Department of Transportation, Commissioner of Highways, Building 5, Room A109, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305-0430, or the office of the District Administrator of the affected district. Matters thus presented, if their nature warrants, may be negotiated and settled by the Commissioner of Highways, the District Administrator, or some other duly authorized employee, without formal hearings. If the matters cannot be resolved satisfactorily to all parties, the proceeding is held to be without prejudice to the right of any party to file and prosecute a formal claim, complaint or application, whereupon the informal proceeding will be discontinued. No form of informal complaint, claim or application is prescribed, but the letter or other writing must contain a clear and concise statement of the facts and the specific relief sought. The names of all parties affected or involved shall be stated in full, and the address of each party, with the name and address of his attorney, if any, stated therein or thereon.

3.4.b. Formal Pleadings. All formal complaints, claims, applications, petitions and protests shall be verified and addressed to the Commissioner of Highways. Such papers shall set forth plainly and distinctly the grounds for the relief sought or reasons for protest and should be written as fully and

completely to advise the Commissioner of Highways of the nature of the grievances or alleged violations of law.

3.4.b.1. The names of all parties affected or involved shall be stated in full and the address of each party, with the name and address of his or her attorney, if any.

3.4.b.2. Two copies of all papers shall be filed with the presiding officer.

3.5. Answers or Responsive Pleadings. Within thirty days after receipt of a formal pleading or protest, the Division of Highways or the director of the division affected shall file an answer to such pleading or protest. The answer shall fully and plainly inform the parties involved of the nature of the Commissioner's defense or reason for the decision or action upon the particular matter involved. The Division of Highways shall serve such answer upon the parties either in person or by registered or certified mail, facsimile or email to the party or his attorney.

3.6. Stipulations or Agreed Facts. The parties to any proceeding may, by stipulation in writing filed with the presiding officer, agree upon the facts, or any portion thereof, involved in the controversy, which stipulation shall be recorded and used at the hearing.

3.7. Hearings; Notices; Evidence. When issue is joined by the service of an answer on the complainant upon any matter for which the Commissioner is required by law to hold a hearing or shall pursuant to this rule determine that a hearing shall be held, the presiding officer will assign a time and place for the hearing, which will be at the Division headquarters in the City of Charleston or elsewhere in the state at the discretion of the Commissioner. The hearing will be held by the presiding officer designated to hold hearings.

3.7.a. Notices. The presiding officer shall give all parties not less than ten days' notice of the time and place of hearing, which may be served upon the parties by personal delivery, or by registered or certified mail, electronic means, or in any manner by which a notice may be served at law.

3.7.b. Evidence. The parties must prove the existence of the facts as alleged in their pleadings. The presiding officer will hear such proof of facts as he or she may deem proper and reasonable, and may make such investigation and enter such order as the facts justify and the circumstances may require.

3.7.b.1. The presiding officer shall not be bound by common law or statutory rules of evidence in conducting hearings. He will admit all testimony or other evidence having reasonable probative value, but will exclude immaterial, irrelevant or unduly repetitious testimony. He or she shall, however, give effect to any rules of privilege recognized by the law of this state.

3.7.b.2. All evidence, including records and documents in the possession of the Commissioner of Highways may be duly offered and made a part of the record in a case. Every party to the proceeding shall be afforded adequate opportunity to rebut or offer countervailing evidence.

3.7.b.3. The presiding officer may take official notice of any generally recognized fact or any established technical or scientific fact; but parties shall be notified either before or during the hearing or by full reference in preliminary reports or otherwise, of the facts so noticed, and they shall be afforded an opportunity to contest the validity thereof.

3.7.b.4. Witnesses shall be examined under oath in the manner and form, and in the order designated by the presiding officer. If the presiding officer so directs, or any party in interest so

requests, the testimony given shall be reduced to writing or such other form of recording as the presiding officer may direct and preserved in the Commissioner's files. Should any party in interest request a transcript of the proceedings or should the presiding officer direct that a transcript be prepared, then sufficient copies shall be made and delivered to each party making such request, and at the expense of the person making the request.

3.8. Depositions. The testimony of any witness may be taken by deposition at the instance of a party, in any proceeding or investigation at any time after the same is at issue, with the consent of the Commissioner. The presiding officer may, of his or her own motion, order testimony to be taken by deposition in any proceeding or investigation pending before him, at any stage of such proceeding or investigation.

3.9. Subpoenas. Subpoenas requiring the attendance of witnesses, from any place in the State of West Virginia, at any designated place of hearing before the presiding officer for the purpose of taking the testimony of such witness, and subpoenas requiring the production of documentary evidence, will be issued upon the application of either party, by the presiding officer.

3.10. Decisions. Every decision of the presiding officer in a contested case shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each contested issue of fact without recital of evidence.

3.11. Service of Notices, Subpoenas and Decisions. All notices shall be served by personal delivery or by registered or certified mail or by electronic means to each party to the proceeding or to his or her attorney of record, or as provided by law. Every decision when made by the presiding officer shall be recorded in the Commissioner's Order Book and a copy served forthwith by personal delivery or by registered or certified mail or electronic means to each adversary party to the proceeding or to his or her attorney or record.

**§157-1-4. Scholarships for Prospective Division of Highways Personnel.**

4.1. General. Pursuant to the provisions of W. Va. Code §17-2A-4b, the Commissioner of Highways is authorized to award scholarships to competent persons, whether employed by Division of Highways or not, for the purpose of enabling and encouraging them to attend a college or university to pursue such course of study as may be approved by the Commissioner of Highways, to aid in attracting and holding competent personnel for the Division of Highways. No more than fifteen persons may hold such scholarships at any one time.

4.2. Eligibility. To be eligible for a scholarship, an applicant must:

4.2.a. have a minimum overall (cumulative) college grade point average (GPA) of 2.50 on a four-point scale;

4.2.b. be enrolled in an accredited college or university program within the State of West Virginia seeking a degree in engineering, computer sciences, accounting, a doctor of juris prudence, or other programs for professionals and para-professionals which have an application to some aspect of the activities of the Division of Highways;

4.2.c. declare an intent to work for the Division of Highways immediately following the date of the receipt of an eligible degree;

4.2.d. complete and file, as referenced in this rule, an application as well as comply with all other requirements adopted by the Commissioner of Highways;

4.2.e. be a Division of Highways Co-op student in good standing for at least one year; and

4.2.f. be entering the junior year of college in degree program of study or second year of law school.

