

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

Do Not Mark In this Box

APR 21 12 43 PM '95

OFFICE OF THE SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: Dept. of Transportation, Div. Highways TITLE NUMBER: 157

CITE AUTHORITY: §17-2A-4b & 17-2A-8

RULE TYPE: PROCEDURAL INTERPRETIVE

EXEMPT LEGISLATIVE RULE

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

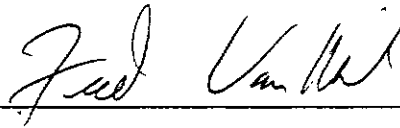
TITLE OF RULE BEING AMENDED: Regulations Pertaining to
Particular Functions of the Commissioner of Highways

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: _____

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS May 21, 1995



Fred VanKirk
Deputy Sec. &
State Highway Engineer/Commissioner



**WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION**

1900 Kanawha Boulevard East • Building Five • Room 109
Charleston, West Virginia 25305-0440 • 304/558-0444

Gaston Caperton
Governor

Charles L. Miller, P.E.
Secretary

April 20, 1995

Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, West Virginia 25305

Dear Secretary Hechler:

Notice of Agency Adoption
of a Procedural Rule
Division of Highways, Series 1

The attached information is submitted by the Commissioner of Highways with my consent and agreement in accordance with the provisions of Chapter 5G, Article 1 of the State Code. This amended rule removes Section 6, entitled, "Regulations Relating to Roads to be Incorporated into the State Highway System."

Very truly yours,

A handwritten signature in cursive script that reads "Charles L. Miller".

Charles L. Miller, P.E.
Secretary

CLM:c
Attachment

Division of Highways, Series 1
Regulations Pertaining to Particular Functions of
the Commissioner of Highways

Agency Adoption of a Procedural Rule

April 6, 1995

STATEMENT OF CIRCUMSTANCES:

This amended procedural rule is being filed to remove the former Section 6, entitled, "Regulations Relating to Roads to be Incorporated into the State Highway System." The purpose of this section was to advise of the guidelines for standards for roads to be considered by the Highways Commissioner for inclusion in the State Highway System. The common reference for these types of roads has been "orphan roads."

The Division of Highways' decision to delete this information reflects this agency's experience with petitions for accepting "orphan roads" to the system. Regardless of the physical or engineering criteria referenced in Section 6 of CSR1571, each request to add an "orphan road" to the State Highway System requires a thorough examination of a broad range of facts, not just the physical dimensions of the road surface and its right of way.

The decision to remove Section 6 of 157CSR1 will not alter the Commissioner of Highways' State Code responsibilities to consider requests to adopt "orphan roads," nor will its removal change the evaluation criteria. The removal of Section 6 is intended to prevent any confusion of petitioners as to the prospects of an "orphan road" being accepted or rejected to the State Highway System simply on the basis of the summary evaluation criteria that has been displayed in Section 6.

ADVERTISEMENT OF THE PUBLIC COMMENT PERIOD:

The public comment period was advertised the week of February 20, 1995 in the "State Register."

COMMENTS RECEIVED AND AMENDMENTS TO THE PROPOSED RULE

No comments were received and no amendments were made to the proposed rule as a result of the public comment period.

FILED

157CSR1

Apr 21 12 49 PM '95

TITLE 157
PROCEDURAL RULES
DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS

OFFICE OF WEST VIRGINIA
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. - April 21, 1995

1.4. Effective Date. - April 21, 1995

§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 Book. - 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 Book. All orders issued by the Commissioner during each day shall be entered therein, and all such orders so entered shall be indexed and cross-indexed 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.

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.

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.

3.3.1. 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.

3.4.1. 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 Engineer. Matters thus presented, if their nature warrants, may be negotiated and settled by the Commissioner of Highways, the District Engineer, 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.

3.4.2. 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.

3.4.2.a. 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.

3.4.2.b. 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.)

3.4.2.c. 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.

3.7.1. 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.

3.7.2. 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.

3.7.2.a. 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.

3.7.2.b. 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.

3.7.2.c. 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.

3.7.2.d. 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.

FORM 1

STATE OF WEST VIRGINIA
Commissioner of Highways
Charleston

TO THE COMMISSIONER OF HIGHWAYS:

Your petitioner, (name of petitioner), respectfully states:

1. That (Here state occupation, or business of petitioner, and address).

2. That petitioner (Here state form of relief sought from Division of Highways, i.e., whether an application, claim, complaint, or protest to a ruling or decision of the Commissioner of Highways, together with a brief statement setting forth plainly the grounds therefore).

