



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: Environmental Protection Secretarys Office TITLE-SERIES: 60-13
RULE TYPE: Procedural Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: Design Build Program
CITE STATUTORY AUTHORITY: W. Va. Code § 22-34-2

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

June 21, 2024

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

Yes

Jason E Wandling -- 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 60
PROCEDURAL RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY'S OFFICE

SERIES 13
DESIGN BUILD PROGRAM

§60-13-1. General.

1.1. Scope. -- The purpose of this procedural rule is to establish guidelines and procedures for the use of design-build for reclamation projects. This policy ensures that the agency meets the requirements for design-build as outlined in State and federal laws and regulations. This procedural rule applies to all reclamation projects that will use the design-build delivery method. This includes projects that involve the reclamation of land and water damaged by mining, drilling, or other activities that have caused an environmental impact.

1.2. Authority. -- W. Va. Code § 22-34-2.

1.3. Filing Date. – May 15, 2024

1.4. Effective Date. – June 21, 2024

§60-13-2. Definitions.

2.1. "Department" means the West Virginia Department of Environmental Protection created and established under W. Va. Code §22-1-1 *et seq.*

2.2. "Engineering/design services" are those professional services within the scope of the practice of engineering.

2.3. "Best Value" same as Value-based; see below.

2.4. "Business" means any corporation, partnership, individual sole proprietorship, joint stock company, joint venture, or any other private legal entity.

2.5. "Change order" means a written order signed by the procurement officer, directing the contractor to suspend work or make changes, which the appropriate clauses of the contract alteration in specification, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

2.6. "Construction" means the process of building, renovating, altering, improving, or repairing.

2.7. "Construction does not mean the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

2.8. "Contract" means any state agreement for the procurement or disposal of supplies, services, design, or construction.

2.9. "Design-Build" means a project delivery method whereby the design and construction phases are combined into a single project. This method of design and construction can include the design-build provider acquiring the right of way as part of the contract.

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2.10. "Local Governmental Agencies" means counties; municipalities; watershed improvement districts; soil conservation districts; sanitary districts; public service districts; drainage districts; regional governmental authorities and any other governmental agency, entity, political subdivision, public corporation or agency having the authority to acquire, construct or operate public water facilities, storm-water systems or wastewater facilities.

2.11. "Maintenance" refers to a commitment to maintain a highway facility in an acceptable condition for an established period of time.

2.12. "Owner" means the West Virginia Department of Environmental Protection.

2.13. "Procurement" means buying, purchasing, renting, leasing, leasing with an option to purchase, or otherwise acquiring any supplies, service, or construction. It also includes all projects or functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection, and solicitation of sources, preparation, and award of a contract, and all phases of contract administration.

2.14. "Request for Proposals" (RFP) means an advertisement requesting proposals for work in accordance with the requirements outlined in the design-build criteria package.

2.15. "Request for Qualifications" (RFQ) means an advertisement requesting statements of qualifications. It contains at least the desired minimum qualifications of the designbuilder, criteria for evaluation, a scope of work statement, and general project requirements.

2.16. "Responsive bidder or proposer" means an entity or person who has submitted a bid or proposal which conforms in all material respects to the invitation for bids or request for proposals.

2.17. "Secretary" means the cabinet secretary of the West Virginia Department of Environmental Protection.

2.18. "Sealed" does not preclude acceptance of electronically sealed and submitted bids or proposals in addition to bids or proposals manually sealed and submitted.

2.19. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end project other than reports which are merely incidental to the required performance. It does not include employment agreements or collective bargaining agreements.

2.20. "Specification" means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item for delivery.

2.21. "State" means the State of West Virginia.

2.22. "Stipend" refers to the fee paid to unsuccessful firms for development of a responsive proposal.

2.23. "Supplies" means all property, including equipment, materials, and printing.

2.24. "Value-based" refers to a procurement process where price and other key factors are considered in the evaluation and selection process.

§60-13-3. Overview.

3.1. The agency recognizes the benefits of using the design-build delivery method for environmental projects. Design-build allows for increased efficiency, reduced costs, and greater collaboration between the design and construction teams.

3.2. The agency/owner will be responsible for providing a clear delineation of environmental needs/goals. The agency will use a two-phase selection process for design-build projects is a procurement method that involves two distinct phases of Best Value evaluation for selecting the design-build team for a construction project. This process helps to ensure that the project is delivered with the highest quality, efficiency, and cost-effectiveness.

§60-13-4. Phase One: Request for Qualifications (RFQ).