4.3. Application. Applicants may request an application packet by visiting or contacting the Division of Highways, Human Resources Division, 1900 Kanawha Boulevard, East, Building 5, Room 317, Charleston, West Virginia 25305-0430, telephone (304) 558-3111 or [DOHCareers@wv.gov](mailto:DOHCareers@wv.gov). The following must be delivered or mailed to the Division of Highways at the address specified in the application packet by the date prescribed by the Commissioner of Highways:

4.3.a. a completed application packet with all specified forms with information printed or typed legibly and with original or digital signatures;

4.3.b. a written essay of not less than 300 or more than 500 words explaining why the applicant is interested in the Division's scholarship program; and

4.3.c. an official college transcript.

4.4. Applicant Review and Ranking. Applications will be reviewed and those applicants meeting the eligibility requirements will be ranked according to the following criteria:

4.4.a. college grade point average;

4.4.b. written essay;

4.4.c. honors and awards from, and participation in, technical or academic organizations;

4.4.d. vocational education; and

4.4.e. work experience as a Co-op documented by recommendation of Division of Highway supervisor of applicant.

4.5. Personal Interview. If after receiving the application and other papers required by the preceding sections, the Commissioner feels that the applicant is entitled to further consideration, a personal interview will be arranged and the applicant will be notified of the time and place at least ten days in advance.

4.6. Award of Scholarship. Upon the basis of the documented information and personal interview, the Commissioner may award a scholarship to such person or persons as he considers competent and entitled thereto. The Division will send a written notice to applicants selected to receive a scholarship informing them of the amount to be awarded for the scholarship.

4.6.a. Any such scholarship shall carry a stipend in an amount fixed by the Commissioner, not to exceed \$3,000 per semester.

4.6.b. The sum so awarded will be paid to the recipient of the scholarship in equal installments

not exceeding \$3,000, at the beginning of each quarter or semester for which the recipient is enrolled.

4.7. Execution of Notes. Each recipient of a scholarship will be required to execute a negotiable promissory note prior to receiving each quarter or semester stipend. The note will be in a form prescribed by the Commissioner and will set forth the terms and conditions of the scholarship including, but not limited to, the amount of the stipend and the requirements of continued eligibility pursuant to section 4.8 of this rule. The negotiable promissory note shall state that if the recipient is held in default at any time prior to or after graduation, he/she must choose one of the following repayment plans: a) repayment of the full amount within 48 months with no interest accruing to the debt; or b) repayment of the full amount within 60 months with 6% annual interest added to the debt.

4.8. Maintaining Scholarship Eligibility After Award. In order to maintain eligibility, the scholarship recipient must: a) be enrolled as a full-time college student pursuing the eligible declared degree program with a minimum of 12 credit hours of course study each semester; b) maintain an overall institutional grade point average of 2.50 cumulative through graduation; c) maintain employment in the Division of Highways' Co-op program until graduation unless relevant summer employment in the field of study is obtained elsewhere and approved by the Commissioner of Highways; and d) receive satisfactory evaluations from the Co-op supervisor. The recipient enrolled in the Co-op program will complete an evaluation at the end of each Co-op year on his/her Co-op experience and submit it to the Division of Highways Training and Development Section.

4.8.a. If the scholarship recipient fails to meet the minimum grade point average or fails to meet the minimum credit hours for a single quarter or semester, eligibility will be maintained if: a) the recipient receives credit for no fewer than 12 credit hours in each successive quarter or semester; and b) attains a grade point average of at least 3.00 cumulative in subsequent years for all quarters or semesters thereafter until graduation.

4.8.b. If the scholarship recipient fails to maintain employment as a Division of Highways Co-op, the recipient is in default of the scholarship agreement and will receive no further scholarship funds. Upon graduation, the defaulting recipient is required to repay the amount of funds (s)he has received by setting up a repayment schedule with Division of Highways' Finance Division, Accounts Receivable Section.

4.9. Employment Credited Against Notes. If, upon graduation, or completion of the approved course of study, the person awarded the scholarship herein described enters the employ of the Division of Highways and remains so employed, the Commissioner of Highways will credit the oldest outstanding note of such person in the amount of \$1,500.00 for every six-month period that such person is employed by the Division of Highways.

4.10. Default. The Commissioner of Highways will declare a recipient in default of the scholarship agreement and will require the recipient to repay all scholarship funds received from the Division of Highways if the recipient: 1) withdraws from the education institution; or 2) fails to comply with any portion of these rules or the promissory note; or 3) changes their major or declared course of study.

4.11. Repayment. If a scholarship recipient is required to repay funds as a result of being declared in default or as a result of leaving the employ of the Division of Highways prior to earning full credit for all notes, a repayment schedule will be established. The recommended repayment schedule will be: a) repayment of the full amount within 48 months with no interest accruing to the debt or b) repayment within 60 months with 6% annual interest added to the debt. However, the scholarship recipient may elect a shorter term for repayment and an alternative schedule may be approved by the Division of

Highways business manager if it meets the needs of the agency and/or the recipient.

4.11.a. The scholarship recipient will make the first installment payment 90 days after being declared in default or after leaving the employ of the Division of Highways.

4.11.b. Installment payments may be temporarily reduced or deferred and the prescribed repayment schedule extended if the scholarship recipient demonstrates an inability to pay due to catastrophic illness or family emergency. The recipient must submit a written request and justification for the temporary payment reduction or suspension to the Commissioner of Highways for approval. Any reduction, deferral or extension will not relieve the scholarship recipient's responsibility to repay all funds.

4.12. Deviation. Any deviation in the process or policies dictated by Section 4 of this rule must have the written approval of the Commissioner of Highways.

#### **§157-1-5. Location, Relocation, Classification or Reclassification of State Roads.**

5.1. General. Pursuant to the provisions of W. Va. Code §17-2A-8(3), the Commissioner of Highways may conduct investigations and experiments, and he may hold formal or informal hearings or other public meetings and conferences for the purpose of acquiring information from which he can determine future courses of action and procedure relative to the state road system.