3. That (Here state names of all parties, and their addresses, who may be involved, if any).

WHEREFORE, the petitioner, or complainant, request that (Here set forth specifically the relief sought or action desired to be taken by the Commissioner).

Dated this ____ day of _____, 19____.

Petitioner

Attorney for Petitioner

Address

FORM 2
VERIFICATION

(To be added to all complaints, answers, applications
and petitions.)

STATE OF WEST VIRGINIA,

COUNTY OF _____, to-wit:

_____, the (Petitioner, etc.) named in
the foregoing (petition, etc.) being duly sworn, says that the
facts and allegations therein contained are true, except so far
as they are therein stated to be on information, and that, so far
as they are therein stated to be on information, he believes them
to be true.

Affiant

Taken, sworn to and subscribed before me this ____ day
of _____, 19____.

My commission expires _____.

Notary Public in and for said County

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

4.1. General. - Pursuant to the provisions of W. Va. Code §17-2A-4b, the West Virginia Commissioner of Highways is authorized to award scholarships to competent persons whether employed by the West Virginia 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 West Virginia Commissioner of Highways, with the end in view of attracting and holding competent personnel for the West Virginia Division of Highways. No more than twelve persons may hold such scholarships at any one time.

4.2. Application. - Any person who is eligible to attend any accredited college or university may apply for a West Virginia Division of Highways scholarship. Application blanks shall be furnished at the Commissioner's office and when completed shall be returned to the Commissioner's office.

4.3. Certified Copy of Academic Grades. - Any person applying for a West Virginia Division of Highways scholarship shall provide the Commissioner, as a part of his application, a certified copy of his grades, and the subjects studied for all previous institutions of higher learning attended by the applicant. Where the applicant has attended high school only, a certified copy of his high school grades shall be sent to the Commissioner with the written application.

4.4. Written Essay. - Each applicant shall submit to the West Virginia Commissioner of Highways a written essay of not more than one thousand words explaining why he is interested in the Division's scholarship program.

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 information and personal impressions which the Commissioner has received from the information requested by virtue of the preceding subdivisions of this section, the Commissioner may

award a scholarship to such person or persons as he considers competent and entitled thereto. Any such scholarship shall carry a stipend in an amount fixed by the Commissioner, but not to exceed a total of \$4,000.00. The sum so awarded will be paid to the recipient of the scholarship in equal installments at the beginning of each quarter or semester wherein the recipient has agreed to pursue his course of study.

4.7. Execution of Notes. - The recipient of a scholarship shall execute negotiable promissory notes for the full amount of the scholarship stipends awarded him by the West Virginia Commissioner of Highways and each such note shall be in the amount actually received from the State Road Fund and shall be payable on demand to the order of the State Treasurer.

4.8. 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 West Virginia Division of Highways and remains so employed, the West Virginia Commissioner of Highways will credit the oldest outstanding note of such person in the amount of \$400.00 for every six months period that such person is employed by the West Virginia Division of Highways.

4.9. Failure to Graduate or Complete Education. - If for any reason, except death or physical or mental disability or being drafted into the armed services, the recipient of the scholarship fails to successfully complete the course of study for which the scholarship was granted, or if after the completion of the approved course of study such person does not become or continue to be an employee of the West Virginia Division of Highways, or ceases to be an employee before all such notes have been paid or canceled, the West Virginia Commissioner of Highways shall demand payment of all such unpaid notes, and shall transmit them to the State Treasurer for immediate collection.

§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.

5.2.1. Copies of Commissioner's Order - Copies of any such order of the Commissioner shall be sent to the office of the District Engineer 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:

5.3.1. 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.

5.3.2. A concise and clear statement of the problem or situation which the petitioners are asking the Commissioner to resolve.

5.3.3. 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.

5.3.4. 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 Engineer 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 Engineer 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 Engineer 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:

6.6.1. The office of the District Engineer of the District wherein any such road is located, which order shall be available for public inspection during all normal business hours;

6.6.2. The Clerk of the County Court of the county wherein the abandoned road is located;

6.6.3. 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 to W. Va. Code §5G-1, et seq., for state funded work.

