



Division of Highways, Series 1  
Regulations Pertaining to Particular Functions  
of the Commissioner of Highways  
Agency Adoption of a Proposed Rule  
September 20, 2007

SUMMARY OF PUBLIC COMMENTS and RESPONSES:

The public comment period was advertised in the State Register, published July 27, 2007. No comments were received on the proposed amendments during the comment period ending on August 27, 2007. Therefore, no changes were made to the proposed rule.

FILED

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TITLE 157  
PROCEDURAL RULE  
DEPARTMENT OF TRANSPORTATION  
DIVISION OF HIGHWAYS

OFFICE OF THE CLERK  
SECRETARY OF STATE

SERIES 1  
REGULATIONS PERTAINING TO PARTICULAR  
FUNCTIONS OF THE COMMISSIONER OF HIGHWAYS

**§157-1-1. General.**

1.1. Scope. -- This procedural rule addresses particular 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. -- September 25, 2007.

1.4. Effective Date. -- October 25, 2007.

**§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 may be permanently recorded and maintained in such manner that they will be conveniently accessible to interested persons.

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 shall maintain in his office a record of all orders issued by him, which record shall be designated as the Commissioner of Highways' Order Database. All orders issued by the Commissioner during each day shall be entered therein, and all such orders so entered shall be formatted and archived so as to afford a method of ready and convenient access to each such 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, shall become effective immediately upon filing, unless some provision of law or some statement as to the effective date of such decision is stated in the order itself.

2.5. Copies of Commissioner's Orders; Distribution. The Commissioner of Highways shall provide a certified copy of any Commissioner's Order to any person who is directly affected by any such order and who requests a copy thereof. In addition to any person requesting a copy of such order, the Commissioner may furnish copies to any governmental agency or to such other persons, firms or organizations as he may deem suitable or proper in order to provide the most 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. These rules shall apply to all hearings which may be held by the Commissioner of Highways, whether the same be initiated by the Commissioner or by any citizen, it being the intent hereof that these rules shall be applicable whenever, by any action of the Commissioner of Highways, the rights of any citizen will be adversely and directly affected and it is proper that such citizen have due notice and an opportunity to be heard thereon.

3.2.a. These rules shall also apply to the

conduct of all hearings on claims asserted against the Division of Highways, other than claims heard and determined by the Court of Claims. These rules shall not 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. These rules shall 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 designee shall be responsible for all administrative and clerical duties relating to hearings and for all records and pleadings pertaining to hearings. He shall receive all applications, petitions, protests, claims or other written documents relating to a hearing before the Division of Highways. The designee 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 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 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 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. 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. However, 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 in writing 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 so drawn 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 attorney, if any.

3.4.b.2. Formal pleadings shall be substantially in the form hereinafter prescribed, and verification shall likewise be substantially in the form hereinafter prescribed. (See Forms No. 1 and 2, Appendix A, Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1.)

3.4.b.3. Two copies of all such papers shall be filed with the Commissioner.

3.5. Answers or Responsive Pleadings by Commissioner of Highways. Within thirty days

after receipt of a formal pleading or protest, the Commissioner of Highways or the director of the division thereby affected shall file an answer to such pleading or protest. Such 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 Commissioner of Highways shall serve such answer upon the parties either in person or by registered or certified mail to the party or his attorney.

3.6. Stipulations or Agreed Facts. The parties to any proceeding before the Commissioner of Highways may, by stipulation in writing filed with the Commissioner, 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 these rules and regulations determine that a hearing shall be held, the Commissioner will assign a time and place for such hearing, which will be at his offices in the City of Charleston or elsewhere in the state at the discretion of the Commissioner. The hearing will be held by the Commissioner of Highways or by one or more of his employees who shall have been designated by him to hold hearings.

3.7.a. Notices. The Commissioner shall give all parties not less than ten days' notice of the time and place of hearing, which notice may be served upon the parties by personal delivery, or by registered or certified mail, 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 Commissioner, however, will hear such proof of facts as he 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 Commissioner of

Highways 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 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 Commissioner of Highways, or his duly authorized hearing examiner, 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. At any hearing conducted by the Commissioner, or by a designated employee thereof, witnesses shall be examined under oath in the manner and form, and in the order designated by the presiding officer. If the Commissioner or presiding officer so directs, or any party in interest so requests, the testimony given shall be reduced to writing in the form of shorthand notes or such other form of recording as the Commissioner may direct, and preserved in the Commissioner's files. Should any party in interest request a transcript of the proceedings, or should the Commissioner 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, by the consent of the Commissioner. The Commissioner may, of his 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. Depositions shall be taken in a manner consistent with the provisions of Section 3, Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1.

