WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #3

Do Not Mark In this Box

RECEIVED

2007 JUL 27 PM 3:11

SECRETARY OF STATE
STATE OF WEST VIRGINIA

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: Department of Transportation, Division of Highways TITLE NUMBER: 157

CITE AUTHORITY: §17-2A-8(1) and (2) and §17-4-19

AMENDMENT TO AN EXISTING RULE: YES☒ NO☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 3

TITLE OF RULE BEING AMENDED: Construction and Reconstruction of State Roads

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

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE POMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Paul A. Mattox, Jr.
Secretary of Transportation/
Commissioner of Highways

Division of Highways, Series 3
Construction and Reconstruction of State Roads
Proposed Amendments to a Legislative Rule
May 23, 2007

SUMMARY OF PROPOSED RULE:

Series 3 provides general rules for the construction and reconstruction of public highways. This rule includes: plans and specifications for the construction and reconstruction of state roads; bidding requirements; award and execution of the contract; control of work; control of material; legal relations and responsibility to public; prosecution and progress; measurement and payment; miscellaneous provisions; and disqualification and suspension of pre-qualified contractors.

STATEMENT OF CIRCUMSTANCES:

This amendment of an existing legislative rule is being filed to update the legislative rule to correspond with current DOH business practices concerning contract bonds and the contractor's public liability and property damage liability insurance. In addition the schedule of liquidated damages has been updated to correspond with Transportation's Standard Specifications Roads and Bridges manual.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Series 3, Construction and Reconstruction of State Roads

Type of Rule: ☒ **Legislative** ☐ **Interpretative** ☐ **Procedural**

Agency: Division of Highways

Address: Building 5, 1900 Kanawha Boulevard, East Room A-748
Charleston, WV 25305-0430

Phone Number: 304-558-9558 **Email:** mskiles@dot.state.wv.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

These rule changes do not impact costs and revenues of the state government.

Fiscal Note Detail

Show over-all effect in item 1 and 2 and, in item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of proposal	Current Increase/Decrease (use " ")	Next Increase/Decrease (use " ")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Equipment	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

Rule Title: Construction and Reconstruction of State Roads

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues:

These rule changes do not impact any annual or fiscal year costs.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: May 23, 2007

Paul A. Mattox, Jr.

Secretary of Transportation/Commissioner of Highways

Division of Highways, Series 3
Construction and Reconstruction of State Roads
Agency Approval of a Proposed Rule and
Filing with the Legislative Rule-Making Review Committee
July 25, 2007

SUMMARY OF PUBLIC COMMENTS and RESPONSES:

The public comment period was advertised in the State Register, published May 25, 2007. One comment was received on the proposed amendments. A summary of the comments along with the action taken follows.

The Surety & Fidelity Association of America
Submitted by: Matthew Klimezak, Director - Underwriting

In a letter dated June 5, 2007 the respondent noted the following:

1. The Surety & Fidelity Association of America believes that increasing the surety bond to 102% does not provide any additional substantive protection that the DOH doesn't already have with a 100% bond. Providing an option for the elimination of a relatively modest amount of retainage only serves to reduce the leverage both the Division as well as Surety has to assure successful completion of a project. It could result in some sureties reconsidering providing bonds for projects with such an option thereby lessening competition.

   RESPONSE:

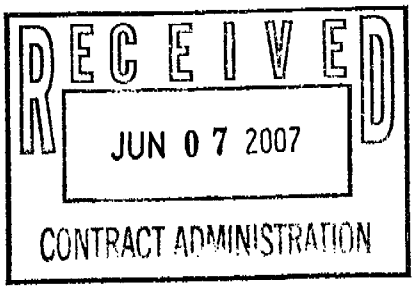
   The Division of Highways provides contractors the option of furnishing either a 100% surety bond with 2% retainage to be withheld or a 102% surety bond without the withholding of retainage. In the past two years the DOH has certified and prequalified 321 contractors to perform work for the Division. Of the 321 contractors, only 11 have chosen the option of routinely providing a 100% surety bond with 2% contract amount to be withheld by the Division. In addition, no prime contractor has reported any difficulty obtaining a 102% surety bond nor have any bonding or surety agencies expressed any opposition to this policy. Therefore, the DOH proposes to continue this practice.

The Surety & Fidelity Association of America

1101 CONNECTICUT AVENUE, NW, SUITE 800, WASHINGTON, DC 20036 TEL: (202) 463-0600 – FAX: (202) 463-0606
website: http://www.surety.org
E-mail: information@surety.org

LYNN M. SCHUBERT
President

EDWARD G. GALLAGHER
General Counsel
LENORE MAREMA
Vice President of Government Affairs
MATTHEW KLIMCZAK
Director-Underwriting
BARBARA FINNEGAN REIFF
Director-Regulatory Affairs
ALAN CLARK, A.C.A.S., M.A.A.A.
Actuary



June 5, 2007

Mr. Mike Skiles
WV Division of Highways
1900 Kanawha Boulevard, East
Room A-748
Charleston, WV 25305-0430

Re: Department of Transportation, Division of Highway
TITLE NUMBER: 157
RULE TYPE: Legislative
AUTHORITY: Section 17-2A-8(1) and (2) and Section 17-4-19
AMENDMENT TO EXISTING RULE No. 3
TITLE OF RULE BEING AMENDED: Construction and Reconstruction of State Roads

Dear Mr. Skiles:

The Surety and Fidelity Association of America ("SFAA") is a trade association consisting of about 500 insurance companies that are licensed to underwrite fidelity and surety bonds in the United States. SFAA members provide the vast majority of bonds that secure public construction in all states including West Virginia.

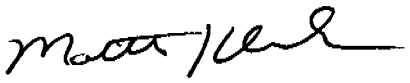
The Highway Division (Division) of the West Virginia Department of Transportation (DOT) has proposed to amend its rules for contract bonds for the construction and reconstruction of public highways. SFAA members are concerned about this proposal.

The proposed rules would provide a contractor the option of avoiding the withholding of retainage by posting a surety bond in the amount of 102 percent of the contract price. Retainage still would be withheld if the contractor provides a bond for 100 percent of the contract price.

SFAA opposes this option. Retainage has proven to be a worthwhile protective measure for the benefit of the Division as well as the Surety by encouraging the final completion of a project to obtain final payment. It represents actual and immediate dollars available for completion of a project either by the Division or the Surety and is a consideration in a surety's underwriting process. Increasing the bond to 102 percent does not provide any additional substantive protection that the Division does not already have with a 100 percent bond. Providing an option for the elimination of a relatively modest amount of retainage only serves to reduce the leverage both the Division and the Surety have to assure successful completion of a project. It could also result in some sureties reconsidering providing bonds for projects with such an option thereby lessening competition. We do not believe a bond for 102 percent of the contract price is equivalent to 2 percent retainage.

We respectfully ask that you reconsider implementing this section of the rules change. Please feel free to contact me if you would like further input or clarification of our position.

Sincerely,



Matthew Klimczak

Director - Underwriting
The Surety & Fidelity Association of America
(202) 778-3630
mklimczak@surety.org

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Highways
1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • 304/558-3505

Joe Manchin III
Governor

PREPARED BY: MM Mills DATE: 7-25-07		
	OFFICE	OK
	CC	
2	CH	MMM
	HP	
1	PC	MM
	AC	
	SEC	

July 25, 2007

Mr. Matthew Klimczak, Director-Underwriting
The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, D. C. 20036

Dear Mr. Klimczak:

Thank you for your letter of June 5, 2007 in which you express the concerns of the Surety & Fidelity Association of America regarding the proposed amendment to Title 157, Series 3, Sections 17-2A-8(1) and (2) and 17-4-19 of the West Virginia Legislative Rule. Specifically, your comments were relative to the portion of the proposed amendment which stipulates that contractors be given the option of providing the West Virginia Division of Highways a surety bond in the amount of 102 percent of the total amount of any given contract in lieu of the withholding of retainage by the Division.

During a past Session, the Legislature of West Virginia passed a bill dealing with the prompt payment of monies owed by prime contractors to their sub-contractors and suppliers. This bill commonly referred to as the Prompt Payment Act was approved by the Governor and stipulates that any funds, including retainage, due sub-contractors or suppliers from prime contractors be paid within a 14 day time period.

In order for the Division of Highways to enable the contracting industry to comply with these requirements, a Special Provision citing the prompt payment requirements set forth in the law was developed at the behest of the Contractors' Association of West Virginia and made applicable to all highway construction contracts. Additionally, the Division of Highways provided the contractors the option of furnishing either a 100 percent surety bond with 2 percent retainage to be withheld or a 102 percent surety bond without the withholding of retainage.

Currently, the Division of Highways has certified and prequalified 321 contractors to perform work for the Division. However, only 11 have chosen the option of routinely providing a 100 percent surety bond with 2 percent of the contract amount to be withheld by the Division.

Furthermore, during the two years this policy has been implemented and used, no prime contractors have reported difficulty in obtaining 102 percent surety bonds nor have any bonding agencies or surety underwriters expressed any opposition to this policy. Therefore, the West Virginia Division of Highways proposes to continue to provide the contracting industry the option of furnishing either a 100 percent surety bond or a 102 percent surety bond.

Very truly yours,

Marvin G. Murphy, P.E., P.L.S.
State Highway Engineer

MGM:Rc

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 25, 2007

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM:(*Agency Name, Address & Phone No.*) WV Department of Transportation, Division of Highways
1900 Kanawha Boulevard E., Charleston, WV 25305-0430
558-0444

LEGISLATIVE RULE TITLE: Construction and Reconstruction of State Roads

1. Authorizing statute(s) citation Title 157, Series 3 - 17-2A-8(1) and (2) and 17-4-19

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

   May 23, 2007

   b. What other notice, including advertising, did you give of the hearing?

   Comment period established in lieu of Public Hearing

   c. Date of Public Hearing(s) ***or*** Public Comment Period ended:

   June 25, 2007

   d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

   Attached X No comments received _____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 27, 2007

f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Paul A. Mattox, Jr., Secretary/Commissioner, WV Department of Transportation

State Capitol Complex Building 5, Room A-109

1900 Kanawha Boulevard, E., Charleston, WV 25305-0430

Phone: 558-0444 Fax: 558-1004 pmattox@dot.state.wv.us

g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Same

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

(No findings or determinations required prior to promulgation)

b. Date of hearing or comment period:

(None required)

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

(No findings or determinations required)

d. Attach findings and determinations and reasons:

Attached (None required)

RECEIVED
2007 JUL 27 PM 3: 11
SECRETARY OF STATE
STATE OF WEST VIRGINIA

TITLE 157
LEGISLATIVE RULE
DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS

SERIES 3
CONSTRUCTION AND RECONSTRUCTION OF STATE ROADS

§157-3-1. General.

1.1. Scope. -- This rule relates to the construction and reconstruction of state roads.

1.2. Authority. W. Va. Code "17-2A-8(1) and (2) and 17-4-19.

1.3. Filing Date. --

1.4. Effective Date. --

§157-3-2. Definitions.