5.2. Commissioner's Order; Distribution. When the Commissioner has received the results of any engineering study or survey, or investigation, or when as the result of any hearing, public meeting or conference, he determines the location, relocation, classification or reclassification or designation by number of any road in this state, he shall set forth his conclusions in an order and spread such order upon the pages of the Commissioner's Order Book to be retained as a permanent record of his conclusions and his actions regarding any such road. All such orders of the Commissioner shall become effective immediately upon being signed and entered in the Commissioner's Order Book by the Business Manager of the Division of Highways.

5.2.a. Copies of Commissioner's Order. Copies of any such order of the Commissioner shall be sent to the office of the District Administrator of the District wherein any such road is located and shall be kept available for public inspection during all normal business hours. The Commissioner may also send copies of any such order to such public officials or private persons or groups as he may feel will provide adequate public notice of his action.

5.3. Petition of Interested Persons. Any group of twenty-five or more persons interested in the location, relocation, classification or reclassification of any road or proposed road may file a petition in writing with the Commissioner of Highways setting forth therein the request, complaint or demand of the persons signing such petition, and the Commissioner shall immediately designate one or more employees of the Division of Highways to investigate the situation described in the petition. All such petitions shall be directed to the WV Department of Transportation, Commissioner of Highways, Building 5, Room A109, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305-0430, and shall contain at least the following information:

5.3.a. A description of the road or proposed road in as definite terms as possible, with references to route numbers and approximate distances from intersections with other roads or from city limits where possible.

5.3.b. A concise and clear statement of the problem or situation which the petitioners are

asking the Commissioner to resolve.

5.3.c. A concise and clear statement of the action the petitioners want the Commissioner of Highways to take to remedy the situation described in the petition.

5.3.d. Signatures and mailing addresses of the petitioners.

5.4. Investigation by Department. Upon receipt of any such petition, the Commissioner of Highways shall immediately forward a copy thereof to the District Administrator of the District wherein the road problem or road situation described in the petition is located, and request that a complete investigation be undertaken. The District Administrator shall then immediately commence such investigation, and during the course thereof, no less than two of the persons who have signed their names to the petition shall be personally interviewed by the District Administrator or his duly authorized representative. Where possible, the first two persons who have signed the petition will be interviewed.

5.5. Hearing. If, after completing his investigation, the Commissioner of Highways believes that a hearing should be held, or if the petitioners request a hearing, the Commissioner shall set a time and place for the hearing and shall notify all persons who have signed the petition and any other person he feels may be interested in order that all such persons may appear at the hearing and express their views. The Commissioner may, if in his opinion the situation warrants, cause a notice of the hearing to be published in some newspaper of general circulation in the county in which the road to be affected is situated.

5.6. Commissioner's Determination. Upon the completion of his study of the results of the investigation provided for herein, and after reviewing the evidence presented at the hearing provided for herein, if such hearing be held, the Commissioner shall decide whether the relief requested by the petition shall be granted and will notify at least the first five persons whose signatures and mailing addresses appear on the petition of his conclusions, unless the petitioners have designated some other person or group of persons to receive such notice. If the Commissioner's decision is such that it must be put into effect by means of a formal Commissioner's Order as provided for herein, the Commissioner shall send copies of the order to at least the first five persons whose signatures and mailing addresses appear on the petition.

**§157-1-6. Abandonment and Discontinuance of State Roads.**

6.1. General. Pursuant to the provisions of W. Va. Code §17-2A-8(12), the Commissioner of Highways may discontinue, vacate and close any road or highway, or any part thereof, where he finds the continuance and maintenance of any such road unnecessary and improper.

6.2. Petition of Interested Persons. Any person whose property or property interests are affected by any road or highway subject to the control and jurisdiction of the Commissioner of Highways may petition the Commissioner for the abandonment and discontinuance of any such road. The petition shall describe the road, or portion of the road, in such a fashion and by reference to some form of land marks so that it can be readily located by Division of Highways' personnel; the petition shall state the reasons why the petitioner wants the road abandoned; and the petitioner shall sign his full name and provide his mailing address.

6.3. Hearing. Upon receiving a petition for the abandonment of a road, the Commissioner may, if he deems it necessary or desirable, or shall, if the petitioner so requests, set the matter for a hearing as provided in section 3 of this rule, and upon the basis of the evidence produced at the hearing, the

Commissioner shall determine whether the road or portion of the road should be abandoned. If requested by the petitioner or if the Commissioner in his discretion deems it advisable, a notice of the proposed abandonment of said road shall be advertised in a newspaper of general circulation in the county in which the road is located as a Class I legal advertisement advising any person having objections to the proposed abandonment to notify the Commissioner by registered letter at least ten days prior to said date of the proposed abandonment of his desire for a hearing in which event the Commissioner shall set a hearing at the earliest convenient time. If a public hearing is requested, the time and place of said hearing shall be advertised in the same manner as above set forth.

6.4. Investigation by Commissioner. The Commissioner of Highways may on his own motion, cause an investigation to be made of any road or highway, and upon the basis of the information so produced, determine whether it is in the best interests of the state for a road, or a part of a road, to be abandoned and discontinued, and if he finds that it is in the best interests of the state so to do, he may abandon and discontinue the same. Where such an investigation is made by the Commissioner prior to a hearing, as provided for in the preceding section, the Commissioner shall produce the findings of his investigation at the hearing and allow all other interested parties to either rebut or support his findings.

6.5. Abandonment by Commissioner's Order. In every case where the Commissioner of Highways determines that it is in the best interests of the state to abandon and discontinue a road or portion of a road, he shall abandon, discontinue, vacate or close the same by a formal Commissioner's Order, duly entered in the permanent Commissioner's Order Book as provided for in section 1 of this rule. Any such road or portion of a road shall be abandoned as of the date the Commissioner's Order is entered in the Commissioner's Order Book.