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 Commissioner, or any employee of the Commissioner whom he shall have designated to hold such hearing, 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 Commissioner or his designee.

3.10. Decisions of the Commissioner of Highways. Every decision of the Commissioner of Highways 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 Commissioner's Decision, Subpoenas and Notices. Every decision when made by the Commissioner of Highways shall be recorded in the Commissioner's Order Book, and a copy thereof shall be served forthwith by personal delivery or by registered or certified mail to each adversary party to the proceeding or to his attorney of record; and all subpoenas for parties or witnesses and all notices shall be served by personal delivery or by registered or certified mail to each adversary party to the proceeding or to his attorney of record, or as provided by law.

**§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. be a West Virginia resident;

4.2.b. have a minimum overall (cumulative) high school grade point average (GPA) of 2.50 on a four-point scale or a minimum score of 850 on the Stanford Achievement Test (SAT) or a minimum score of 21 on the ACT test or a minimum overall college grade point average of 2.00;

4.2.c. declare an intent to seek a baccalaureate degree in Civil Engineering or Computer Sciences at an accredited college or university;

4.2.d. demonstrate the need for financial assistance to attend the selected college or university;

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

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

4.3. Application. Applicants may request an application packet by visiting or contacting the Division of Highways, Human Resources Division, 1900 Kanawha Boulevard, East, Building Five, Room 949, Charleston, West Virginia 25305-0430, telephone (304) 558-3111. 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 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 high school or 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. financial need;

4.4.b. secondary school or college grade point average;

4.4.c. SAT or ACT score;

4.4.d. written essay;

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

4.4.f. vocational education; and

4.4.g. work experience.

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.

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

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 curriculum with a minimum of 12 credit hours of course study each semester; and b) maintain an overall institutional grade point average of at least 2.00 on a four-point scale.

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 2.00 for all quarters or semesters thereafter until graduation.

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 months period that such person is employed by the Division of Highways.

4.10. Default. The Commissioner of Highways will declare a student in default of the scholarship agreement and will require the student

to repay all scholarship funds received from the Division of Highways if the student: 1) withdraws from the education institution; or 2) fails to comply with any portion of these rules or the promissory note.

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 repayment schedule will be 120 equal monthly installments providing that the minimum installment shall be \$20. However, the scholarship recipient may elect a shorter term for repayment.

4.11.a. The scholarship recipient will make the first installment payment six months 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 Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1, 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, Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1. 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 wherein 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 wherein 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 and 23 U.S.C. §112 for Federally funded work and to W. Va. Code §5G-1, et seq., for State funded work.

7.2. Application. This regulation 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:

- a) project management
- b) construction management and inspection
- c) feasibility studies
- d) preliminary engineering
- e) design engineering
- f) design
- g) engineering
- h) surveying
- i) mapping
- j) architectural
- k) materials, inspection, sampling, and testing
- l) archaeological investigation
- m) historic investigation
- n) related services to any above

7.2.a. When it is necessary to utilize the services of a consultant, the Division Director or the Responsible Charge 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 noncompetitive selection is appropriate. Competitive selection must be used for all Federally funded work. Non-competitive selection may be used only on State funded work. In the case of noncompetitive selections, justification, in accordance with the procedures in Section 7.6, *Regulations Pertaining to Particular Functions of the Commissioner of Highways*, 157CSR1, will be given.

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

7.2.c. As allowed in 23 CFR 172.15, the West Virginia Division of Highways has requested approval under "Alternate Procedures" and the Federal Highway Administration (FHWA) has concurred. (See Exhibit D, *Regulations Pertaining to Particular Functions of the Commissioner of Highways*, 157CSR1.)

### 7.3. Definitions.

7.3.a. CFR - Code of Federal Regulations.

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

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

7.3.f. Cost Accounting Information Statement (CAIS). - 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.g. 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. Any major variations from norms shall be documented and supported.