2.1. Abbreviations. Whenever the following abbreviations are used in the specifications, plans or contract documents, they are defined as follows:

AAN - American Association of Nurserymen

AAR - Association of American Railroads

AASHTO - American Association of State Highway and Transportation Officials

AIA - American Institute of Architects

AISC - American Institute of Steel Construction, Incorporated

AISI - American Iron and Steel Institute

AMA - Automotive Manufacturer=s Association

AMS - Aerospace Material Specification

ANSI - American National Standards Institute

ARA - American Railway Association

AREA - American Railway Engineering Association

ASCE - American Society of Civil Engineers

ASD - Aluminum Standards and Data-Aluminum Association

ASLA - American Society of Landscape Architects

ASTM - American Society for Testing and Materials

AWWA - American Water Works Association

AWS - American Welding Society

FHWA - Federal Highway Administration

FSS - Federal Specifications and Standards, General Services Administration

IEEE - Institute of Electronic and Electrical Engineers

IPCEA - Insulated Power Cable Engineers Association

ISA - Instrument Society of America

MIL - Military Specification

MP - Materials Procedure (See 2.2(50) for Definition)

NBFU - National Board of Fire Underwriters

NEC - National Electric Code

NEMA - National Electrical Manufacturer=s Association

PEI-ALS - Porcelain Enamel Institute:

Aluminum Standards

UL - Underwriters Laboratories

SAE - Society of Automotive Engineers

SSPC - Steel Structures Painting Council

TTE-TTP - Federal Specifications and Standards

2.2. Access Connection means any roadway facility by means of which vehicles enter or leave arterial highways.

2.3. Admission means a statement made by a contractor in a court, or an official statement before any public body or official, that the contractor committed a certain act or omitted to perform a certain act.

2.4. Advertisements means the public announcement, as required by law, inviting bids for work to be performed, or material to be furnished.

2.5. "Aluminum, glass, and steel products" means products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated, or otherwise similarly processed from aluminum, glass and steel. "Domestic aluminum, glass and steel products" means aluminum, glass and steel products made in the United States.

2.6. Arterial highway means a general term denoting a highway primarily for through traffic.

2.7. Auxiliary lane means the portion of the roadway adjoining the traveled way for parking, speed-change or other purposes supplementary to through traffic movement.

2.8. Award means the acceptance by the division of a bid.

2.9. Base course means the layer or layers of specified material of designated thickness placed on a subbase or a subgrade to support a surface course or courses.

2.10. Bidder means an individual, firm, corporation, or combination thereof, acting directly or through a duly authorized representative, and prequalified according to the requirements and provisions of the division, submitting a bid for the proposed work.

2.11. Bidding crime means any act prohibited by state or federal law committed in any jurisdiction involving fraud, conspiracy, collusion, lying, or material misrepresentation with respect to bidding on any contract public or private.

2.12. Bridge means a structure, including supports, erected over a depression or an obstruction, such as water, a highway or railway and having a track or passageway for carrying traffic or other moving loads and having a length measured along the center of roadway more than 20 ft. between undercopings of abutments or extreme ends of openings for multiple boxes.

2.12.1. The length of a bridge structure is the overall length measured along the line of survey stationing back to back of abutments if present, otherwise, end to end of the bridge floor, but in no case less than the total clear opening of the structure. Roadway width is the clear width measured at right angles to the longitudinal centerline of the bridge between the bottom of curbs.

2.13. Calendar day means every day shown on the calendar.

2.14. Certified technician means an individual who has been examined by the joint Industry-Division Certification Board and deemed competent in the particular technical field for which the individual has been examined. This competency is documented by written notification and issuance of a certificate to the individual and remains in effect for a given period of time as determined by the regulations of the board. Should any questions develop concerning the status of an individual, verification may be made through the Training Section of the Personnel Division of the Division.

2.15. Change order means a general term referring to force account work orders, supplemental agreements, and work orders of the

contract.

2.16. Channel means a natural or artificial water course.

2.17. City, town or district means a subdivision of the county used to designate or identify the location of the proposed work.

2.18. Commissioner means the West Virginia Commissioner of Highways.

2.19. Construction limits means the physical limits of construction as described by designated lines drawn on the Plans.

2.20. Contract means the written agreement between the division and the contractor covering the performance of the work, the furnishing of labor, equipment and materials, and the basis of payment. The contract includes the invitation for bids, proposal, contract form, contract bond, specifications, supplemental specifications, special provisions, plans, notice to proceed, any change orders that are required to complete the construction of the work in an acceptable manner, including authorized extensions thereof, all of which constitute one instrument.

2.21. Contract bond means the approved form of security, executed by the contractor and their surety, guaranteeing completion of the work and payment of all legal debts pertaining to the construction of the project.

2.22. Contract period means the period from the specified date of commencement of work to the specified date of completion of the work, both dates inclusive, as is specified in the contract.

2.23. Contract time means the number of working or calendar days specified in the proposal, indicating the time allowed for the completion of the work contemplated, including authorized time extensions. In case a calendar date of completion is specified in the proposal, the work shall be complete by that date or any approved extensions thereof.

2.24. Contractor means the individual, firm or corporation, party of the second part to the contract, acting directly or through their agents, employees, or subcontractors.

2.25. Control of access, full means the condition where the right of owners or occupants of abutting land or other persons to access, light, air or view in connection with a highway is fully controlled by public authority. The authority to control access is exercised to give preference to through traffic by providing access connections with selected public roads only and by prohibiting crossings at grade or direct driveway connections.

2.26. Control of access, partial means the condition where the right of owners or occupants of abutting land or other persons to access, light, air or view in connection with a highway is partially controlled by public authority. The authority to control access is exercised to give preference to through traffic to a degree that, in addition to access connections with selected public roads, there may be some crossings at grade and some private driveway connections.

2.27. Conviction means a judgment or conviction of criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

2.28. County means the county or counties of West Virginia in which the work is to be done.

2.29. Culvert means any structure not classified as a bridge which provides an opening under the roadway.

2.30. Debarment means an exclusion or bar from contracting with or bidding on contracts let by the division.

2.31. Department means West Virginia Department of Transportation.

2.32. Disqualification means the debarment of a contractor by the revocation of the contractor's Certificate of Qualification that is necessary for contracting with or bidding on contracts let by the division for a specified period of time.

2.33. Divided highway means a highway with

separated roadways for traffic in opposite directions.

2.34. Division means West Virginia Division of Highways, a corporation.

2.35. Division Administrator means the Division of Highways Administrator, West Virginia Department of Transportation or an authorized representative or employee.

2.36. Easement means a right acquired by one party to use land belonging to another party for a specified purpose.

2.37. Embankment means the structure of soils, soils aggregate and broken rock between the embankment foundation and the subgrade.

2.38. Embankment foundation means the material below the original ground surface whose physical characteristics affect the support of the embankment.

2.39. Employee means any person working on behalf of the project who is under the direction of the contractor or any subcontractor.

2.40. Engineer means the State Highway Engineer of the division, or an authorized representative, limited by the scope of duties assigned.

2.41. Equipment means all machinery and equipment, together with the necessary supplies for upkeep and maintenance, and also tools and apparatus necessary for the proper construction and acceptable completion of the work.

2.42. Estimates means the official written itemization of the value of materials in place and work performed.

2.43. Expressway means a divided arterial highway for through traffic with full or partial control of access and generally with grade separations at intersections.

2.44. Extra work means an item of work not provided for in the contract as awarded, but found essential to the satisfactory completion of the contract within its intended scope. See section 6.3 of this rule.

2.45. Force account work order means an order signed by the engineer or his or her authorized representative, directing additional work to be performed, with payments based on labor, materials used, equipment cost, plus specified percentages.

2.46. Freeway means an expressway with full control of access.

2.47. Frontage street or road means a local street or road auxiliary to and located on the side of an arterial highway for service to abutting property and adjacent areas, and for control of access.

2.48. Hearing Examiner means a person designated by the commissioner to conduct a hearing as set forth in subsection 13.5 of this rule.

2.49. Highway means the entire improvement comprising the entire right-of-way. See (70).

2.50. Highway grade separation means any structure carrying highway or street traffic over or under another highway or street.

2.51. Holidays means official holidays which are New Year's Day, Martin Luther King, Jr. Day, ~~Lincoln's Birthday,~~ ~~Washington's Birthday~~ President's Day, Memorial Day, West Virginia Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day, and any day in which an election (primary or general) is held throughout the state and such other days as the president, governor, or other duly constituted authority shall proclaim to be holidays. If a holiday falls on a Sunday, the following Monday shall be observed in lieu thereof. If a holiday falls on a Saturday, the previous Friday shall be observed in lieu thereof.

2.52. Inspector means the engineer's authorized representative assigned to make any or all necessary inspection of the work as further described in subsection 7.10 of this rule.

2.53. Instructions to bidders means the notice to contractors containing all necessary information

as to provisions, requirements, date, location, and time of submitting Proposals.

2.54. Interpretations. In order to avoid cumbersome and confusing repetition of expressions in the Specifications, it is provided that whenever anything is, or is to be done, if, as, or, when, or where "contemplated, required, determined, directed, specified, authorized, ordered, given, designated, indicated, considered necessary, deemed necessary, permitted, reserved, suspended, established, approval, approved, disapproved, acceptable, unacceptable, suitable, accepted, satisfactory, unsatisfactory, sufficient, insufficient, rejected, or condemned," it shall be understood as if the expression were followed by the words "by the engineer" or "to the engineer".

2.55. Invitation for bids means the advertisement for bids, as required by law, inviting bids for work to be performed or material to be furnished.

2.56. Item means a specifically described unit of work for which a price is provided in the contract.

2.57. Laboratory means the testing laboratories of the division or any other testing laboratories designated by the division.

2.58. Lot means an isolated quantity of specified material from a single source or a measured amount of specified construction assumed to be produced by the same process.

2.59. Materials means any substances specified for use in the construction of the project and its appurtenances.

2.60. Materials procedure means a procedure defining standard methods or guidelines for the inspection, sampling, testing, evaluation, and documentation of the Materials Division's activities relative to the quality assurance program for materials, products, and processes. Each materials procedure is identified by the letters MP followed by seven digits, (i.e. MP XXX.XX.XX).

2.61. Median means the portion of a divided highway separating the travelled ways for traffic in opposite directions.

2.62. Median lane means a speed-change lane within the median to accommodate left turning vehicles.

2.63. Multiple deficiency means a multiple deficiency is defined as a failure to meet specified requirements involving more than one characteristic of a material within the same lot.

2.64. Notice to proceed means a written notice to the contractor to proceed with the contract work including, when applicable, the date of beginning of contract time.

2.65. Parking lane means an auxiliary lane primarily for the purpose of vehicular parking.

2.66. Parkway means an arterial highway for noncommercial traffic, with full or partial control of access, and usually located within a park or a ribbon of parklike development.

2.67. Pavement structure means the combination of subbase, base course, and surface course placed on a subgrade to support the traffic load and distribute it to the roadbed.

2.68. Plans means the approved plans, profiles, typical sections, cross sections, working drawings, standard drawings and supplemental drawings, or exact reproductions thereof, which show the location, character, dimensions and details of the work to be done.

2.69. Pre-construction conference means a conference normally called by the district engineer, following award and prior to start of construction, to be attended by division officials and by the responsible officials of the contractor and other affected parties.

2.70. Pre-qualification statement means the approved form or forms upon which Contractors shall furnish information as to their ability to perform work, their experience, manpower, equipment and financial condition.

2.71. Pre-qualified contractor means any individual person, partnership, corporation or other

legal entity, including its directors and officers, holding a valid Certificate of Qualification, which submits bids for, is awarded, or reasonably may expect to submit bids for or be awarded a contract for labor, services or material or any combination of these by the division.

2.72. Profile grade means the trace of a vertical plane intersecting the top surface of the proposed wearing surface, usually along the longitudinal centerline of the roadway. Profile grade means either elevation or gradient of such trace according to the context.

2.73. Project means the specific section of the highway, together with all appurtenances and construction to be performed thereon, under the Contract.