7.2. Application. - This regulation applies to all engineering 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 | i) mapping |
| b) construction management and inspection | j) architectural |
| c) feasibility studies | k) materials, inspection, sampling, and testing |
| d) preliminary engineering | - l) related services |
| e) design engineering | m) archaeological investigation |
| f) design | n) historic investigation |
| g) engineering | |
| h) surveying | |

When it is necessary to utilize the services of a consultant, the Division Director will submit his reasons for so doing through appropriate channels to the Commissioner or his delegate for approval. The request will also indicate whether competitive or noncompetitive selection is appropriate. In the case of noncompetitive selections, justification, in accordance with the procedures in subsection 7.6, Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1, will be given.

It is the policy of the West Virginia Department of Transportation, Division of Highways, that Disadvantaged Businesses 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.

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.

7.3.1. Alternate Procedure. - The process outlined in 23 CFR 172.15 whereby the Division of Highways has the review and approval authority for all actions in the process from establishing the need for consultant services through the selection, negotiation and contract approval except in any action brought under the Protest Procedures in subsection 7.13 and contractual/administrative issues in subsection 7.14, Regulations

Pertaining to Particular Functions of the Commissioner of Highways 157CSR1.

7.3.2. CFR - Code of Federal Regulations.

7.3.3. 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.

7.3.4. 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.

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

7.3.6. Cost Accounting Information Statement. - 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.

7.3.7. 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.

7.3.8. Disadvantaged Business Enterprise (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.

7.3.9. 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 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.

7.3.10. 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.

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

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

7.3.13. Letter of Intent. - A letter from the Commissioner to a consultant authorizing work to begin prior to the execution of an agreement with the understanding that the consultant will be reimbursed by Division of Highways for any and all reasonable monies expended for work authorized if agreement is not executed by any and all of the parties concerned.

7.3.14. 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 minimum, a current qualification questionnaire, location of where work would be performed, Cost Accounting Information Statement and a description of the firms overall capabilities to handle the work, including work force available to be assigned to the project, personnel qualifications, and present workload. Additional statements as to the consultants particular abilities and qualifications, pertinent to preliminary scope of work may be included if deemed necessary. (See Exhibit A, Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1.)

7.3.15. Master Agreement. - An agreement written for a specified period of time for a particular service or services establishing specific rates of pay.

7.3.16. 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.

7.3.17. 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.

7.3.18. 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.

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

7.3.20. 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.

7.3.21. 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 Director of the Division requesting the service. The State Highway Engineer may appoint additional members at his discretion. At least three members are necessary to transact the short list.

7.3.22. Prenegotiation Audit. - An examination of a consultant's records made in accordance with generally accepted auditing standards. (See Exhibit C, Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1.)

7.3.23. 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 his proposed costs to perform the required service.

7.3.24. Procurement Standards. - The Division's own procurement procedures which reflect applicable state and local laws and regulations.

7.3.25. Qualification Questionnaire. - A Division form on which a consultant's experience data, personnel, fields of work performed and present and past activities are listed.

7.3.26. Qualification & Technical Analysis. - A review of the consultant's qualifications, including review of experience, reputation, expertise for a particular project under consideration, demonstrated ability, capability to meet requirements, location of offices, distribution of work to individuals and firms (specifically DBEs), time frame proposed by the consultant or required by the Division and past performance both administratively and technically. Other criteria may be required in special cases.

7.3.27. 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.

7.3.28. Selection Committee. - This committee shall consist of the Secretary of Transportation, the Commissioner of Highways, the State Highway Engineer and the next lower level of management beneath the State Highway Engineer under whose direction the work will be performed. The Secretary of Transportation may appoint additional members at his discretion. At least three members are necessary to transact the selection.

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

7.4. Competitive Selection. - State funded projects where services are estimated to cost \$250,000 or more and on federal aid projects estimated to cost over \$25,000. 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.

7.4.1. 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.

7.4.2. 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 B, Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1.)

7.4.3. 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 complete 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.

7.4.4. The Division responsible for the direct conduct of the contract, will provide a qualifications and technical analysis for each proposal which will be furnished to the Preliminary Selection Committee and which will be filed in the Division's records.

7.4.5. The Preliminary Selection Committee will develop a short list of consultants, the number being two (2) more than needed, who are in their opinion best qualified to perform the desired service.

7.4.6. All Disadvantaged Business Enterprises on the list of consultants who submitted proposals will be so identified on the qualifications and technical analysis.

7.4.7. 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.

7.4.8. When the services of a consultant are desired for a continuing or master agreement for items such as inspection services, subsurface investigation, or minor design services, the procedures of this section shall be utilized.

7.4.9. This short list shall be submitted to the Selection Committee with a copy of the qualification and technical analysis of each firm contained in the list.