7.3.h. Disadvantaged Business Enterprises (DBE). - A small business concern which is owned and controlled by one or more socially or economically disadvantaged individuals which have been certified under the Small Business Administration's 8(a) program or by the Division of Highways.

7.3.i. Engineer's Cost Estimate. - A written detailed estimate prepared prior to the receipt of the consultant's priced 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.j. Exempt 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.

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

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

7.3.m. Letter of Qualification. - A written expression of interest made by the consultant indicating his desire to perform a particular project, task, or service. This shall include, as a minimum, the evaluation factors and other information shown on Exhibit A 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. (See Exhibit A)

7.3.n. Master Agreement. - An agreement written for a specified period of time for a particular service or services establishing specific methods of pay. Unless otherwise approved by the Commissioner, a master agreement shall not exceed a two (2) year period including time extensions.

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

- (1) Lump sum.
- (2) Cost per unit of work.
- (3) Cost plus a fixed fee.
- (4) Specific rates of compensation.
- (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.p. 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 as a minimum:

- (1) The project number.
- (2) The purpose of the negotiation.
- (3) The name and position of each person representing the consultant and the Division.
- (4) The most significant facts or considerations controlling the establishment of the negotiated price.

7.3.q. Noncompetitive Selection. - The procurement through solicitation of a proposal from only one source or, after solicitation of a number of sources, competition is determined to be inadequate. This process may be utilized only for State funded work.

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

7.3.s. 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.t. Preliminary Selection Committee. - A committee consisting of the State Highway Engineer, the next lower level manager under whose direction the work will be performed and the Division Director or the Responsible Charge District Engineer/Manager requesting the service. The State Highway Engineer may appoint additional members. At least three members are necessary to transact the short list.

7.3.u. Prenegotiation Audit. - An examination of a consultant's records made in accordance with generally accepted auditing standards.

7.3.v. Priced 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. Per Section 7.3.8 of these rules 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.w. Procurement Standards. - The Division's own procurement procedures which reflect applicable State and local laws and regulations.

7.3.x. Scope of Work.

(a) Preliminary: A general description of the work to be accomplished, including the location.

(b) Detailed: A clear, accurate, and detailed description of the technical requirements for the services to be rendered.

7.3.y. Selection Authority. - This Authority shall consist of the Commissioner of Highways. The Deputy Commissioner of Highways, the State Highway Engineer, and/or the next lower level of management beneath the State Highway Engineer under whose direction the work will be performed may be designated by the Commissioner to serve as the selection authority. The Commissioner of Highways may appoint additional members.

7.3.z. 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.aa. Selection Report. - A report prepared by the Preliminary Selection Committee 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 Committee upon which the Selection List is based.

7.3.bb. Short List. - A list of consultants, the number being two (2) more than required, considered to be most qualified to accomplish a proposed project.

7.3.cc. Short List Selection Criteria Technical Evaluation Factor Form (See Exhibit B).

- A form used to aid the review of the consultant's qualifications per the evaluation factors shown in Exhibit A.

7.4. Competitive Selection. - To be used on State funded projects where services are estimated to cost \$250,000 or more and on Federal-aid projects estimated to cost over \$100,000 and for the selection of consultants to be assigned master agreements. Individual assignments under master agreements shall follow the procedures of Section 7.5.4. 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. The minimum requirements for publicizing the solicitation are that the advertisement shall appear once each week, on a weekday, for at least two successive weeks in the daily Charleston newspapers. The advertisement will also be posted in various offices of the Division which will afford the greatest dissemination of the solicitation. The notice will also be furnished to other organizations, such as engineering societies, upon their specific request, who may desire to disseminate the information to their members. Further, the notice will appear on the Internet at <http://www.wvdot.com/>.

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 date to be submitted. (See Exhibit A)

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 last day of advertisement.

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 (Exhibit B)" for each proposal which will be furnished to the Preliminary Selection Committee. 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 evaluation factors in Exhibit A 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.

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 Section 7.5.4.

7.4.i. The Preliminary Selection Committee will schedule interviews with each 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 Preliminary Selection Committee shall prepare a Selection List (see Section 7.3.26) and a Selection Report (see Section 7.3.27) for review and approval by the Selection Authority.

7.4.k. The award of negotiated contracts

financed with Federal funds will take into consideration the annual DBE award goals.