2.74. Project engineer or project supervisor means the representative of the engineer on a project. See section 6.9.

2.75. Proposal means the offer of a bidder, on the prescribed form, to perform the work and to furnish the labor and material at the prices quoted.

2.76. Proposal form means the approved form on which the division requires a bid to be prepared and submitted for the work.

2.77. Proposal guaranty means the security furnished with a bid to guarantee that the bidder will enter into the contract if his or her bid is accepted.

2.78. "Public works" includes roads, highways, streets, bridges, sidewalks, sewage systems, buildings, engineering and architectural works, and any other structure, facility or improvement constructed or undertaken by the division.

2.79. Railway-highway separation means any structure carrying highway traffic over or under the tracks of any railway.

2.80. Ramp means a connecting roadway between two intersecting highways, usually at a highway grade separation.

2.81. Right-of-way is a general term denoting land, property, or interest therein, usually in a strip, acquired for or devoted to a highway.

2.82. Road is a general term denoting a public way for purposes of vehicular travel, including the entire area within the right-of-way, or needed for the maintenance of travel. See W. Va. Code '17-1-3.

2.83. Roadbed means the grade portion of a highway, within top and side slopes, prepared as a foundation for the pavement structure and shoulders.

2.84. Roadside is a general term denoting the area adjoining the outer edge of the roadway. Extensive areas between the roadways of a divided highway may also be considered roadside.

2.85. Roadside development means those items necessary to the complete highway which provide for the preservation of landscape materials and features; the rehabilitation and protection against erosion of all areas disturbed by construction through seeding, sodding, mulching and the placing of other ground covers; such suitable plantings and other improvements as may increase the effectiveness and enhance the appearance of the highway.

2.86. Roadway B The portion of the highway within limits of construction.

2.87. Seasonal restrictions means limitations imposed on the work which prohibit the contractor from performing certain types of work during specific seasons of the year.

2.88. Shoulders means the portion of the roadway contiguous with the travelled way for accommodation of stopped vehicles, for emergency use, and for lateral support of base and surface courses.

2.89. Sidewalk means that portion of the roadway primarily intended for the use of pedestrians.

2.90. Single deficiency means a failure to meet specified requirements involving one

characteristic of a material.

2.91. Special provisions means additions and revisions to the standard and supplemental specifications covering conditions peculiar to an individual project.

2.92. Specifications is a general term applied to all directions, provisions, and requirements pertaining to performance of the work.

2.93. State means the State of West Virginia.

2.94. Street is a general term denoting a public way for purposes of vehicular travel, including the entire area within the right-of-way.

2.95. Structures means bridges, culverts, catch basins, drop inlets, retaining walls, cribbing, manholes, endwalls, buildings, sewers, service pipes, underdrains, foundation drains, and other features which may be encountered in the work and not otherwise classed.

2.96. Subbase means the layer or layers of specified or selected materials of designed thickness placed on a subgrade to support a base course.

2.97. Subcontractor means an individual, firm, or corporation to whom the contractor sublets part of the contract.

2.98. Subgrade means the upper portion of a roadbed upon which the pavement structure and shoulders are constructed.

2.99. Substructure means all that part of the structure below the bearings of simple and continuous spans, skewbacks of arches and tops of footings of rigid frames, together with the back-walls, wingwalls, and wing protection railings.

2.100. Superintendent means the contractor's authorized representative in responsible charge of the work.

2.101. Superstructure means the entire structure except the substructure.

2.102. Supplemental agreement means a modification of the contract covering changes in the plans or quantities, or both, and establishing the basis of payment and time adjustment for the work necessitated by reason of the modification, requiring the signature of the commissioner, the contractor, and the surety, or their authorized representatives.

2.103. Supplemental specifications means additions to and revisions of the standard specifications that are approved subsequent to issuance of the standard specification book. supplemental specifications prevail over standard specifications when in conflict therewith.

2.104. Surety means the corporation, partnership, or individual, other than the contractor, executing a bond furnished by the contractor.

2.105. Suspension means an exclusion or bar from contracting with or bidding on contracts let by the division for a temporary period of time, pending the completion of an investigation or legal or disqualification proceedings.

2.106. Tare or tare weight is the weight of the empty delivery vehicle or hauling unit.

2.107. Temporary structure means a structure required for the use of traffic or other purpose while construction is in progress and not to be retained as part of the improvement.

2.108. Titles means the titles or headings of the sections and subsections are intended for convenience of reference and shall not be considered as having any bearing on their interpretation except those titles and headings used in conjunction with the definition of the terms.

2.109. Traffic lane means the portion of the roadway for the movement of a single line of vehicles.

2.110. Travelled way means the portion of the roadway for the movement of vehicles, exclusive of shoulders and auxiliary lanes.

2.111. Work means the furnishing of all labor, materials, equipment, and other incidentals

necessary or convenient to the successful completion of the project and the carrying out of all duties and obligations imposed by the contract.

2.112. Working day means every day shown on the calendar, exclusive of Saturdays, Sundays, and holidays as set forth in subsection 2.51, on which weather and other conditions not under the control of the contractor will permit construction operations to proceed for a minimum of five hours with normal working forces engaged in performing the controlling item or items of work.

2.113. Working drawings means stress sheets, shop drawings, erection plans, falsework plans, framework plans, cofferdam plans, bending diagrams for reinforcing steel, or any other supplemental plans or similar data which the contractor is required to submit to the engineer for approval.

2.114. Work order means a written order, signed by the engineer, requiring certain performance by the contractor without negotiation. Such order shall not change quantities of major items beyond the 25 percent or $10,000 limitations, shall not create new items, nor make revisions to item prices.

'§157-3-3. Plans and Specifications for the Construction and Reconstruction of State Roads.

3.1. General Purposes. This series of rules is promulgated pursuant to W. Va. Code '29A-1-2(c) to provide Legislative rules to make specific the procedures in relation to the construction and reconstruction of roads and bridges and furnishing of materials and supplies to the commissioner and to govern contracts pertaining thereto pursuant to the provisions of W. Va. Code '17-4-19, 1931, as amended.

3.2. Preparation of Plans and Specifications. The Commissioner of Highways, either through his or her staff employees or through consultants, shall prepare all plans and specifications for the construction and reconstruction of state roads. No such plans or specifications shall be used by any contractor or by any employee or agent of the State of West Virginia for the purpose of constructing, altering, or repairing any state road until such plans or specifications have been approved in writing by the Commissioner of Highways or his or her authorized representative.

3.2.a. Amendments to Plans and Specifications. The plans and specifications for any state road project may be altered at any time by the Commissioner of Highways if he or she believes the alteration is necessary or desirable for the benefit of the citizens of this state.

3.3. Purpose of Plans and Specifications. The purpose of plans and specifications for the construction or reconstruction of any road is to provide the contractor or any other person undertaking such work with detailed directions regarding the work to be done, the manner in which or the method by which such work is to be done, and the materials and equipment which are to be used in such work. The bidder is required to examine carefully the plans, specifications, special provisions, supplemental specifications, contract forms, and the site of the work contemplated. The submission of a bid shall be considered prima facie evidence that the bidder has made such examination and has judged and satisfied himself or herself as to the character, quality and quantity of work to be performed and material to be furnished under the contract. Accordingly, it is expected that the contractor, or other person who undertakes such work, will follow the plans and specifications in each and every detail.

3.4. Copies of Plans and Specifications. Three complete sets of plans, profile, cross sections and contract proposal will be furnished upon request to the contractor who is undertaking the work. Additional sets may be obtained by writing to the commissioner, and upon payment of the following charges:

(1) Plan and Profile ------ per set -- $15.00
(2) Cross Sections -------- per set -- $50.00
(3) Contract Proposal ----- per each - $10.00
(4) Standard Specifications -- per each - $10.00

3.5. Adoption of Standard Specifications. The Commissioner of Highways may prepare standard specifications to be followed in the construction process of any state road project unless specific

provisions of another nature are set forth in the contract. Although these general or standard specifications may be amended or altered by the commissioner at any time, the specifications in effect at the time of the execution of the contract as referenced in the contract documents shall serve as the basis for all transactions between the contractor and the commissioner concerning the compensation due the contractor.

§157-3-4. Bidding Requirements and Conditions.

4.1. Pre-qualification of Bidders. All bidders on projects let to contract by the division shall be pre-qualified as provided for by rules or regulations, or both, of the commissioner. A Certificate of Qualification will be issued by the commissioner fixing the amount of incomplete work a contractor may have under contract at any one time and the type of work for which the contractor is qualified.

4.1.a. To obtain a Certificate of Qualification, the contractor must file a "Contractor's Prequalification Statement" containing the information as required based on the category of work for which prequalification is being requested.

4.1.b. Applications for qualification will be accepted by the commissioner until 15 calendar days prior to the date set for receiving bids on projects on which the applicant may wish to submit a proposal. Award of a certificate may be held in abeyance until such time as the commissioner is able to verify all references and satisfy himself or herself as to the applicant's qualifications.

4.1.c. No contractor will be issued a Certificate of Qualification until the division has had adequate time to review and verify the adequacy of the information provided in the "Contractor's Prequalification Statement".

4.2. Contents of Proposal Forms. The proposal forms will show the location and description of the proposed work, the approximate estimates of the various quantities of work to be performed, the amount of the proposal guaranty, the West Virginia Division of Labor approved fair minimum wage rate schedules, the number of working days or date on which the work is to be completed, and the date, time and place of opening of proposals. The form will also include any special provisions or requirements not contained in the Standard Specifications. All papers bound with or attached to the proposal form are considered a part thereof and must not be detached or altered.

4.2.a. The plans, specifications, and other documents designated in the proposal form are considered a part of the proposal form whether attached or not attached.

4.2.b. Upon request, the division will furnish pre-qualified bidders or their authorized representatives with proposal forms. Proposals issued for informational purposes, available to all interested parties, will be marked "Not Valid for Bidding Purposes" and will not be accepted as a bid from any company.

4.3. Issuance of Proposal Forms. Proposal forms, on which the name of the bidder is to be typed or written in ink before issuance, will be issued to pre-qualified contractors only or to their authorized representatives, or to contractors who have filed on a division standard form an application for prequalification 15 calendar days prior to the date set for receiving bids on projects on which the applicant desires to bid.

4.3.a. The division may at its discretion issue to a contractor a proposal requiring prequalification in excess of the amount allotted the contractor provided it considers that this contractor is particularly fitted by reason of his or her experience or equipment, or both, to perform work of this type involved in an amount exceeding his or her prequalification limits and further provided that the prospective bidder furnish the division with a letter from a reputable Surety advising of their willingness to furnish him or her a performance bond for the project.

4.3.b. When more than one project is advertised, proposals will be issued on as many projects as the contractor requests, providing the contractor is qualified as above for each individual project, but no contracts will be awarded

exceeding the permissible limit of the contractor's prequalification rating except as otherwise provided in subsection 5.1 of this rule.

4.4. Interpretation of Approximate Estimates. The quantities appearing in the proposal form are approximate only and are prepared for the comparison of bids. Payment to the contractor will be made only for the actual quantities of work performed and accepted, or for materials furnished in accordance with the contract. If upon completion of the construction the actual quantities show either increase or decrease, the unit bid prices offered in the proposal will prevail except as further provided.

4.5. Examination of Plans, Specifications and Site of Work. The bidder is required to examine carefully the plans, specifications, supplemental specifications, contract forms, and the site of the work contemplated. The submission of a bid shall be considered prima facie evidence that the bidder has made such examination and has judged for and satisfied himself or herself as to the character, quality, and quantity of work to be performed and material required to be furnished under the contract.