6.6. Copies of Commissioner's Order of Abandonment. The Commissioner shall send a certified copy of any order wherein a road or a part of a road is abandoned, discontinued, vacated or closed to the following persons:

6.6.a. The office of the District Administrator of the District where any such road is located, which order shall be available for public inspection during all normal business hours;

6.6.b. The Clerk of the County Court of the county where the abandoned road is located;

6.6.c. Any person who has notified the Commissioner that his personal or property interests may be affected by the abandonment, discontinuance, vacating or closing of the road in question.

#### **§157-1-7. Procurement Procedures for Negotiated Contracts.**

7.1. Purpose. To set forth procedures for negotiated contracts to ensure that a qualified consultant is obtained through an equitable selection process and that prescribed work is properly accomplished in a timely manner at a just and reasonable cost pursuant to 23 CFR 172 for federally funded work and pursuant to W. Va. Code §5G-1, et seq., for state funded work.

7.2. Application. This rule applies to all design services and design related service contracts financed with federal-aid highways funds and contracts authorized under procedures codified in State statutes funded by State funds such as:

- \* project management
- \* construction management and inspection
- \* feasibility studies
- \* preliminary engineering

- \* design engineering
- \* design
- \* engineering
- \* surveying
- \* mapping
- \* architectural
- \* materials, inspection, sampling, and testing
- \* archaeological investigation
- \* historic investigation
- \* related services to any above

7.2.a. When it is necessary to utilize the services of a consultant, the Division Director or the District Engineer/Manager will submit the reasons for so doing through appropriate channels to the Commissioner, or designee, for approval. The request will also indicate whether competitive or non-competitive selection is appropriate. Competitive selection must be used for all federally funded work. Non-competitive selection may be used on state funded work, provided that in all non-competitive selections, justification must be demonstrated in accordance with the procedures of Subsection 7.7 of this Rule.

7.2.b. The West Virginia Department of Transportation, Division of Highways, policy requires that Disadvantaged Business Enterprises shall have the maximum opportunity to participate in the performance and award of contracts, whether financed in whole or in part with Federal funds in accordance with the Division of Highways; Disadvantaged Business Enterprise Program.

### 7.3. Definitions.

7.3.a. Audit. – An official inspection of an organization’s accounts that is done in accordance with Government Auditing Standards issued by the Comptroller General of the United States and all eliminations required by the Federal Acquisition Regulations (FAR) will be made. The submitted certified audit overhead (indirect cost rate) report shall include the certification for the allowable costs used to establish the final indirect cost rate are in accordance with the FAR cost principles, or a verification indicating this certification was previously submitted and accepted by the cognizant agency.

7.3.b. CFR - Code of Federal Regulations.

7.3.c. Cognizant Agency. – Any federal or state agency that has conducted and issued an audit report of as defined in 23 CFR 172.3

7.3.d. Competitive Selection. - All procurement transactions conducted in such a manner as to provide unrestricted opportunities for any and all prospective consultants to obtain work with the Division.

7.3.e. Consultant. – A business, educational institution, individual or public agency qualified to perform a service required by the Division. A consultant may be a consulting engineer, architect, public agency or other professional firm or agency.

7.3.f. Consultant Confidential Qualification Questionnaire (CCQQ). - A Division form on which a consultant's experience data, personnel, fields of work performed, and present and past activities are listed.

7.3.g. Contract Modification. - An agreement modifying the existing contract, such as an agreement to accomplish work beyond the scope of the original contract.

7.3.h. Cost Analysis. - A review and evaluation of the separate cost elements and proposed fixed fee of (a) a consultant's cost or pricing data and (b) the judgmental factors applied in projecting from the data to the Engineer's Cost Estimate in order to form an opinion on the degree to which the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.

7.3.i. Delegated Projects – Federally funded projects where FHWA and the Division of Highways have agreed that the Commissioner of Highways will act on behalf of the FHWA. Also known as Exempt Projects.

7.3.j. Disadvantaged Business Enterprises (DBE). - A for-profit small business concern which is at least 51 percent owned by one or more socially or economically disadvantaged individuals, whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it, and which meets all certification criteria under 49 CFR, Part 26 and has been certified by the Unified Certification Program.

7.3.k. Engineer's Cost Estimate. - A written detailed estimate prepared after the detailed scope of work meeting and prior to the receipt of the consultant's price proposal. This will have an appropriate breakdown of specific types of labor required, work hours, indirect cost, and an estimate of the consultant's fixed fee (considering the risk and complexity of the work) for use during negotiations.

7.3.l. Extra Work. - Any service or actions required of the consultant above and beyond the obligations of the original or modified contract.

7.3.m. Fixed Fee. - A dollar amount established to cover the consultant's profit and business expenses not allocable to overhead.

7.3.n. Indefinite Delivery/Indefinite Quantity (ID/IQ) – On call contract for the performance of services for a number of projects, under task or work orders issued on an as-needed basis, for an established contract period. ID/IQ contract period cannot exceed five (5) years and must specify a maximum total contract dollar amount to be awarded under a contract. ID/IQ Master Agreements authorized under this rule shall not exceed five (5) years, unless otherwise approved by the Commissioner.

7.3.o. Internal Control Questionnaire (ICQ) - A statement that provides adequate details to demonstrate that the prospective consultant has a job cost accounting system that is capable of segregating, identifying, and accumulating costs for cost type contracts.

7.3.p. Letter of Qualification. - A written expression of interest made by the consultant indicating his or her desire to perform a particular project, task, or service. This shall include, at a minimum, the evaluation factors and other information needed to verify the consultant's qualifications and a completed Technical Evaluation form. Additional statements as to the consultant's particular abilities and qualifications, pertinent to preliminary scope of work may be included if deemed necessary. Forms and example sheets are available through Engineering Division's consultant services personnel or on online at:

<https://transportation.wv.gov/highways/engineering/Consultant/DCC%20Manual%20with%20updated%20PMD.pdf>

7.3.q. Master Agreement. - A written agreement covering a specified period of time for the performance of a particular service or services that establishes specific methods of pay. A master agreement shall not exceed a two (2) year period, without time extensions, unless approved by the Commissioner.