7.4.l. All consultants who have submitted proposals will be notified promptly in writing 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. Small Purchases. – To be used on State-funded projects where services are estimated to cost less than \$250,000 and Federal-aid projects estimated to cost less than \$100,000 and for each individual assignment under a master agreement. When services of a consultant under these procedures is desired, the indicated steps are to be followed.

7.5.a. The Division Director or Responsible Charge District Engineer/Manager requesting the service shall obtain approval from the Commissioner to use this small purchase procedure.

7.5.b. The Division Director or Responsible Charge District Engineer/Manager shall follow all the requirements on Section 7.4 and shall serve as the Preliminary Selection Committee.

7.5.c. The Division Director or Responsible Charge District Engineer/Manager requesting the service shall submit a Selection List to the State Highways Engineer, who shall serve as the Selection Authority (ref. Section 7.4.10), for review and approval.

7.5.d. For project specific assignments to be performed under a master agreement, the following steps shall be utilized.

7.5.d.1. The Division Director or Responsible Charge District Engineer/Manager requesting the service of a consulting firm, who has a 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 Commissioner having approved the master agreement process and selection.

7.5.d.2. The Division Director or Responsible Charge District Engineer/Manager requesting the service shall conduct discussions with three or more professional firms previously selected and having a master agreement currently in place.

7.5.d.3. The Division Director or Responsible Charge District Engineer/Manager requesting the service shall submit a selection list to "C" level for review and approval.

7.5.d.4. Master agreements shall have the following monetary limits:

Maximum \$250,000.00 per individual State funded project assignment.

Maximum \$100,000.00 per individual Federal funded project assignment.

Maximum \$750,000.00 aggregate per agreement per year.

Maximum length of agreement *one* year with *one* year extension by mutual consent of both parties.

#### 7.6. Noncompetitive Selection.

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

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

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

7.6.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; or

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

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

7.6.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), Section 7.6.

#### 7.7. Negotiation of Fee.

7.7.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 priced 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 shown in Exhibit A and shall include a complete listing of all anticipated sub-consultants.

7.7.b. The Division Director or Responsible Charge District Engineer/Manager initiating the request for service will be 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.

7.7.c. Price-proposals will be subjected to prenegotiation audits in accordance with 23 CFR 172.7.

7.7.d. Negotiations shall be conducted by the Division or District requesting the service.

7.7.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-exempt and concurrence 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.

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

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

7.7.h. The Commissioner will then request the Preliminary Selection Committee to make a reassessment to determine whether or not 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.

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

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

#### 7.8. Contract Modifications.

7.8.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-exempt and concurrence projects shall be subject to prior approval by FHWA.

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

7.8.c. Overruns in the costs of the work shall not warrant an increase in the fixed fee portion of a cost plus fixed fee contract. Significant changes to the scope of work may require adjustment of the fixed fee portion in a cost plus fixed fee contract or in a lump sum contract.

7.8.d. When necessary to maintain schedules and/or as determined by the Commissioner, 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 concurrence and non-exempt projects at least verbal prior approval by FHWA must be obtained.

7.8.e. A modification to an original agreement, where the original advertisement concerned all phases of the work, shall be negotiated following the requirements of Section 7.7. 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 Section 7.4 shall be followed for the selection of a consultant. 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.

7.8.f. Contract modifications are required for any modification in the terms of the original contract that changes 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 approved by the Division Director or Responsible Charge District Engineer responsible for the work. An independent engineers 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.

7.8.g. Any contract modification that causes a small purchase contract or master agreement contract to exceed the \$100,000 federal threshold will be ineligible for Federal – aid.

7.9. Control of Work. - After notification to proceed is given to a consultant in writing, 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 are usually held every month. At these meetings, a complete review of the progress to date is made with emphasis on acceptability of costs billed, as well as the next phases of the work to be performed. 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 particular type of 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.

7.10. Evaluation of Work. - 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 of the Division of Highways when appropriate. The performance report shall be reviewed by a reviewing official, which shall be the Division Director or Responsible Charge 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. Consultant contracts that are based on the calendar or fiscal year shall be evaluated in the last month of the contract. The Division or District shall retain the report for at least six years after the date of the report.

7.11. 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.