4.6. Preparation of Proposal. The bidder may submit his or her proposal on the form furnished by the division. In lieu of using the division=s schedule of items, the bidder may submit a computer generated substitute schedule with the proposal. The substitute schedule must be in a format approved in writing by the division prior to use. The bidder must furnish a unit price or a lump sum price as called for in the Proposal, in numerical figures, for each pay item listed therein, except that in the case of alternates, the bid may be made on only one alternate if so desired. The bidder must also show the products of the respective unit prices and quantities in numerical figures in the column provided for that purpose and the total amount of the Proposal obtained in adding the products of the items. All figures shall be in ink or typed. In case of discrepancy between the unit price and its extensions, the unit price will govern.

4.6.a. The proposal must be signed in ink by the bidder or a qualified and authorized agent; by one or more bidders or officers of each firm represented in a joint venture; by one or more officers of a corporation, duly authorized to act for and on behalf of the corporation; or by all partners or their individually qualified and authorized agents in case of a partnership.

4.6.b. The proposal must contain the name and post office address of an individual bidder, the name and post office address of each individual or firm represented in a joint venture, the name and post office address of a corporation and its corporate officials, or the name and post office address of each member of a partnership.

4.6.c. The proposal shall comply with West Virginia Contractor Licensing Act, W. Va. Code '21-11, except that on federal-aid projects a contractor=s license is not required at time of bid, but will ~~will~~ be required before work can begin.

4.7. Irregular Proposals. Proposals will be considered irregular and will be rejected for any of the following reasons:

4.7.a. When the proposal is on a form other than that furnished by the division or if the form is altered. Use of a division approved computer generated schedule of items shall not be considered an alteration of form or format within the meaning of these specifications.

4.7.b. When there are unauthorized additions, conditional or alternate bids, or irregularities of any kind which may tend to make the proposal incomplete, indefinite, or ambiguous as to its meaning Also, when division approved computer generated schedule of items show any alteration of format, additions or amendments not called for, errors or omissions in units of measure, or measures.

4.7.c. When the bidder adds any provisions reserving the right to accept or reject an award, or to enter into a contract pursuant to an award. This does not exclude a bid limiting the maximum gross amount of awards acceptable to any one bidder at any one bid letting, provided that any selection of awards will be made by the division.

4.7.d. When the proposal does not contain a unit price for each pay item listed, except in the case of authorized alternate pay items.

4.7.e. Failure to sign, properly execute or return the bid bond on the official form furnished by the division, unless a certified or cashier's check is provided in lieu thereof in accordance with subsection 4.8 in the case of authorized alternate payments.

4.7.f. Failure to sign, properly execute, or notarize the proposal.

4.7.g. Failure to indicate a proposed goal in Section C, Item 3 of the notice contained in the proposal, when a division determined goal is indicated in paragraph 5 of the special provision for Disadvantaged Business Enterprise Utilization.

4.7.h. Failure to properly acknowledge receipt of addendum(s) in accordance with Section I of the notice contained in the proposal.

4.7.i. Failure to show the West Virginia Contractor=s License Number when required in Section H of the notice contained in the proposal.

4.7.j. Failure to provide copies of SSPC-QP1 and/or SSPC-QP2 certifications when required for field painting new or existing bridges as required by Section 688.3.1, A Standard Specifications, Roads and Bridges@ adopted 1993.

4.8. Proposal Guaranty. No proposal will be considered unless accompanied by a guaranty in the form of a certified or cashier's check, or bid bond, in the amount specified in the proposal, made payable to the West Virginia Division of Highways. Bid bonds will be accepted only if executed on the official form furnished by the division, and any proposal accompanied by a bond executed on a copy, duplicate, or facsimile will be rejected.

4.9. Delivery of Proposals. Each proposal shall be submitted in a special envelope furnished by the division with the proposal. In the event of loss of the envelope a similar one of the same general size and shape may be used. The envelope shall be endorsed on the outside

"Proposal for the Improvement of the Road or Bridge Number _____, Project No. _____, County _____ West Virginia,"

and shall have the name of the bidder thereon. Envelopes shall be addressed to the West Virginia Department of Transportation, Division of Highways, Charleston, West Virginia, and shall have the name and address of the bidder thereon. Proposals shall be deposited at the proper designated office of the division prior to the hour set in the proposal for opening of bids. Proposals received after the time for opening of bids will be returned to the bidder unopened.

4.10. Withdrawal of Proposals. At any time prior to the opening of proposals, bidders may withdraw proposals already deposited with the division, provided the request is made in writing or by telegram; provided further that any bidder may withdraw his or her bid during the course of reading of bids prior to the actual reading of bids on the project for which the bid is withdrawn; further provided that the requested withdrawal is made in writing in the following form:

"I, the undersigned, of _____, Contractor(s) hereby acknowledge that I have this day withdrawn the sealed bid of _____, Contractor(s) on West Virginia Department of Transportation, Division of Highways Project No. _____."

4.10.a. Contractors who are found to be low bidders on a number of projects of which the total exceeds the contractor's rating may withdraw, with the approval of the commissioner, bids on such project or projects as will bring the remaining total to within the limit of the rating. At his or her discretion, the commissioner may award contracts for the project on which bids have been so withdrawn to the next lowest qualified bidder.

4.11. Combination Proposals. If the division so elects, proposals may be issued for projects in combination or separately, so that bids may be submitted either on the combination or on separate units of the combination. The division reserves the right to make awards on combination bids or

separate bids to the best advantage of the division. No combination bids other than those specifically set up in proposals by the division will be considered. Separate contracts will be written for each individual project included in the combination.

4.12. Public Opening of Proposals. Proposals will be opened and read publicly at the time and place indicated in the notice to contractors. Bidders, their authorized agents, and other interested parties are invited to be present.

4.13. Disqualification of Bidders. Either of the following reasons may be considered as being sufficient for the disqualification of a bidder and the rejection of his or her proposal or proposals.

4.13.a. More than one proposal for the same work from an individual, firm, or corporation under the same or different name.

4.13.b. Evidence of collusion among bidders. Participants in such collusion will receive no recognition as bidders for any future work of the division until any such participant shall have been reinstated as a qualified bidder.

4.14. Material Guaranty. The successful bidder shall furnish a complete statement of the origin, composition and manufacture of all materials to be used in the construction of the work, together with samples when required. Samples may be subjected to the tests provided for in these specifications to determine their quality and fitness for the work.

4.15. Free Competitive Bidding Affidavit. Prior to the approval of federal-aid contracts, a sworn statement in the form of an affidavit shall be executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded. This affidavit must be sworn to before a notary public who must affix his or her seal thereto if outside the State of West Virginia.

4.15.a. The affidavit, with accompanying endorsement and acknowledgment sections, is contained in the contract proposal.

§157-3-5. Award and Execution of Contract.

5.1. Consideration of Proposals. After the proposals are opened and read, they will be compared on the basis of the summation of the products of the approximate quantities shown in the bid schedule by the unit prices. The results of such comparisons will be made immediately available to the public after award of the contract. In the event of discrepancy between unit bid prices and extensions, the unit bid price shall govern.

5.1.a. The right is reserved to reject any or all proposals, to waive technicalities or to advertise for new proposals if, in the judgement of the commissioner, the best interests of the State will be promoted.

5.1.b. If proposals for more than one project are issued to a bidder, which projects individually would be within the bidder's qualification established as provided in subsection 4.1 of this rule, but a combination of more than one, considering also the work under contract and incomplete, would be in excess of his or her qualification, the right is reserved to consider only such proposal or proposals, as, in the opinion of the commissioner, are most advantageous to the division.

5.1.c. Proposals containing special provisions for Disadvantaged Business Enterprise utilization will be considered as follows:

5.1.c.1. When the low bidder's goal submitted in section C, item 3 - Contractor's Goal for DBE participation, of the notice contained in the project proposal, meets or exceeds the contract DBE goals, and the division considers the amount of the bid to be reasonable, such bidder will be the successful bidder.

5.1.c.2. When the low bidder's goal submitted in section C, item 3 - Contractor's Goal for DBE participation, of the notice contained in the project proposal, does not meet the DBE contract goal and the division considers the amount of the bid to be reasonable, the bid will be accepted if he or she can show that good faith efforts were made prior to the bid to meet the contract goals.

5.1.c.3. When the low bidder cannot

satisfy the division that good faith efforts have been made, then this bid may be rejected and the second low bid will be evaluated in the same manner. This procedure will continue, evaluating bids in ascending order, until either the contract DBE goal is attained or good faith efforts can be verified and that bid will be accepted provided the amount thereof is considered reasonable by the division.

5.2. Award of Contract. The award of contract, if it be awarded, will be made within 30 calendar days after the opening of proposals to the lowest pre-qualified bidder. The commissioner may, with the agreement of the successful bidder, withhold award for any length of time. The successful bidder will be notified by letter, mailed to the address shown on his or her Proposal, that his or her bid has been accepted and that he or she has been awarded the contract.

5.3. Cancellation of Award. The division reserves the right to cancel the award of any contract at any time before the execution of the contract documents by all parties without any liability against the division.

5.4. Return of Proposal Guaranty. All proposal guaranties, except those of the two lowest bidders, will be returned immediately following the opening and checking of the Proposals. The retained proposal guaranty of the unsuccessful of the two lowest bidders will be returned within ten 10 days following the award of contract, and that of the successful bidder will be returned after a satisfactory contract bond has been furnished and the contract has been executed.

5.5. Requirement of Contract Bond. At the time of the execution of the contract, the successful bidder shall execute and deliver to the division a good and sufficient surety or collateral bond payable to the State of West Virginia. The successful bidder has the option of submission of the aforementioned bond in ~~the~~ an amount ~~of~~ equivalent to either 102 percent or 100 percent of the contract price. The successful bidder shall notify the Division regarding the type and percentage of the bond intended for submission to the Division within five (5) calendar days following the issuance of the Notice of Award to the successful bidder.

5.5.a. Submission of a bond in an amount equivalent to 102 percent of the contract price by the successful bidder does not necessitate the withholding of retainage by the Division from monies due on future progress voucher estimates payable under the terms of the contract. Further, the decision by a particular contractor to submit said bond in an amount equivalent to 102 percent of the contract price shall be consistent and applicable throughout the duration of the contract for which the bond is being submitted.

5.5.b. Submission of a bond in an amount equivalent to 100 percent of the contract price does necessitate the withholding of retainage by the Division from monies due on future progress voucher estimates payable under the terms of the contract and as set forth in 11.6. If the successful bidder submits a good and sufficient surety or collateral bond payable to the State of West Virginia in an amount equivalent to 2 percent of the whole will be deducted from the total of the amounts ascertained as payable and will be retained by the Division until the completion of the entire contract in an acceptable manner. The balance, or amount equivalent to 98 percent of the whole, less all previous payments, will be certified for payment. Further, the decision by a particular contractor to submit said bond in an equivalent to 100 percent of the contract price shall be consistent and applicable throughout the duration of the contract for which bond is being submitted.

5.5.~~a~~c. As an alternate, the successful bidder may deposit with the sState tTreasurer cash bond, United States Treasury Bonds, United States Treasury Certificates of Indebtedness, United States Treasury Bills or West Virginia Road Bonds in the amount of either 102 percent or 100 percent of the contract amount. A safe keeping receipt from a bank located in the State of West Virginia may be deposited with the state treasurer in lieu of any of the definitive securities.