7.3.r. Methods of Pay. - Methods of pay which may be used are as follows:

- 7.3.r.1. Lump sum;
- 7.3.r.2. Cost per unit of work;
- 7.3.r.3. Cost plus a fixed fee;
- 7.3.r.4. Specific rates of compensation; or
- 7.3.r.5. Cost plus percentage of cost (state funded work only).

Each contract shall have a maximum amount payable which shall not be exceeded unless adjusted by a contract modification.

7.3.s. Negotiation Memorandum. - At the conclusion of each negotiation of an initial or revised price, the Division shall promptly prepare a memorandum of the principal elements of the price negotiation. The memorandum shall be included in the contract file and shall include at a minimum:

- 7.3.s.1. The project number;
- 7.3.s.2. The purpose of the negotiation;
- 7.3.s.3. The name and position of each person representing the consultant and the Division;

and

7.3.s.4. The most significant facts or considerations controlling the establishment of the negotiated price.

7.3.t. Noncompetitive Selection. - The method of procurement of professional design and related services when it is not feasible to award the contract using competitive negotiation or small purchase procurement methods. This process may be utilized only for state funded work. This type of procurement will follow procedures set forth in 23CFR172.7(3).

7.3.u. Non-Delegated Projects - Federally funded projects that require the involvement and oversight of the FHWA.

7.3.v. Non-Project Specific Work. - Work of a general nature such as soils investigations, materials sampling, testing, and aerial photography.

7.3.w. Performance Reports. - A report prepared by the Division monitoring the service after the final acceptance of work or after contract termination, as applicable, evaluating the overall performance of the consultant.

7.3.x. Preliminary Selection Committee (also known as the "Shortlist Committee"). - A permanent committee consisting of the Chief Engineer, Special Programs, Chief Engineer, Performance Management, Chief Engineer of Development/Deputy State Highway Engineer, Engineering Division Director, Chief Engineer of Construction/Deputy State Highway Engineer, Deputy State Highway Engineer responsible for the work being performed and the Division Director requesting the service. In the event of scheduling conflicts, a committee member may propose three alternatives to serve in his or her absence to the State Highway Engineer. The State Highway Engineer shall select one of the proposed alternatives to serve during the member's absence. At least three (3) members are necessary

to transact the short list. The committee shall select an interview panel of at least five (5) members to evaluate and rate the shortlisted firms.

7.3.y. Prenegotiation Audit. - The prenegotiation audit or shortlist scoring sheet is an examination of a consultant's records made in accordance with generally accepted performance standards and shall be used for evaluation of qualifications and availability for work.

7.3.z. Prequalified List. - A list of prequalified firms available to perform specific categories of work. The prequalified list shall be open for a maximum of five (5) years. Any consultant who wants to request inclusion on the list may file the proper pre-qualification documents pursuant to an advertisement at any time the list is open. If the consultant meets the qualifications to be included on the list, the consultant shall be placed on the list for the remainder of the term of the list.

7.3.aa. Price Proposal. - A statement by a consultant which is submitted after the consultant is selected to accomplish the work and after the detailed scope of work meeting, indicating the consultant's proposed costs to perform the required service. The Price Proposal cannot be submitted until the Engineer's Cost Estimate is completed. The Consultant shall obtain approval prior to submitting their Price Proposal.

7.3.bb. Scope of Work.

7.3.bb.1. Preliminary: A general description of the work to be accomplished, including the location.

7.3.bb.2. Detailed: A clear, accurate, and detailed description of the technical requirements for the services to be rendered.

7.3.cc. Selection Authority. The Commissioner of Highways is the Selection Authority for projects following Subsection 7.4 et seq., for firms selected for use on a Master Agreement per Subdivision 7.4.h., and for firms included on a Prequalification List per Subdivision 7.6.b. The State Highway Engineer is the Selection Authority for individual selections from a Master Agreement and Prequalified List per Subdivisions 7.5.d. and 7.6.e., respectively. The District Engineer/Manager is the Selection Authority for individual selections for district specific Master Agreements and Prequalified Lists per Subdivision 7.5.e. and Subdivision 7.6.e. respectively.

7.3.dd. Selection List. - A list of consultants, the minimum number being two (2) more than required, in order of preference, prepared by the Preliminary Selection Committee.

7.3.ee. Selection Report. - A report prepared by the Division Director requesting the service and sent to the Selection Authority, along with the Selection List. The report shall include a description of the interviews and evaluation conducted by the Preliminary Selection Committee upon which the Selection List is based.

7.3.ff. Short List. - A list of consultants, with a minimum of two more than required, all considered to be most qualified to accomplish a proposed project, determined by the evaluation factors shown on the Shortlist Scoring Sheet.

7.3.gg. Short List Selection Criteria Technical Evaluation Factor Form. A form used to aid in the review of a consultant's qualifications per the evaluation factors.

7.4. Competitive Selection. - Quality-Based Selection (QBS) following the guidelines set forth under

the Brooks Act to be used on projects where services are estimated to cost more than the maximum limits as established by 23 CFR 172 for federally funded work or W.Va. Code §5G-1-4 for state funded work, for the selection of consultants. When the service of a consultant under this procedure is desired, the Division will advertise for letters of qualification from consultants interested in performing the service and develop a list for the specific project.

7.4.a. At a minimum, a solicitation for work will appear for two weeks on the Division's website at: <http://www.transportation.wv.gov/highways/Pages/UpcomingContracts.aspx>. The notice will also be furnished to other organizations, which may desire to disseminate the information to their members (such as engineering societies).

7.4.b. The solicitation shall include a clear and accurate description of the service to be performed, shall identify all significant evaluation factors and their relative importance, and shall include the latest date by which the Letter of Qualification must be submitted.

7.4.c. All Letters of Qualification received from consultants will be reviewed by the Division initiating the request to assure that all pertinent information and data have been submitted. Any letters which were received not containing complete information or which were not received prior to the submission date deadline, shall be rejected and the consultant so notified. The deadline shall be at least 10 working days after the initial day of solicitation. Letters of qualification shall be received electronically. The solicitation shall identify the delivery means, addresses and deadlines of electronic submittal.