7.12. Audit Followup. - 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.

7.13. Protest Procedures. - 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.

7.13.a. 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. However, reviews of protests by the Federal agency will be limited to:

7.13.a.1. Violations of Federal law or regulations and;

7.13.a.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.

7.14. 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-exempt work). 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. [See 23 CFR 172.9.(a)(6)] 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 Section 7.15. The Division or District shall be responsible to enforce the liability and collect the amount due as determined by the Commissioner.

7.15. 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.

7.15.a. A review and analysis of the findings shall be made to confirm whether or not an error or deficiency exists, with agreement being reached on such with the reporting Division or District.

7.15.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.

7.15.c. The State Highway Engineer shall

report the findings to the Commissioner for final disposition.

7.16 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.

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

**EXHIBITS**

- A. Suggested Notice for Consulting Services.
- B. Short List Evaluation Factor Form

**EXHIBIT A**

**SUGGESTED  
NOTICE  
FOR  
CONSULTING SERVICES**

Notice is hereby given by the West Virginia Department of Transportation, Division of Highways,  
that consulting services will be utilized for \_\_\_\_\_

\_\_\_\_\_

in \_\_\_\_\_ County. The work will consist of  
\_\_\_\_\_  
\_\_\_\_\_

Firms interested in being considered for this project must submit a "Letter of Qualification" and  
unpriced proposal to \_\_\_\_\_, Director,  
\_\_\_\_\_ Division, Room \_\_\_\_\_, Division of  
Highways, Building Five, State Capitol Complex, Charleston, West Virginia 25305 prior to 4:00 p.m. on  
\_\_\_\_\_, 20 \_\_\_\_.

As a minimum, the prospectus will include the following evaluation factors:

1. Professional qualifications necessary for satisfactory performance of required services;
2. Specialized experience and technical competence in the type of work required, including, where appropriate, experience in energy conservation, pollution prevention, waste reduction, and the use of recovered materials;
3. Capacity to accomplish the work in the required time;
4. Past performance on contracts with Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules;
5. Location in the general geographical area of the project and knowledge of the locality of the project;

In addition to the above evaluation factors, the prospectus shall include, as a minimum, the following items:

1. A completed copy of the Division's Consultant Confidential Qualification Questionnaire, if not already on file, dated January 1, 20 \_\_\_\_\_, or later.

**EXHIBIT A (cont'd)**

2. Indication of whether the Consultant maintains a cost accounting system capable of segregating and identifying accumulating costs for each job that is performed under cost type projects.
3. A completed copy of the Division's Short List Evaluation Factor Criteria Form.

The method of payment to be used on this project will be:

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A single "Letter of Qualification" and unpriced prospectus is required regardless of the number of projects requested by the firm for consideration. All evaluation factors as noted hereinbefore will be given equal consideration in the selection process, unless a project specific weighting of the evaluation factors is shown in the Notice for Consulting Services.

Prior to entering into contract negotiations, the selected firm and any subconsultants shall submit a current audited overhead rate computation performed by a State or Federal government agency or independent CPA firm. The submitted overhead audit shall contain a detailed exhibit of the computations with all applicable eliminations and references. The audit shall be 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 will be made. This requirement will be waived for the selected firm or any subconsultant when its portion of the fee for the project is less than One Hundred Thousand Dollars (\$100,000.00). In such instances, a company computed overhead rate may be utilized.

It is the policy of the West Virginia Division of Highways that Disadvantaged and Women-owned Business Enterprises shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds.

**EXHIBIT B**

WEST VIRGINIA  
DEPARTMENT OF TRANSPORTATION  
DIVISION OF HIGHWAYS

SHORT LIST SELECTION CRITERIA  
TECHNICAL EVALUATION FACTOR FORM

Project Description: \_\_\_\_\_ County:  
Consultant:

1. Professional Qualifications:
2. Specialized Experience:
3. Capacity
  - (a) Work Force:
  - (b) Current Work Load (Overall):
  - (c) Type of Work (Overall)  
Past:  
  
Present:
4. Past Performance:
5. Project Office Location:
6. Most Recent Consultant Qualification Questionnaire Date:
7. Most Recent Consultant Cost Accounting Statement Date:
8. Certified DBE in WV? Yes No

**FOR WVDOH USE ONLY**

<p><b>Comments:</b></p>
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