5.5.~~b~~d. The state treasurer shall, on a regular basis, collect all interest or income on the obligations so deposited and pay same, when and if collected, to the contractor who deposited the obligations. If the deposit is in the form of coupon

bonds, the state treasurer shall deliver each coupon as it matures to the contractor.

5.6. Insurance Requirements. The contractor shall be required, in addition to any other form of insurance or bonds required under the terms of the contract and specifications, to procure and maintain during the life of the contract the following types of insurance in the amounts set forth.

5.6.a. All such policies of insurance shall be occurrence policies and the certificate of insurance provided to the division shall so specify. The policies must provide coverage for all damages arising out of injuries to persons or property which allegedly occurred during the life of the contract regardless of when the claim is filed subject to statute of limitations.

5.6.a.1. Contractor's Public Liability and Property Damage Liability Insurance. The contractor shall furnish evidence to the state that, with respect to the operations he or she performs, he or she carries (1) regular Contractor's Public Liability Insurance providing for a limit of not less than ~~$250~~ 1,000,000 for all damages arising out of bodily injuries to or death of one person and, subject to that limit for each person, a total limit of ~~$500~~ 1,000,000 for all damages arising out of bodily injuries to or death of two or more persons in any one accident; and (2) regular Contractor's Property Damage Liability Insurance providing for a limit of not less than $1,000,000 for all damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, a total (or aggregate) limit of ~~$5~~2,000,000 for all damages arising out of injury to or destruction of property during the life of the contract. The policy shall be written or endorsed to cover the hazards of blasting, operation of mechanical equipment on streets and highways, and collapse.

5.6.a.2. If any part of the work is sublet, it shall be the duty of the contractor to see that similar insurance is provided by or in behalf of the subcontractors to cover their operations.

5.6.b. Contractor's Protective Public Liability and Property Damage Liability Insurance. The contractor shall furnish evidence to the state that, with respect to the operations performed for him or her by subcontractors, the Contractor carries (1) regular Contractor's Protective Public Liability Insurance providing for a limit of not less than $250,000 for all damages arising out of bodily injuries to or death of one person, and subject to that limit for each person, a total limit of $500,000 for all damages arising out of bodily injuries to or death of two or more persons in any one accident; and (2) regular Contractor's Protective Property Damage Liability Insurance providing for a limit of not less than $100,000 for all damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, a total (or aggregate) limit of $500,000 for all damages arising out of injury to or destruction of property during the life of the Contract. The policy shall be written or endorsed to cover the hazards of blasting, operations of mechanical equipment on streets or highways, and collapse.

5.6.c. Automobile Insurance. The contractor shall furnish evidence to the state that with respect to the operations he or she performs, the contractor carries ~~(1)~~ Automobile Insurance providing for a combined single limit of not less than $1,000,000 for each accident. ~~all damages arising out of bodily injuries to or death of one person and, subject to that limit for each person, a total limit of $300,000 for all damages arising out of bodily injuries to or death of two or more persons in any one accident; and (2) Property Damage Liability Insurance having a total (or aggregate) limit of $100,000.~~ This policy shall cover all owned, hired, or non-owned cars used on the project.

5.6.d. Steam Boiler Insurance. In event steam boilers are used on the work, the contractor shall furnish evidence that the contractor carries in his or her own behalf standard Steam Boiler Insurance having an aggregate limit of not less than $250,000. The insurance specified shall be carried until all work required to be performed under the terms of the contract is satisfactorily completed as evidenced by the formal acceptance of the state.

~~5.6.e. Countersignature of Resident West Virginia Agent. The policy or policies of insurance~~

~~required must be countersigned by a resident agent of the State of West Virginia, in accordance with the applicable statute of the State of West Virginia.~~

5.6.e.~~1.~~ All certificates of insurance used to verify the policies issued must be endorsed by a West Virginia licensed resident agent. Such endorsement must include the printed name, street address, city and zip code of the resident agent.

5.7. Special Bonds and Insurance. When the work is of such nature that special bond or insurance is required, the special requirements will be detailed and included in the proposal for the project.

5.8. Execution of Contract. The contract shall be executed by the bidder to whom the contract has been awarded, the bond executed by the principal and the sureties, and the contract and bond returned to the division within 20 days after the date of the notice of the award.

5.9. Failure to Execute Contract. Failure by the bidder to execute the contract and file acceptable bond within 20 days after notice of award shall be just cause for the annulment of award or the contract, that the amount of the guaranty deposited with the proposal will be retained by the division and deposited in the Division of Highways Fund, not as a penalty, but as liquidated damages. Award may then be made to the next lowest responsible bidder, or the work may be re-advertised and constructed under contract or otherwise, as the division may decide.

5.10. Pre-Construction Conference. As soon as possible after the award of each contract a pre-construction conference will be arranged by the division. The contractor, his or her superintendent, or an authorized agent shall be present at the conference and shall present the proposed schedule of work, list of proposed subcontractors, if any, and a list of suppliers from whom materials are anticipated to be purchased. The information so presented shall be on forms submitted to the contractor with the letter of contract award. The division will make arrangements for utility representatives to be present.

~~§~~157-3-6. Scope of Work.

6.1. Intent of Contract. The intent of the contract is to provide for the construction and completion in every detail of the work described. The contractor shall furnish all labor, materials, equipment, tools, transportation, and supplies required to complete the work in accordance with the plans, specifications, and terms of the contract.

6.1.a. Should any misunderstanding arise as to the intent or meaning of the contract, or any discrepancy appear therein, the decision of the commissioner shall be final.

6.2. Alteration of Plans or Character of Work. Under no circumstances shall alterations of plans or the nature of the work involve work beyond the beginning or ending of the proposed construction except as may be necessary to satisfactorily complete the project. In addition to the above, alterations in plans or increased quantities of items may be made necessary at a time when the contract or the items involved in the operations are substantially completed, the related contractor organization demobilized, and related equipment essentially removed from the project. Under these circumstances, if it is demonstrated that the unit cost to the contractor has increased, additional compensation may be allowed by the engineer and the additional work performed as prescribed in subsection 6.3 as "Extra Work" of this rule.

6.2.a. Any adjustment in compensation because of a change or changes resulting from one or more of the conditions described above will be made in accordance with the provisions of subsection 10.3 of this rule. Any adjustment in contract time because of such change or changes will be made in accordance with the provisions of subsection 10.6 of this rule.

6.3. Extra Work. The contractor shall perform unforeseen work, for which there is no price included in the contract, whenever it is deemed necessary or desirable in order to complete fully the work as contemplated. The work shall be performed in accordance with the Specifications and as directed, and will be paid for as provided by a written supplemental agreement on a unit price or lump sum basis. In the event the engineer and the

contractor are unable to agree upon the terms of the supplemental agreement, the contractor shall proceed with the work and receive payment therefore in the manner and amount prescribed in subsection 11.4 of this rule.

6.4. Temporary Structures. In contracts for bridges only, the contractor will not be required to construct or maintain temporary structures unless the construction and maintenance of such structures are stipulated in the contract or ordered as extra work by the engineer. If the building of temporary structures is included in the contract, or added by extra work order, the responsibility of the contractor for accidents to the public or to his or her employees, arising from its construction or maintenance, shall extend to such structure and its roadway approaches.

6.5. Maintenance of Traffic. The project, while undergoing improvement, shall be kept open to all traffic by the contractor so that both local and through traffic will be adequately and safely accommodated. All construction operations shall be scheduled to keep traffic delay to a minimum. The division has adopted, and the contractor shall follow the standard, "Traffic Control for Street and Highway Construction and Maintenance Operations", published by the West Virginia Division of Highways.

6.5.a. All expenses for the following items shall be borne by the contractor without extra compensation except when the proposal provides for payment under 636, Maintaining Traffic Standard Specifications, Roads and Bridges, Adopted 1993:

6.5.a.1. The construction and maintenance of temporary detours, temporary structures, temporary approaches, crossings and intersections with streets and roads, including the furnishing and application of aggregates for maintenance of traffic and liquid asphalt oil, calcium chloride, or water for use as dust palliative.

6.5.a.2. Furnishing flaggers, pilot trucks and drivers.

6.5.a.3. Furnishing, erecting and maintaining warning devices, such as signs, auxiliary barriers, channelizing devices, hazard warning lights, barricades, flares and reflective markers.

6.5.a.3.A. If actual field conditions are not illustrated in the plans, engineering judgment and discretion shall be exercised to select devices that will be adaptable, but the general policies herein prescribed shall be adhered to. Final responsibility for the installation of adequate safety devices for the protection of the traveling public and employees, as well as for the safeguard of the work in general, shall rest with the contractor.

6.5.a.3.B. During any suspension of work, the contractor shall make passable and shall open to traffic such portions of the project and temporary roadways or portions thereof as may be agreed upon between the contractor and the engineer for the temporary accommodation of necessary traffic during the anticipated period of suspension. Thereafter, and until an issuance of order for the resumption of construction operations, the maintenance of the temporary route or line of travel agreed upon will be by and at the expense of the division. When work is resumed, the contractor shall replace or renew any work or materials lost or damaged because of such temporary use of the project and shall remove, to the extent directed by the engineer, any work or materials used in the temporary maintenance thereof by the division and shall complete the project in every respect as though its prosecution has been continuous and without interference. All additional work caused by such suspensions, for reasons beyond the control of the contractor, will be paid for by the division at contract prices or by extra work.

6.5.b. The division will provide all necessary snow removal.

6.6. Rights In and Use of Materials Found on the Work. The contractor, with the approval of the engineer, may use on the project such stone, gravel, sand, or other material determined suitable by the engineer, as may be found in the excavation and will be paid both for the excavation of such materials at the corresponding contract unit price

and for the pay item for which the excavated material is used. The contractor shall replace at his or her own expense with other acceptable material all of that portion of the excavation material so removed and used which was needed for use in the embankments, backfills, approaches, or otherwise. No charge for the material so used will be made against the contractor. The contractor shall not excavate or remove any material from within the highway location which is not within the grading limits, as indicated by the slope and grade lines, without written authorization from the engineer.

6.6.a. Unless otherwise provided in the contract, the material from any existing old structures and pipes shall become the property of the contractor and shall be removed from the project.

6.7. Final Clean Up. Before final acceptance is made, the contractor shall clear the highway, waste areas, borrow pits and all ground occupied by the contractor during the construction, of all rubbish, excess materials, temporary structures and equipment. The contractor shall restore in an acceptable manner all property, both public and private, which has been damaged during the course of the work; and shall leave the highway or bridge site, including streams and banks, in a neat and presentable condition in accordance with applicable laws of the state. All excavated material or falsework placed in stream channels shall be removed, and all material from around piers and abutments shall be replaced and compacted to the level of the original surface.

6.8. Bridge Plate. A bronze plate, carrying the project number, the number of the bridge, and the year of the bridge construction, will be furnished and placed by the Contractor without extra compensation. The name plate on through steel bridges shall be placed on the end posts about eight feet vertically above the floor. On other bridges, they shall be placed in the railings as shown on the Plans or as designated by the engineer. The plate shall be a minimum of 8 in. by 10 in. wide, with letters and numbers of 3/4 in. minimum height raised 1/8 in. above the surface of the plate. The information on the plate shall be arranged as follows:

Project No.

Bridge No.

Built (Year of Construction)

6.9. Differing Site Conditions. During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the site is disturbed and before the affected work is performed.

6.9.a. Upon written notification, the engineer will investigate the conditions. If it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding anticipated profits, will be made and the contract modified in writing accordingly. The engineer will notify the contractor of their determination whether or not an adjustment of the contract is warranted.