7.4.10. The Selection Committee will review the short list and 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 analysis, provided that if interviews were conducted concerning qualifications and capabilities prior to or during the selection process, then the committee may in its discretion forego further interviews and discussions.

7.4.11. After scheduled interviews with the short listed consultants, the highest qualified is selected. The remaining consultants will be ranked in order of preference for future use if negotiations fail with the highest rated consultant.

7.4.12. The award of negotiated contracts financed with federal funds will take into consideration the annual DBE award goals.

7.4.13. 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.

7.4.14. For non-project specific work, when more than one consultant has been selected, the responsible Division shall evaluate each assigned task. This evaluation shall consider consultant qualifications to perform the individual task. When qualifications are equivalent, price may be considered as a criteria for selection.

7.5. Small Purchases. - State funded projects where services are estimated to cost less than \$250,000 and federal aid projects estimated to cost less than \$25,000.

7.5.1. The Director of the Division shall obtain approval to use this process from the Commissioner.

7.5.2. The Director of the Division requesting the service shall conduct discussions with three or more professional firms solicited on the basis of known or submitted qualifications for assignment prior to awarding of any contract, provided that if interviews were conducted concerning qualifications and capabilities prior to or during the selection process; then the committee may in its discretion forego further interviews and discussions.

7.5.3. The Director of the Division requesting the service shall submit a qualification analysis to the Selection Committee for selection of a consultant.

7.6. Noncompetitive Selection. -

7.6.1. Circumstances under which a contract may be awarded by noncompetitive negotiations are limited to the following:

7.6.1.a. The item is available only from a single source; or

7.6.1.b. When there is an emergency which will not permit the time necessary to conduct competitive negotiations; or

7.6.1.c. After solicitation of a number of sources, competition is determined inadequate; or

7.6.1.d. When it is determined appropriate to use available services of a public agency or educational institution.

7.6.2. The name of the consultant who is considered qualified to perform the service will be submitted to the Selection Committee with an explanation of the circumstance in paragraph a, subsection 7.6, Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1.

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

7.7. Negotiation of Fee. -

7.7.1. The consultant selected for the service will be requested to attend a detailed scope of work meeting, after which time he is to submit a priced proposal. The initial scope of work meeting may be waived for those consultants that are satisfactorily providing the same service such as drilling, sampling, inspection, etc.

7.7.2. The Director of the Division 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 consultant selected number one, except for services obtained on a per unit cost.

7.7.3. Fee proposals will be subjected to prenegotiation audits in accordance with 23 CFR 172.5. (See Exhibit C, Regulations Pertaining to Particular Functions of the Commissioner of Highways, 157CSR1.)

7.7.4. Negotiations shall be conducted by the Division requesting the service.

7.7.5. The proposed contract, including the agreed upon cost figures, shall be submitted to the Commissioner for approval and execution.

7.7.6. When approved by the Commissioner of Highways, the consultant may be given a letter of intent. On federally funded work, this action shall be subject to authorization of federal funds. Also on federal aid projects, reimbursement will be limited to actual costs based on subsequently approved negotiated fees. If the subsequent negotiated fee fails to be approved, those associated charges will be non-participating.

7.7.7. In the event that an agreement with the fee is unable to be reached, the Division 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 Committee and so on, if necessary.

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

7.7.9. The Commissioner will then request the 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.

7.7.10. A negotiation memorandum shall be maintained for a three year period after final payment.

7.8. Contract Modifications. -

7.8.1. Contract modifications are required for any modifications in the terms of the original contract; 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.

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

7.8.3. 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.

7.8.4. When necessary to maintain schedules and/or as determined by the Commissioner of Highways, the consultant may be authorized to proceed with work prior to agreement on the amount of compensation and execution of the contract modifications. (See Letter of Intent) (This Letter of Intent process is used primarily when first initiating work.)

7.9. Control of Work. - After notification to proceed is given to a consultant in writing, the responsible Division will meet regularly with the consultant to discuss progress and problems as they may occur with notes of the meetings recorded 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 also made in accordance with the applicable type project involved. All phases of contract work are viewed by the Division within the Division of Highways concerned with that particular type of work and that Division'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, 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 shall discuss problems as they occur. Documentation of the discussions shall be kept in the consultant's file.

7.10. Evaluation of Work. - Upon completion or performance termination of the consultant's work, the responsible Division 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. 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 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.

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

7.12. Audit Followup. - Primary responsibility for action and followup on audit findings and recommendations rest with the Division 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 of Highways 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.