7.4.d. The Division responsible for the direct conduct of the contract will provide a completed copy of the Short List Selection Criteria Technical Evaluation Factor Form for each proposal to the Preliminary Selection Committee. The forms pertaining to short list criteria and selection are available on the division's website at: <https://transportation.wv.gov/highways/engineering/Consultant/DDC%20Manual%20with%20updated%20PMD.pdf> This evaluation will be filed in the Division's records.

7.4.e. The Preliminary Selection Committee will evaluate the firms, in accordance with the services requested in the solicitation and will develop a short list of consultants who are, in their opinion, best qualified to perform the desired service. The minimum number of firms on the short list shall be two (2) more than required to complete the project.

7.4.f. All Disadvantaged Business Enterprises on the list of consultants who submitted proposals will be identified on the qualifications and technical evaluation.

7.4.g. Multiple consultants may be obtained through the use of a single solicitation when the services to be performed are of a similar nature and can be clearly defined in the advertisement. The listing submitted to the Selection Committee should indicate the number of consultants required.

7.4.h. When the services of a consultant are desired for a continuing or master agreement for items such as inspection services, subsurface investigation, or design services, the procedures of this section shall be used for the selection process only. Individual assignments for master agreements shall follow Subsection 7.5.d.

7.4.i. The Division Director, or designee, requesting the service will schedule interviews with each shortlisted firm. Discussions will be held regarding anticipated concepts and proposed methods of approach to the assignment, including those items noted in the qualification and technical evaluation.

7.4.j. After scheduled interviews with the short-listed consultants, the Division Director shall prepare a Selection Report for review and approval by the Selection Authority.

7.4.k. The award of negotiated contracts financed with Federal funds will take into consideration projects utilizing DBE participation.

7.4.l. All consultants who have submitted proposals will be notified that the selection has been made and the name of the preferred consultant. The notification shall inform the successful and unsuccessful firms that debriefings are available at their request.

7.5. ID/IQ Project Procurement - To be used for procuring professional services for projects estimated to cost less than the maximum limits established by 23 CFR 172 for federally funded work or WV Code §5G-1-4 for state funded work. This type of procurement will follow procedures set forth in 23 CFR 172.9.

7.5.a. Projects that can utilize this form of procurement are:

7.5.a.1. State funded projects. This contract shall match maximum thresholds as set by state code.

7.5.a.2. Federal-aid projects using the ID/IQ type of contract.

7.5.a.3. Individual assignments under a Master Agreement.

7.5.b. The Division Director or District Engineer/Manager requesting the service shall obtain approval from the Commissioner to use the ID/IQ project procedure.

7.5.c. The Division Director or District Engineer/Manager shall follow all the requirements of Subsection 7.4 and shall serve on the Preliminary Selection Committee.

7.5.d. The Division Director or District Engineer/Manager requesting the service shall submit a Selection List to the State Highways Engineer, the Selection Authority, for review and approval.

7.5.e. For project specific assignments to be performed under an ID/IQ Master Agreement, the following steps shall be utilized;

7.5.e.1. The Division Director or District Engineer/Manager requesting the service of a consulting firm, who has an ID/IQ Master Agreement in place, is not required to obtain pre-approval from the Commissioner to use this process. Pre-approval shall be assumed due to the Selection Authority having approved the ID/IQ Master Agreement process and selection.

7.5.e.2. The Division Director or District Engineer/Manager requesting the service shall consider three or more regionally based professional firms qualified to perform the service and have a current ID/IQ Master Agreement.

7.5.e.3. The Division Director or Responsible Charge District Engineer/Manager requesting the service shall submit a selection list to the Selection Authority for review and approval.

7.5.e.4. ID/IQ Master Agreements shall have the following monetary and term length limits:

7.5.e.4.A. Maximum Dollar limits as established by 23 CFR 172 for federally funded work or WV Code §5G-1-4 for state funded work, per individual project assignment.

7.5.e.4.B. Maximum dollar limits in aggregate, Two Million Five Hundred Thousand Dollars and Zero Cents (\$2,500,000.00), per agreement, per year.

7.5.e.4.C. Maximum length of two years, provided that up to three one year extensions shall be permissible with consent of both parties.

7.6. Procurement using Prequalified List - May be used for procuring professional services for projects estimated to cost less than maximum limits established by 23 CFR 172 for federally funded work or W.Va. Code §5G-1-4 for State funded work. The Commissioner must approve the use of this procurement method for all categories of work. Division Directors or Responsible Charge District Engineer/Manager, who intend to use this procurement method, shall prepare prequalification categories, a general description of work to be performed by firms under each prequalification category, and obtain approval from the Commissioner. Prequalification lists shall be maintained by Engineering Division, Consultant Services Unit, unless otherwise directed by the Commissioner, and made available to the public on the DOT website. Information on the website must include, at a minimum, the various categories of prequalification lists, firms available for use in the category, and the term of the prequalification list. This type of procurement will follow procedures set forth in 23 CFR 172.9.

7.6.a. Projects that can utilize this form of procurement are:

7.6.a.1. State funded projects.

7.6.a.2. Federal-aid projects using the ID/IQ type of contract. This contract form is limited to contracts whose costs are less than the maximum amount set forth in W.Va. Code § 5G-1-4; and

7.6.a.3. Individual assignments shall be from a Categorized Prequalification List of approved firms.

7.6.b. A solicitation will be placed, in accordance with Subdivision 7.4.a, requesting interested firms submit a Letter of Qualification for the categorized prequalification list. A firm must submit a separate Letter of Qualification for each prequalification list for which it is interested. The solicitation will address the information to be included on the Letter of Qualification, all significant factors used in evaluating the interested firm and their relative importance, the term of the pre-qualification list and the length of time the firm may remain on the list before renewal is required.

7.6.c. The Division Director or Responsible Charge District Engineer/Manager, receiving a request from a firm for inclusion on a prequalification list, shall review the firm's Letter of Qualification to determine if the interested firm submitted all required information and if the firm is qualified for the work advertised. If the firm meets all required qualifications, the Division Director or District Engineer/Manager shall obtain approval for inclusion on the list from the Commissioner. Once approved, the firm's name will be included on the prequalified list with the appropriate information.

7.6.d. The Division Director or District Engineer/Manager shall follow all the requirements of Subsection 7.4 and shall serve on the Preliminary Selection Committee.