6.9.b. No contract adjustment which results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice. No contract adjustment will be allowed under this clause for any effects caused on unchanged work.

6.10. Suspension of Work Ordered by the Engineer. If the engineer issues a written suspension or delay in the performance of all or any portion of the work that is for an unreasonable period of time (not originally anticipated, customary or inherent in the construction industry) and the contractor believes that additional compensation and/or contract time is due as a result of such suspension or delay, the contractor shall submit a written request for adjustment to the engineer within seven (7) calendar days of receipt of the notice to resume work. The request shall set forth the reasons and support for such adjustment.

6.10.a. Upon receipt, the engineer will evaluate the contractor's request. If the engineer agrees that the cost and/or time required for the performance of the contract has increased as a result of such suspension and the suspension was caused by conditions beyond the control of and not the fault of the contractor, its suppliers, or subcontractors at any approved tier, and not caused by weather, the engineer will make an adjustment (excluding profit) and modify the contract in writing accordingly. The contractor will be notified of the engineer's determination whether or not an adjustment of the contract is warranted.

6.10.b. No contract adjustment will be allowed unless the contractor has submitted the request for adjustment within the time prescribed. No contract adjustment will be allowed under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided or excluded under any other term or condition of this contract.

6.11. Significant Changes In the Character of the Work. The engineer reserves the right to make, in writing, at any time during the work, changes in quantities and alterations in the work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the contract nor release the surety, and the contractor agrees to perform the work as altered.

6.11.a. If the alterations or changes in quantities significantly change the character of the work under the contract, whether such alterations or changes are in themselves significant changes to the character of the work or by affecting other work cause such other work to become significantly different in character, an adjustment, excluding anticipated profit, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the contractor in such amount as the engineer may determine to be fair and equitable.

6.11.b. If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract. The term "significant change" shall be construed to apply only to the following circumstances:

6.11.b.1. When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or

6.11.b.2. When a major item of work, (any item having an original contract value in excess of 10 percent of the original contract amount or $50,000 dollars), is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

6.12. Value Engineering. The contractor may submit to the engineer, in writing, Value Engineering Proposals (VEP) for modifying the plans, specifications or other requirements of the contract for the purpose of reducing the total cost of construction without reducing design capacity or quality of the finished product. If accepted by the division, net savings resulting from the VEP will be shared by the contractor and the division on a fifty-fifty basis.

6.12.a. This subsection applies to all VEPs initiated and developed by the contractor and which are identified as such by the contractor at the time of their submission to the engineer; however, nothing shall be construed as requiring the engineer to consider or approve a VEP submitted hereunder.

6.12.b. As a minimum, the following information shall be submitted, in quadruplicate, with each VEP:

6.12.b.1. a statement that this proposal is submitted as a VEP;

6.12.b.2. a description of the difference between the existing contract

requirements and the proposed change;

6.12.b.3. a statement concerning the basis for the VEP and benefits to the Division together with an itemization of the contract items and requirements affected by the VEP;

6.12.b.4. separate detailed cost estimates for both the existing contract requirements and the proposed change;

6.12.b.5. an itemization of plan details, design standards or specifications to be changed if the VEP is adopted;

6.12.b.6. an estimate of the effect on collateral costs to the division. Collateral costs are defined to be reduced costs of operation, maintenance or repair and extended useful service life; and

6.12.b.7. a statement of the time by which approval must be issued to obtain the total cost reduction during remainder of contract, noting any effect on contract completion time or delivery schedule.

6.12.c. The division will process the VEP in the same manner as prescribed for any other proposal which would necessitate issuance of a contract change order. The division may accept in whole or in part any VEP by issuing a change order which will identify the VEP on which it is based. The Division will not be liable to the contractor for failure to accept or act upon any VEP submitted pursuant to this provision nor for any delays to the work attributable to any such proposal. Until a proposal is effected by change order, the contractor shall remain obligated to the terms and conditions of the existing contract. When an executed change order has not been issued by the date upon which the contractor's proposal specifies that a decision should be made, or such other date as the contractor may subsequently have specified in writing, such proposal shall be deemed rejected.

6.12.d. The change order effecting the necessary contract modification will establish the estimated net savings agreed upon, will provide for adjustment in the contract prices and will indicate the net savings be equally divided between the contractor and the division. The contractor shall absorb all costs incurred in preparing a VEP for submission to the division. All reasonably incurred costs of reviewing and administering the VEP will be borne by the division. The division reserves the right to include in the change order any conditions it deems appropriate for consideration, approval and implementation of the proposal. The contractor's fifty-percent share of the net savings shall constitute full compensation for effecting all changes pursuant to the change order.

6.12.e. Acceptance of the VEP and performance of the work there under will not change the contract completion date as a result of the VEP, unless specifically provided for in the change order authorizing the VEP.

6.12.f. The division expressly reserves the right to adopt a VEP for general use in contracts administered by the division when it determines the VEP is suitable for application to other contracts without obligation or compensation of any kind to the contractor.

6.12.g. Proposed changes in the basic design of a bridge or pavement type, or which require different right-of-way limits, will not normally be considered as an acceptable VEP. The engineer shall be sole judge of the acceptability of a VEP.

6.12.h. When a VEP is accepted by the division, the provisions of subsection 5.2 of this rule pertaining to adjustment of contract unit price due to alterations of contract quantities will not apply to the items adjusted or deleted as a result of effecting the VEP by change order.

6.12.i. The cost of the revised work, as determined in the value engineering change order, will be paid on current estimates. In addition to such payment, the contractor will be paid, on a lump sum basis by a separate item, one half of the difference (net savings) of the cost of the original contract work and the final cost of the new work listed in the change order.

6.12.j. One fourth of the estimated net savings will be paid to the contractor upon

approval of the change order. The remainder of the net savings due the contractor will be paid upon completion of all items of work included in the change order. This final lump sum payment will be determined by the actual quantities for items paid by the unit. Final payment for other lump sum or proposal quantity items will be the change order amount, subject to subsection 11.2 of this rule.

§157-3-7. Control of Work.

7.1. Authority of the Engineer. The engineer will decide all questions which may arise as to the quantity, quality, and acceptability of materials furnished and work performed, and as to the rate of progress of the work; all questions which may arise as to the interpretation of the Plans and Specifications; and all questions as to the acceptable fulfillment of the contract on the part of the contractor. The decision of the engineer will be final.

7.1.a. The engineer will have the authority to suspend the work wholly or in part due to the failure of the contractor to correct conditions unsafe for the workman or the general public, for failure to carry out provisions of the contract, for failure to carry out orders, for such periods as he or she may deem necessary due to unsuitable weather, for conditions considered unsuitable for the prosecution of the work, or for any other condition or reason deemed to be in the public interest. All such suspension orders will be directed to the contractor in writing.

7.1.b. The engineer is not authorized to increase the obligation of the division to any contract except as herein provided.

7.2. Plans and Working Drawings. Approved plans will show the location, profile, typical cross section, structures except as hereinafter specified, incidental items, and a summary of all items appearing in the proposal. Any deviations which may be required by the exigencies of the construction will be determined by the engineer and authorized by him or her in writing. The contractor shall keep one set of approved plans available on the work at all times.

7.2.a. Plans will show such details as are necessary to give a comprehensive idea of the construction contemplated. Any information which may be shown on drawings regarding results obtained from the test piles or borings will be a record of conditions encountered at the place where such test piles were driven or borings were made, as nearly as these conditions could be interpreted by the engineer observing the operations. The contractor shall interpret the data in the light of his or her own experience. The contractor is not bound to accept or rely on the data shown on the drawings, but may make such additional borings and investigations, including test piles, as he or she may desire in order to satisfy himself or herself concerning the lengths of piles and the conditions governing or entering into the construction of foundations.

7.2.b. The plans will show the foundation depths and dimensions on which the estimate of quantities is based. These depths and foundation dimensions, however, are subject to such variations as may be necessary to secure a foundation satisfactory to the engineer, and the right is expressly reserved to increase or diminish the dimensions and depths of the foundations as the engineer may determine.

7.2.c. The contractor shall submit to the engineer for approval such additional stress sheets, shop details, and other working drawings as may be required for the construction of any part of the work; and prior to the approval of such plans, any work done or materials ordered shall be at the contractor's risk.

7.2.d. Working drawings for steel structures shall consist of shop detail, erection and other working plans, showing details, dimensions, sizes of material, and other information necessary for complete fabrication and erection of metal work. The division will require shop lists for structured steel to be submitted on automatic data processing cards or magnetic tape in a format as set forth by the engineer.

7.2.e. Working drawings for concrete structures shall consist of such detail plans as may reasonably be required for the successful prosecution of the work and which are not

included in the plans furnished by the engineer. These may include plans for falsework, bracing, centering and formwork, masonry layout diagrams, and diagrams for bent reinforcement.

7.2.f. The contractor shall furnish the engineer copies of the working drawings as may be required for approval and for construction purposes, and upon completion of the work, reproducible, full-size tracings of the original drawings shall be delivered to the engineer. The size of the original drawings shall be 22 inches by 36 inches, including margins, unless otherwise permitted. The working drawings submitted for approval may be reduced.

7.2.g. It is expressly understood that the approval by the engineer of the contractor's working drawing relates to the requirements for strength and general arrangement, and such approval will not relieve the contractor from responsibility for omission, errors in dimensions, shop fits, field connection, etc., for quantity of materials, or from any of his or her responsibility under the contract for the successful completion of the work. The contract price shall include the cost of furnishing all working drawings, and the contractor will be allowed no extra compensation for such drawings.

7.3. Conformity with Plans and Specifications. All work performed and all materials furnished shall be in reasonably close conformity with the lines, grades, cross sections, dimensions and material requirements, including tolerances, shown on the plans or indicated in the specifications.

7.3.a. Should the engineer determine the materials, or the finished product do not conform to the specifications or the plans, he or she will then make a determination if the work will be accepted and remain in place in accordance with subdivision 10.3.a and subsection 8.7 of this rule. In this event, the engineer will document the basis of acceptance by contract modification which will provide for an adjusted payment. All nonconforming material or construction judged to be inadequate for the use intended shall be either reworked or removed and replaced at no expense to the division.

7.3.b. Each supplemental agreement containing an adjusted price will also have added the sum of two hundred dollars to each adjusted price, for the division's administration costs, to be deducted from monies due the contractor.

7.4. Coordination of Plans, Specifications, Supplemental Specifications, and Special Provisions. The specifications, the supplemental specifications, the plans, special provisions, and all supplementary documents are essential parts of the contract, and a requirement occurring in one is as binding as though occurring in all. They are intended to be complementary and to describe and provide for a complete work. In case of discrepancy, calculated dimensions will govern over scaled dimensions; supplemental specifications will govern over specifications; plans will govern over specifications and supplemental specifications; special provisions will govern over specifications, supplemental specifications and plans. When the plans provide that new work is to connect with existing structures, the contractor must verify all dimensions with the engineer before proceeding with the work.

7.4.a. The contractor shall take no advantage of any apparent error or omission in the plans or specifications. In the event the contractor discovers such an error or omission, he or she shall immediately notify the engineer. The engineer will then make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the plans and specifications.

7.5. Cooperation By Contractor. The contractor will be furnished a maximum of three (3) complete sets of plan and profile sheets and three (3) complete sets of cross sections upon request, without charge. Additional copies may be obtained upon payment of $10.00 per set of plan and profile sheets and $50.00 per set of cross sections. The contractor shall maintain on the project at all times one complete set of plans, specifications, and special provisions.

7.5.a. The contractor shall give the work the constant attention necessary to facilitate the progress thereof, and shall cooperate with the

engineer, his or her inspectors, other contractors, and utilities in every way possible.