Matters concerning work performed, wherein federal funds are utilized 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:

7.13.1. Violations of Federal law or regulations
and;

7.13.2. 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 utilizing FHWA 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 172.5(c)(f)]

7.15. Disposition of Errors and Deficiencies. - When it is determined that an error or deficiency exists, the Division 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.

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.

After an agreement has been reached, the findings shall be reported to the State Highway Engineer who, at his discretion, 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 and the State Highway Engineer, to further review the findings.

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

7.16. 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. Solicitation of Letters of Qualification.
- B. Suggested Notice for Consulting Services.
- C. 23 CFR 172.5(c).
- D. Alternate Procedure Concurrence

SOLICITATION OF LETTERS OF QUALIFICATION

The following items are typical of those to be obtained from or furnished to the consultants from whom Letters of Qualification are solicited:

Typical information to be obtained from consultant:

1. Overall capabilities to handle the project, i.e., work force, work load;
2. Work to be subcontracted;
3. Location of office in which the work will be performed;
4. Assurance that a job order cost accounting system is maintained and is capable of segregating and identifying accumulating costs for cost-type contracts; and
5. Consultant's Qualification Questionnaire, if a current copy is not on file with the Department.

These items should be listed in the advertisement in their relative order of importance for evaluation.

Typical information to be furnished to consultant:

1. Type of service required;
2. Description and location of the work;
3. Any data or work that is a prerequisite to the project;
4. Anticipated schedule for performing the service; and
5. Date by which proposal must be submitted.

SUGGESTED
NOTICE
FOR
CONSULTING SERVICES

Notice is hereby given that consulting engineering services will be utilized for the preparation of construction contract plans and related documents for Project _____ in _____ County. The work will consist of _____

Firms interested in being considered for this project must submit a letter of interest 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 _____, 199_____.

As a minimum, the proposal will include the following items listed in their relative order of importance for evaluation:

1. Overall capabilities to handle this work, including work force available to assign to the project, personnel qualifications and present work load.
2. Location of office in which the engineering work would be performed.
3. Amount of the proposed to be subcontracted.
4. Division's Cost Accounting Information Statement indicating whether a cost accounting system has been maintained and is in effect.

Additionally, a completed copy of the Division's Consultant Engineer Confidential Qualification Questionnaire and Cost Accounting Information Statement, if not already on file, and any brochures or other information that may have a direct relation to the subject project.

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

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

EXHIBIT C

23 CFR 172.5(c)

Prenegotiation audits. The contracting agencies shall prepare prenegotiation audits to provide the necessary data to assure that the consultant has an acceptable accounting system, adequate and proper justification of the various rates charged to perform work and is aware of the Federal Highway Administration's cost eligibility and documentation requirements.

- (1) Prenegotiation audits and the resultant audit opinions are required for all contracts expected to exceed \$250,000 and for contracts of less than \$250,000 where:
 - (i) There is insufficient knowledge of the consultant's accounting system.
 - (ii) There is previous unfavorable experience regarding the reliability of the consultant's accounting system, or
 - (iii) The contract involves procurement of new equipment or supplies for which cost experience is lacking.
- (2) The use of an independent audit, an audit performed by another State/Federal agency or an audit performed by another local governmental agency is acceptable if the information is current and of sufficient detail.
- (3) Prenegotiation audits may be waived when sufficient audited consultant data is available to permit reasonable comparisons with the cost proposal.

EXHIBIT D

ALTERNATE PROCEDURE CONCURRENCE

The section contained in Series 1, Section 8, of the Rules and Regulations of the West Virginia Department of Transportation, Division of Highways, dated April 1992 details the various procedures and documentation required for procuring and using consulting services.

In several paragraphs, reference is made to the involvement and/or approval of the Federal Highway Administration (FHWA). The regulations in 23 CFR 172.15 allows the Division of Highways to request approval under "Alternate Procedures." The Division has requested this option and FHWA has concurred.

Based on this concurrence, the Division has the review and approval authority for all actions in the process from establishing the need for consultant services through the selection, negotiation and contract approval except as noted below. The Commissioner of Highways or his designee will handle all approvals noted in the Procedures as being the responsibility of FHWA.

The FHWA shall remain involved in any action brought under the Protest Procedures in Section 8.13 and contractual/administrative issues in Section 8.14 of the Procurement Procedures for Negotiated Contracts.

Further, the FHWA has agreed that in the interest of simplifying procedures and reducing paperwork, all executed contracts and contract modifications are to be transmitted to and be retained in the Commissioner's files. This eliminates the requirement to submit executed contracts to FHWA.