4.1 During the first phase, the owner/agency will release a Request for Qualifications (RFQ) to interested parties, which will include the project scope, requirements, evaluation criteria, and disclosure of the Design-Build form agreement. Prospective vendors will be required to submit their qualifications, and relevant experience/past performance to the project objectives.

4.2. The evaluation criteria may include, but is not limited to:

- 4.2.1. Experience and qualifications of the team;
- 4.2.2. Technical competence and expertise;
- 4.2.3. Past performance and references;
- 4.2.4. Design-Build experience/past performance;
- 4.2.5. Safety/past performance;
- 4.2.6. Quality Control/past performance;
- 4.2.7. Permit management; or
- 4.2.8. Performance guarantees /warranty(s).

4.3. Based on the evaluation of the submitted qualifications, the owner/agency will shortlist no more than three of the most qualified firms who will be invited to participate in the second phase of the selection process.

§60-13-5. Phase Two: Request for Proposal (RFP).

5.1. During the second phase, shortlisted firms will be required to provide site-specific details of how they propose to solve the problem. During this phase, shortlisted firms will also propose costs based on solutions proposed. The cost component will be evaluated separately. It is also a DBIA Best Practice to disclose the budget.

5.2. The evaluation criteria for the second phase may include:

- 5.2.1. Technical approach and methodology
- 5.2.2. Project management, schedule, and phasing
- 5.2.3. Cost and value engineering
- 5.2.4. Sustainability and environmental considerations
- 5.2.5. Risk management

5.2.6. Design management

5.2.7. Safety management

5.2.8. Quality Control/Quality Assurance management

5.3. Scoring during the second phase will not be based solely on price, but a combination of price and the non-price criteria, as shown above. The owner/agency will provide a stipend to those participating in the second phase of the selection process.

5.4. The agency will provide the two unsuccessful offerors, up to a 1.5% stipend of the stated project budget for the second phase of the selection process.

5.5. The two-phase selection process for design-build projects is an effective way to ensure that the owner/agency selects a highly qualified design-build team that will deliver the project with the highest quality, efficiency, and cost-effectiveness. The process allows for a comprehensive evaluation of the qualifications of the prospective vendors and their proposed solutions, ensuring that the owner/agency selects the best team for the project.

5.6. The Design-Builder will provide appropriate performance guaranties and or warranty(s) for all aspects of the project as applicable, and further described in the projects' RFP.

§60-13-6. General Provisions.

6.1. In collaboration with WV DEP, permits will be the responsibility of the winning Design-Builder.

6.2. Construction can begin in phases as design allows using a "release for construction" process.

6.3. Progress payment will be made according to the Design-Builder as per a payment schedule included in the contract.

6.4. Quality Control and Quality Assurance responsibilities will be collaborated between the agency and the winning Design Builder on a project-by-project basis. Both parties will agree on responsibilities in the executed Design-Build agreement.

6.5. Incentives and disincentives will be associated with time. The contract will specify the expected duration of the project, and the Design-Builder will be incentivized for early completion. Conversely, they will be disincentivized for late completion.

6.6. Agency oversight of design-build refers to the process of monitoring and regulating the design-build process to ensure that it meets the agency's goals, requirements, and standards. In design-build projects, the agency is typically the owner of the project, and it is responsible for ensuring that the project meets its objectives. The agency will utilize the 3rd party services of an Owners-Advisor to assist the agency in the implementation and execution of Design-Build best practices.

§60-13-7. Oversight.

7.1. The agency's oversight of design-build typically involves several key activities, including:

7.1.1. Reviewing the design-build team's qualifications: The agency will review the design-build team's qualifications to ensure that they have the necessary experience and expertise to successfully deliver the project.

7.1.2. Developing the project requirements: The agency will work with the design-build team to develop the project requirements, which will include the project's scope, budget, and timeline.

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7.1.3. Monitoring the design process: The agency will monitor the design process to ensure that the design meets the project requirements and is consistent with the agency's standards and guidelines.

7.1.4. Evaluating the construction process: The agency will evaluate the construction process to ensure that it meets the project requirements and is carried out safely and efficiently.

7.1.5. Conducting inspections and audits: The agency will conduct inspections and audits throughout the design-build process to ensure that the project meets all quality and safety standards.

§60-13-8. Public Records.

8.1 All bids received, and contracts awarded are publicly available for viewing.

§60-13-9. Severability.

9.1. If any word, phrase, or provision of this rule is held to be invalid, the remainder of the rule shall, to the fullest extent possible, not be affected by that holding.