7.6.e. The Division Director requesting the service shall submit a Selection List to the State Highway Engineer, who shall serve as the Selection Authority, for review and approval.

7.6.f. For project specific assignments to be performed using the Prequalification List, the following steps shall be utilized.

7.6.f.1. The Division Director or District Engineer/Manager requesting the service of a consulting firm, using the available firms from the Prequalified List, is not required to obtain pre-approval from the Commissioner to use this process. Pre-approval shall be assumed due to the Commissioner having approved the firm's inclusion on the Prequalification List.

7.6.f.2. The Division Director or Responsible Charge District Engineer/Manager requesting the service shall conduct discussions with three or more professional firms from active firms available from a prequalified list.

7.6.f.3. The Division Director or District Engineer/Manager requesting the service shall submit a selection list to the Selection Authority for review and approval.

7.6.f.4. Agreements using firms from the Prequalified list shall have the following monetary limits:

7.6.f.4.A. Less than the maximum limits as established by 23 CFR 172 for federally funded work or WV Code §5G-1-4 for State funded work, per individual project assignment.

7.6.f.4.B. No more than Two Million, Five Hundred Thousand Dollars and Zero cents (\$2,500,000.00) aggregate per Prequalified List in original agreements per calendar year.

7.6.f.5. Agreements using firms from the Prequalified List shall have the following term limits:

7.6.f.5.A. A Prequalified Category List will be advertised and remain open for a maximum of five years.

7.6.f.5.B. Prequalification lists may be closed or removed at the direction of the Commissioner.

7.6.f.5.C. Firms applying for inclusion on the List will be available for assignment for the limits of the original advertisement no matter when the firm makes application unless the list was previously closed by the Commissioner.

## 7.7. Noncompetitive Selection.

7.7.a. Approval from the Commissioner must be received prior to using this process.

7.7.b. Circumstances under which a contract may be awarded under this procedure are limited to the following:

7.7.b.1. The item is available only from a single source;

7.7.b.2. When there is an emergency, as determined by the Commissioner or State Highway Engineer, which will not permit the time necessary to conduct competitive selections;

7.7.b.3. After solicitation of a number of sources, competition is determined inadequate; or

7.7.b.4. When it is determined appropriate to use available services of a public agency or educational institution.

7.7.c. The name of the consultant who is considered qualified to perform the service will be submitted to the Selection Authority with an explanation of the circumstance in Paragraph (2), Subsection 7.7.

#### 7.8. Negotiation of Fee.

7.8.a. The most preferred consultant, on the selection list approved by the Selection Authority will be requested to attend a detailed scope of work meeting, after which time the consultant is to submit a price proposal. The price proposal shall not be submitted without approval by the Division. The initial scope of work meeting may be waived for those consultants that are satisfactorily providing the required service such as drilling, sampling, inspection, etc. The price proposal shall address the evaluation factors and shall include a complete listing of all anticipated sub-consultants.

7.8.b. The Division Director or District Engineer/Manager initiating the request for service is responsible for preparing an independent engineer's cost estimate prior to the receipt of the fee proposal from the consultant and for negotiating an agreement with the preferred consultant, except for services obtained on a per unit cost.

7.8.c. Negotiations shall be conducted by the Division or District requesting the service.

7.8.d. Price proposals will be subjected to audits in accordance with 23 CFR 172.11.

7.8.e. The proposed contract, including the agreed upon cost figures, shall be submitted to the Commissioner, or designee, for approval and execution. All proposed contracts for non-delegated projects shall be subject to approval by FHWA prior to execution. When approved by the Commissioner, the consultant may be given a notice to proceed on federally funded work, this notice to proceed shall be subject to authorization of federal funds.

7.8.f. In the event that the fee cannot be agreed on, the Division Director or District Engineer/Manager shall advise the Commissioner in writing, through the appropriate channels, and with approval by the Commissioner, may begin negotiations with the consultant who was listed number two by the Selection Authority and so on, if necessary. The Division Director or District Engineer/Manager shall obtain a written final proposal from the firm and notify the firm that negotiations have been terminated.

7.8.g. Should it be impossible to reach an agreement with any of the consultants selected, the Commissioner will be so advised in writing.

7.8.h. The Commissioner will then request the Preliminary Selection Committee to make a reassessment to determine whether to extend the list, to renegotiate with consultants from the existing selections, to accomplish the service "in-house", or to remove the work from the program.

7.8.i. A negotiation memorandum shall be maintained for a three-year period after final payment.

7.8.j. On July 1<sup>st</sup> of each year, in accordance with W. Va. Code 17-2A-22, the Commissioner will issue guidance regarding allowable overhead ceilings, the Commissioner may deem necessary to regulate.

#### 7.9. Contract Modifications.

7.9.a. Contract modifications are required for any modifications in the terms of the original contract that significantly change the character, scope, complexity, or duration of the work or significantly change the conditions under which the work is required to be performed. All contract modifications for non-delegated projects shall be subject to prior approval by FHWA.

7.9.b. A contract modification shall clearly outline the changes made and determine a method of compensation.

7.9.c. Changes to the scope of work may require adjustment, either positive or negative, of the fixed fee portion in a cost plus fixed fee contract, or in a lump sum contract. Overruns or underruns in project costs, as part of the original scope of work, shall not warrant an adjustment in the fixed fee portion of a cost plus fixed fee contract.

7.9.d. When necessary to maintain schedules or as determined by the State Highway Engineer, the consultant may be authorized to proceed with work prior to agreement on the amount of compensation and execution of the contract modifications with adequate justifying documentation. On non-delegated projects at least verbal prior approval by FHWA must be obtained.

7.9.e. A modification to an original agreement, where the original advertisement concerned all phases of the work, shall be negotiated following the requirements of Subsection 7.8. A detailed scope of work meeting and an independent engineer's estimate are required. The original advertisement must have included all phases of work for this procedure to be used. If the original advertisement did not contain all phases of the work, the requirements of Subsection 7.4 shall be followed for the selection of a consultant, unless the State Highway Engineer finds that the work requiring the modification was not known or anticipated at the time of the advertisement, and not allowing the modification would result in additional costs and delays. Examples of this type of modification are development of construction contract plans as Phase II of an original Phase I design study or rehabilitation of a structure where Phase I was a detailed inspection and Phase II is reconstruction or alteration of the construction project delivery.