7.5.b. The contractor shall have on the work at all times, as his or her agent, a competent superintendent capable of reading and thoroughly understanding the plans and specifications, and thoroughly experienced in the type of work being performed, who shall receive instructions from the engineer or his or her authorized representatives. The superintendent shall have full authority to execute orders or directions of the engineer without delay, and to promptly supply such materials, equipment, tools, labor, and incidentals as may be required. Such superintendence shall be furnished irrespective of the amount of work sublet.

7.5.c. The contractor shall furnish to the engineer a list of addresses and telephone numbers of his or her personnel who may be reached in case of emergency during hours when no work is to be performed. On weekends, holidays, during suspensions of work, and during storms the contractor shall alert certain of his or her personnel to stand by and shall inform the engineer of arrangements so made.

7.5.d. The contractor shall provide all reasonable facilities and furnish the division the information, assistance and samples required by the engineer and inspector for proper inspecting or testing of materials and workmanship.

7.5.e. On some contracts it may be necessary, to insure proper coordination between the work of the contractor and the work of various utilities, to hold a pre-construction utility meeting. The division will arrange for the affected utilities to be present. The contractor or his or her representative, authorized to make decisions for him or her in regard to the scheduling of the proposed work, is required to attend the meeting. A report of the pre-construction utility meeting will be prepared and distributed by the engineer to all represented at the meeting.

7.6. Cooperation with Utilities. The division will notify all utility companies, all pipe line owners, or other parties affected, and endeavor to have all necessary adjustments of the public or private utility fixtures, sewers, pipe lines, and other appurtenances within or adjacent to the limits of construction, made as soon as practicable.

7.6.a. Water lines, gas lines, wire lines, sewer lines, service connections, water and gas meter boxes, water and gas valve boxes, light standards, cableways, signals, and all other utility appurtenances within the limits of the proposed construction which are to be relocated or adjusted are to be moved by the owners at their expense, except as otherwise provided for in the Special Provisions or as noted on the Plans.

7.6.b. Should the contractor desire temporary changes of location for his or her convenience of any utility appurtenances, he or she shall satisfy the division that the proposed relocation does not interfere with his or her or other contractors' operations of the requirements of the work and does not cause an obstruction or a hazard to traffic. The contractor shall make his or her own request to the utility or other parties affected by such relocation work. Such relocation work shall be made solely at the contractor's expense.

7.6.c. Any work done under or within the right-of-way of a railroad shall be under the supervision and control of the chief engineer, or other designated officer, of the railroad to the extent necessary in the judgment of the chief engineer, or other designated officer, to insure safe and uninterrupted operation of its trains and the convenient conduct of its business. Any additional conditions or requirements for doing work within the railroad right-of-way will be set forth in the contract.

7.6.d. In general, it is to be understood that the contractor has considered in his or her bid all of the permanent and temporary utility appurtenances in their present or relocated positions as shown on the plans, and that no additional compensation will be made by the State for any delays, inconvenience, or damage sustained by him or her due to interference from the utility appurtenances or the operation of moving them. The locations of the underground utilities shown on the plans have been obtained by diligent field checks and searches of available records. It is

believed that they are essentially correct, but the division makes no guarantees as to their exact locations.

7.6.e. It is the contractor's responsibility to determine the exact location of each publicly or privately owned utility transmission line (pipeline, conduit, wires, cable, etc.) in project areas where these lines would be interrupted or damaged by performing work. In the event of damage or disruption to utility transmission lines which are active and are to remain in service, the contractor shall immediately notify the owner or the responsible official of the organization operating the lines that are interrupted. The contractor shall assume all costs, charges or claims connected with the interruption and repair of any utility transmission lines damaged by the contractor.

7.7. Cooperation Between Contractors. The division reserves the right at any time to contract for and perform other or additional work on or near the work covered by the contract.

7.7.a. When separate contracts are let within the limits of any one project, each contractor shall conduct his or her work so as not to interfere with or hinder the progress or completion of the work being performed by other contractors. Contractors working on the same project shall cooperate with each other as directed.

7.7.b. Each contractor involved shall assume all liability, financial or otherwise, in connection with his or her contract and shall protect and save harmless the division from any and all damages or claims that may arise because of inconvenience, delay, or loss experienced by him or her because of the presence and operations of other contractors working within the limits of the same project.

7.7.c. The contractor shall arrange his or her work and shall place and dispose of the materials being used so as not to interfere with the operations of the other contractors within the limits of the same project. He or she shall join his or her work with that of the others in an acceptable manner and shall perform it in proper sequence to that of the others.

7.7.d. In the event the engineer finds that further coordination effort is necessary, he or she shall call a meeting of the contractors involved. After the meeting has been held, he or she may notify the contractors of the action required of each and his or her decision shall be final.

7.8. Construction Stakes, Lines and Grades. Except when Item 639-1, "Construction Layout Stakes" is included in the contract, the engineer will set construction stakes establishing lines, slopes and continuous profile-grade, together with necessary reference stakes and bench marks. The engineer will set sufficient right-of-way stakes to define right-of-way limits. The engineer will set stakes to mark center line and establish bench marks for bridges and special structures as may be considered necessary.

7.8.a. The stakes and marks in the paragraph above shall constitute field control by and in accordance with which the contractor shall establish all additional stakes and marks necessary to secure a correct layout of all the work. All stakes, except those set by the engineer, shall be furnished by the contractor. The contractor shall not engage the services of any person or persons in the employ of the division for the performance of any of the contractor's layout work.

7.8.b. The contractor shall be responsible for having the finished work in reasonably close conformity with the lines, grades elevations, and dimensions called for on the plans or established by the engineer. The contractor shall be held responsible for the preservation of stakes, marks and references, and shall have them reset at the contractor=s expense when they are damaged, lost, displaced, or removed.

7.9. Authority and Duties of the Project Engineer or Project Supervisor. The project engineer or supervisor has immediate charge of the engineering details of each construction project. He or she is responsible for the administration and satisfactory completion of the project. The project engineer or supervisor has the authority to reject defective material and to suspend any work that is being improperly performed.

7.9.a. The project engineer or supervisor

will have the authority to suspend the work wholly or in part due to the failure of the contractor to correct conditions unsafe for the workmen or the general public; for failure to carry out provisions of the contract; for failure to carry out orders; for such periods as he or she may deem necessary due to unsuitable weather. All such suspension orders will be directed to the contractor in writing. The suspension of the work for the above reasons does not relieve the contractor of his or her responsibility according to subsection 9.16 of this rule.

7.10. Authority and Duties of the Inspector. Inspectors employed by the division will be authorized to inspect all work done and materials furnished. Such inspection may extend to all or any part of the work and to the preparation, fabrication or manufacture of the materials to be used. The inspector is not authorized to alter or waive the provisions of the contract. The inspector is authorized to call the attention of the contractor to any failure of the work or materials to conform to the specifications and contract. The inspector is authorized to reject materials which do not meet specification requirements or suspend the portion of the work involved until any question at issue can be referred to the project engineer or project supervisor. The inspector is not authorized to issue instructions contrary to the plans and specifications. The inspector shall not act as foreman or perform other duties for the contractor, nor interfere with the management of the work by the latter.

7.11. Inspection of Work and Materials. All materials and each part or detail of the work shall be subject to inspection by the engineer. The engineer or a representative shall be allowed access to all parts of the work and shall be furnished with such information and assistance by the contractor as is required to make a complete and detailed inspection.

7.11.a. If the engineer requests it, the contractor, at any time before acceptance of the work, shall remove or uncover such portions of the finished work as may be directed. After examination, the contractor shall restore said portions of the work to the standard required by the specifications. Should the work thus exposed or examined prove acceptable, the uncovering, or removing, and the replacing of the covering or making good of the parts removed will be paid for as extra work; but should the work so exposed or examined prove unacceptable, the uncovering, or removing, and the replacing of the covering or making good of the parts removed shall be at the contractor's expense.

7.11.b. Any work done or materials used without supervision or inspection by an authorized division representative may be ordered removed and replaced at the contractor's expense. Failure to reject any defective material or work shall not in any way prevent later rejection when such defects are discovered, nor obligate the division to final acceptance.

7.11.c. When any unit of government or political subdivision or any railroad corporation is to pay a portion of the cost of the work covered by this contract, its respective representatives shall have the right to inspect the work. Such inspection shall in no sense make any unit of government or political subdivision or any railroad corporation a party to this contract, and shall in no way interfere with the rights of either party hereunder.

7.11.d. No work shall be done at night, Saturdays, Sundays or Holidays without documented prior approval of the engineer.

7.12. Removal of Unacceptable and Unauthorized Work.
Except as provided in subsection 8.3 of this rule, all work which does not conform to the requirements of the contract will be considered as unacceptable work.

7.12.a. Unacceptable work, whether the result of poor workmanship, use of defective materials, damage through carelessness or any other cause, found to exist prior to the final acceptance of the work, shall be removed immediately and replaced in an acceptable manner.

7.12.b. Unacceptable material shall be removed from the job site. No work shall be done without lines and grades having been given or approved by the engineer. Work done contrary to the instructions of the engineer, work done beyond

the lines shown on the plans, or as given, except as herein specified, or any extra work done without authority, will be considered as unauthorized and will not be paid for under the provisions of the contract. Work so done may be ordered removed or replaced at the contractor's expense.

7.12.c. Upon failure on the part of the contractor to comply promptly with any order of the engineer, made under the provisions of this subsection, the engineer will have authority to cause unacceptable work to be remedied or removed and replaced and unauthorized work to be removed, and to deduct the costs from any monies due or to become due the contractor.

7.13. Load Restrictions. The contractor shall comply with all legal load restrictions in the hauling of materials on public roads. A special permit will not relieve the contractor of liability for damage which may result from the moving of equipment.

7.13.a. The operation of equipment of such weight or so loaded as to cause damage to structures or the roadway or to any other type of construction will not be permitted. Hauling of materials over the base course or surface course under construction shall be limited as directed. No loads will be permitted on a concrete pavement, base or structure before the expiration of the curing period. In no case shall legal load limits be exceeded unless permitted in writing. The contractor shall be responsible for all damage done by their own equipment.

7.14. Maintenance During Construction. The contractor shall maintain the work during construction and until the project is accepted except as otherwise provided in subdivision 7.16.a. This maintenance shall constitute continuous and effective work prosecuted day by day, with adequate equipment and forces to the end that the roadway and structures are kept in satisfactory condition at all times.

7.14.a. In the case of a contract for the placing of a course upon a course or sub-grade previously constructed, the contractor shall maintain the previous course or sub-grade during all construction operations.

7.14.b. All cost of maintenance work during construction and before the project is accepted shall be included in the unit prices bid on the various pay items, and the contractor will not be paid an additional amount for such work except as otherwise provided in subsection 6.5 of this rule.

7.15. Failure to Maintain Roadway or Structure. If the contractor, at any time, fails to comply with the provisions of subsection 7.14 of this rule, the engineer will immediately notify the contractor of such non-compliance. If the contractor fails to remedy unsatisfactory maintenance within 24 hours after receipt of such notice, the engineer may immediately proceed to maintain the project, and the entire cost of his or her maintenance will be deducted from monies due or to become due the contractor on his or her contract.

7.16. Acceptance.

7.16.a. Partial Acceptance. If at any time during the prosecution of the project, the contractor completes a unit or portion of the project, such as a structure, an interchange, or a section of road or pavement, he or she may request the engineer to make final inspection of that unit. If the engineer finds upon inspection that the unit has been completed in compliance with the contract, he or she may accept that unit as being completed and the contractor may be relieved of further responsibility for that unit. Such partial acceptance shall in no way void or alter any of the terms of the contract.