7.9.f. Contract modifications are required for any modification in the terms of the original contract that change the cost of the contract or that significantly change the character, scope, complexity, or duration of the work. In the interest of efficiency and continuing the work on the project, the scope of work will be established in the proposal and during negotiations. The scope of work shall be recommended by the Division Director or District Engineer responsible for the work for approval by the Commissioner. An independent engineer's estimate will not be necessary, but a negotiation memorandum shall indicate a thorough review was made and that the scope of work and the adjusted fee are complete and compatible. An example of this type of modification is a change in the design of construction plans due to a geotechnical investigation which shows soil stability inadequacies. Written notification of changes to scope or level of effort that occur past the next possible scheduled meeting in accordance with §7.10 of this rule, will be ancillary and within the scope, but they must be documented in the project file.

7.10. Control of Work. - The Commissioner may authorize a notice to proceed or an advanced notice to proceed by a properly executed agreement between the parties. After notification to proceed

is given to a consultant in writing, or electronically, the responsible Division or District will meet regularly with the consultant to discuss progress and problems as they may occur with notes of the meetings recorded (either on paper or electronically) in the project files. These meetings may be held every month. At these meetings, a complete review of the progress to date is made with emphasis on acceptability of costs billed, the next phases of the work to be performed, schedules, and submissions of contract modification documents. Periodic submission of data is made in accordance with the applicable type project involved. All phases of contract work are viewed by the Division or District within the Division of Highways concerned with that work and that Division's or District's opinion of the consultant's performance and expertise in their field is considered in the evaluation of the consultant for future work. If deemed necessary by the Division or District, visitation of the consultant's office shall be made. For those tasks of short duration, the need for regular meetings may be waived. The responsible Division or District shall discuss problems as they occur. Documentation of the discussions shall be kept in the Division or District file.

#### 7.11. Evaluation of Work.

7.11.a. Performance evaluations should include, but not be limited to, an assessment of the timely completion of work, adherence to contract scope and budget, and quality of the work conducted. The contracting agency shall provide the consultant with a copy of the performance evaluation and the opportunity to provide written comments to be attached to the evaluation. Interim evaluations may be necessary based on the scope, complexity, and size of the contract as a means to provide feedback, foster communication, and achieve desired changes or improvements. Completed performance evaluations should be archived for consideration as an element of past performance in the future evaluation of the consultant to provide similar services.

7.11.b. Upon completion or performance termination of the consultant's work, the Project Manager or Project Supervisor of the responsible Division or District will prepare a report recording its evaluation of the consultant's efforts. It should include comments from other Divisions when appropriate. The performance report shall be reviewed by a reviewing official, which shall be the Division Director or District Engineer/Manager of the responsible Division. A copy shall be sent to the consultant for review and comment, and any written comments received shall be attached to the final report. All consultants with active contracts shall be evaluated in March of each year on each active project. On contracts where the final product has been accepted by the Division or District, but the final invoice has not been paid, the consultant will not need to be evaluated.

7.12. Contract Closeout or Finalization. - Upon completion of all contractual obligations by the consultant, a final audit will be requested from Transportation Auditing by the responsible contracting officer.

7.13. Audit Follow-up- - Primary responsibility for action and follow-up on audit findings and recommendations rest with the Division or District supervising the work. Timely action by these officials is an integral part of the audit system.

#### 7.14. Protest Procedures.

7.14.a. Consultants who feel they have not been selected to perform work for unjust cause may appeal to the Commissioner for a hearing to be held on their behalf. They must do so in writing within ten (10) days after the date of being notified of the determination. In addition, any claims, or disputes in reference to payment, work, method of compensation, or performance evaluation may be appealed to the Commissioner.

7.14.b. Matters concerning work performed, wherein federal funds are used in whole or part, may be protested to FHWA once all administrative procedures have been exhausted with the State. Please refer to the FHWA Consultant Services website for a link to Best Practices in Management of Design Errors and Omissions, as prepared as part of NCHRP Project 20-70, Task 225. However, reviews

of protests by the federal agency will be limited to:

7.14.b.1. Violations of federal law or regulations and;

7.14.b.2. Violations of the State's protest procedures for failure to review a complaint or protest. Protests received by the FHWA other than those specified above will be referred to the State.

7.15. Contractual Responsibilities. - The Division of Highways is responsible for the settlement of all contractual/administrative issues. All settlements relating to contracts using federal-aid funds shall be reviewed and approved by FHWA prior to participation in any additional costs (only on non-delegated projects). The Division of Highways is responsible for determining the extent to which consultants are accountable for the professional quality, technical accuracy, coordination of services, and costs, for which consultants may be reasonably liable, resulting from errors or deficiencies in design furnished under its contracts. When a modification to a construction contract is required because of an error or deficiency in the services provided by the consultant, the Division or District responsible for oversight of the consultant's contracted work shall follow the procedure in Subsection 7.16. The Division or District shall be responsible to enforce the liability and collect the amount due as determined by the Commissioner.

7.16. Disposition of Errors and Deficiencies. When it is determined that an error or deficiency exists, the Division or District responsible for oversight of the consultant's contracted work shall report its findings to the next highest level of management under whose direction the work was performed.

7.16.a. A review and analysis of the findings shall be made to confirm whether an error or deficiency exists, with agreement being reached on such with the reporting Division or District.

7.16.b. After an agreement has been reached, the findings shall be reported to the State Highway Engineer who shall form a committee made up of the next lower level of management beneath the State Highway Engineer under whose direction the work was performed, the reporting Division or District and the State Highway Engineer, to further review the findings.

7.16.c. The State Highway Engineer shall report the findings to the Commissioner for final disposition.

7.17. Redesign for Errors and Deficiencies. – The consultant shall be required to make necessary corrections at no cost to the Division of Highways when the contract documents furnished under their contract contain errors, deficiencies, or inadequacies.

7.18. Record Keeping. - Unless otherwise noted, all documentation under this procedure will be retained on file at the Division of Highways and will be available for review by FHWA.