7.16.b. Final Acceptance. Upon due notice from the contractor of presumptive completion of the entire project, the engineer will make an inspection. If all construction provided for and contemplated by the contract is found completed to his or her satisfaction, that inspection will constitute the final inspection. The engineer will make the final acceptance and notify the contractor in writing of this acceptance. Final acceptance will be the date the Contract Completion Report is fully executed by the division.

7.16.b.1. If, however, the inspection disclosed any work, in whole or in part, as being unsatisfactory, the engineer will give the contractor the necessary instruction for correction of same in writing, and the contractor shall immediately comply with and execute such instructions. Upon correction of the work, another inspection will be made which will constitute the final inspection provided the work has been satisfactorily completed. In such event, the engineer will make the final acceptance and notify the contractor in writing of this acceptance. Final acceptance will be the date the Contract Completion Report is fully executed by the division.

7.17. Claims for Adjustment and Disputes. If, in any case, the contractor deems that additional compensation is due him or her for work or material not clearly covered in the contract or not ordered by the engineer as extra work, as defined herein, the contractor shall notify the engineer in writing of his or her intention to make claim for such additional compensation before he or she begins the work on which he or she bases the claim. If such notification is not given, and the engineer is not afforded proper facilities by the contractor for keeping strict account of actual cost as required, then the contractor hereby agrees to waive any claim for such additional compensation. Such notice by the contractor, and the fact that the engineer has kept account of the cost as aforesaid, shall not in any way be construed as proving or substantiating the validity of the claim. If the claim, after consideration by the engineer, is found to be just, it will be paid as extra work as provided herein for force account work. Nothing herein shall be construed as establishing any claim contrary to the terms of subsection 6.2 of this rule.

§157-3-8. Control of Material.

8.1. Source of Supply and Quality Requirements. The material used on the work shall meet all quality requirements of the contract. To expedite the inspection and testing of materials, the contractor shall notify the engineer of his or her proposed sources of material as required in subsection 5.10 of this rule. At the option of the engineer, materials may be approved at the source of supply before delivery is started. If it is found after trial that sources of supply for previously approved materials do not produce specified products, the contractor shall furnish materials from other sources at no increase in cost to the division.

8.1.a. The contractor shall provide and maintain a quality control system. This quality control system shall conform to all requirements of the specifications.

8.1.b. Preference for Domestic Aluminum, Glass, Steel and Iron Products. The division shall require that all aluminum, glass or steel products to be supplied for this project shall be domestic aluminum, glass, steel or iron products in compliance with W. Va. Code '5-19, unless the offered or bid price of the domestic aluminum, glass, steel or iron products is unreasonable or that the domestic aluminum, glass, steel or iron products are not produced in sufficient quantities to meet the project requirements. The offered or bid price of domestic aluminum, glass, steel or iron products is not unreasonable unless it is more than 20 percent higher than the offered or bid price of foreign made aluminum, glass, steel or iron products (including any applicable duty) or that if the aluminum, glass, steel or iron products to be supplied are produced in a "substantial labor surplus area" as determined by the United States Department of Labor, the offered or bid price of domestic aluminum, glass, steel or iron products is not unreasonable unless it is more than 30 percent higher than the offered or bid price of foreign made aluminum, glass, steel or iron products (including any applicable duty). A listing of the "substantial labor surplus areas" can be obtained from the Division's Contract Section. This Section does not apply to any project in an amount less than $50,000.00.

8.1.c. Contract Payments; Recovery in Case of Violation of Section. The division may not authorize or make any payments to a contractor under a contract which contains or should contain the provision required by subdivision 8.1.b of this rule unless such contractor has fully complied with such Section. Prior to such payment, the division may require the contractor to furnish a certificate of compliance from each subcontractor and supplier. Payments made by the division to any contractor who did not comply with this section

may be recovered by the division.

8.1.d. Procedures for Use of Foreign-Made Materials. If foreign-made aluminum, glass, steel or iron products are supplied in compliance with this section, the contractor shall be responsible for providing procedures acceptable to the division for determining that specification requirements are met, including all inspections at no additional cost to the division. The use of such foreign made products will not be reason for granting an extension of time.

8.1.d.1. Use of Domestic and Foreign Steel. When steel or iron is used it shall be in compliance with Section 165 of the Surface Transportation Assistance Act of 1982, and the applicable provisions of Title 23 CFR, Section 635.410, as amended, entitled "Buy American Requirements".

8.1.d.2. Pig Iron and processed, pelletized, and reduced iron ore manufactured outside of the United States may be used in the domestic manufacturing process for steel and/or iron materials used in federal-aid highway construction projects.

8.1.d.3. When the contractor desires to utilize foreign steel or iron for any of the applicable items contained in this project the contractor shall comply with the provisions, in addition to all other provisions contained in the contract.

8.1.d.4. To be considered domestic in character, all manufacturing processes must occur in the United States of America. Coating is a manufacturing process.

8.1.d.5. The contractor, if he or she desires to utilize foreign steel or iron, shall submit their bid for furnishing domestic steel iron on the normally prescribed bidding forms. In addition, the contractor shall submit an alternate bid for furnishing foreign steel or iron on the "Form for Use of Foreign Materials" contained in section F (1) of the notice.

8.1.d.6. These provisions do not prevent the minimal use of foreign steel or iron provided the cost of materials (less installation) does not exceed one tenth of one percent (0.1 percent) of the total contract cost or $2,500, whichever is greater.

8.1.d.7. In addition to the requirements of subsection 5.2, Award of Contract, of this rule, the award of the contract, if awarded, will be made to the bidder who submits the lowest total bid for the contract based on furnishing domestic steel or iron unless such bid exceeds the lowest total bid received for the contract based on furnishing foreign steel or iron by more than 25 percent, and further provided that the requirements of subsection 8.1 of this rule, Source of Supply and Quality Requirements, have been applied. The more stringent condition, either this section or of subdivision 8.1.b, Preference For Domestic Aluminum, Glass, Steel and Iron Products shall apply. Pig Iron and processed, pelletized, and reduced iron ore manufactured outside of the United States may be used in the domestic manufacturing process for steel and/or iron materials used in Federal-aid highway construction projects.

8.2. Local Material Sources.

8.2.a. Designated Sources. Possible sources of local materials may be designated in the contract documents. The quality of material in such deposits will be acceptable in general, but the contractor shall determine for himself or herself the amount of equipment and work required to produce a material meeting the specifications. It shall be understood that it is not feasible to ascertain from samples the limits for an entire deposit, and that variations shall be considered as usual and are to be expected. The engineer may order procurement of material from any portion of a deposit and may reject portions of the deposit as unacceptable.

8.2.a.1. The division may acquire and make available to the contractor the right to take materials from the sources designated in the contract documents together with the right to use such property as may be specified, for plant site, stockpiles, and haul roads.

8.2.b. Contractor Furnished Sources. If

the contractor desires to use material from sources other than those designated, he or she shall acquire the necessary rights to take materials from the sources and shall pay all costs related thereto, including any which may result from an increase in length of haul. All costs of exploring and developing such other sources shall be borne by the contractor. The use of material from other than designated sources will not be permitted until representative samples taken by the engineer have been approved and written authority is issued for the use thereof.

8.2.b.1. When material deposits are not designated in the contract, the contractor shall provide sources of material acceptable to the engineer.

8.2.b.2. When sources of material or material deposits are provided by the contractor, the division will assume the cost of processing samples to determine the suitability of the material unless otherwise specified.

8.2.b.3. Sites from which material has been removed shall, upon completion of the work, be left in a neat and presentable condition and shall be properly drained. Unless otherwise directed by the engineer, they shall be seeded and mulched as provided in 652 of Highways Standard Specifications, Roads and Bridges, Adopted 1993 without additional compensation. Where practicable, borrow pits, gravel pits, and quarry sites shall be located so they will not be visible from the highway.

8.3. Samples, Tests, Cited Specifications. All materials will be inspected, tested and approved prior to incorporation into the work. Any work which incorporates materials prior to the above evaluation shall be performed at the contractor's risk, and may subsequently be considered as unacceptable. Unless otherwise specified, the materials shall meet the applicable Standard or Interim Specifications of the American Association of State Highway and Transportation Officials, the Standard or Tentative Specifications of the American Society for Testing and Materials, or Standards adopted by other specifying agencies, with preference given in the same order in which the above agencies are listed. The specification which is current at the time of advertisement for bids shall govern, except that, with the approval of the engineer, subsequent revisions or adoptions may govern. Applicable tests of materials shall be made in accordance with the methods prescribed by the American Society for Testing and Materials. All materials being used are subject to inspection, testing or rejection at any time prior to final acceptance of the completed work.

8.3.a. The contractor shall be responsible for the quality of construction and materials incorporated therein. When called for in the specifications, the contractor shall perform all necessary process control inspection, sampling and testing. All materials will be approved for acceptance through the division's acceptance procedures. The division has the exclusive right and responsibility for determining the acceptability of the construction and materials incorporated therein. The division may use the results of the contractor's inspection, sampling and testing for acceptance purposes.

8.3.b. Lot or sub-lot sizes will normally be designated. In the event that operational conditions cause work to be interrupted, or only partially completed before the lot size designated has been achieved, the lot or sub-lot may be redefined by the engineer as being either the amount of work accomplished within the day or that work partially completed combined with the next lot or sub-lot of work. It is the intent of these specifications that the number of samples required to evaluate each lot or sub-lot will be unchanged even when the lot or sub-lot is redefined.

8.3.c. When an acceptance plan is cited, it shall be in accordance with Section 7.3.a.

8.3.c.1. Acceptance Plans

8.3.c.1.A. Percent Within Tolerance: The percentage of each lot or sublot of material, product, item of construction, or completed construction within the specified tolerances will be determined by the procedures as referenced by the specification requirements. When West Virginia AP-A is referenced, it will consist of Tables 106-1 to 106-5 inclusive, published in MP 106.00.20.

8.3.c.1.B. Sampling of Reworked Lots or Sub-lots: It is the intent of these specifications that lots or sub-lots of materials, products, items of construction or completed construction meet specification requirements at the time of submission. Lots or sub-lots generally will not be resampled unless reworked before submission. Sampling after reworking will be at the expense of the contractor.

8.4. Plant Inspection. The engineer may undertake the inspection of materials at the source. In the event plant inspection is undertaken, the following conditions shall be met:

8.4.a. The engineer shall have the cooperation and assistance of the contractor and the producer with whom he or she has contracted for materials.

8.4.b. The engineer shall have full entry at all times to such parts of the plant as may concern the manufacture of production of the materials being furnished.

8.4.c. Adequate safety measures are to be provided and maintained. The division reserves the right to retest all materials, which have been tested and accepted at the source of supply, after the materials have been delivered to the project and prior to incorporation into the work and to reject all materials which, when retested, do not meet the requirements of the specifications or those established for the specific project.

8.5. Storage of Materials. Materials shall be so stored as to assure the preservation of their quality and fitness for the work. Stored materials, even though approved before storage, may again be inspected prior to their use in the work. Stored materials shall be located so as to facilitate their prompt inspection. Approved portions of the right-of-way may be used for storage purposes and for the placing of the contractor's plant and equipment, but any additional space required therefore must be provided by the contractor at his or her expense. Private property shall not be used for storage purposes without written permission of the owner or lessee, and if requested by the engineer, copies of such written permission shall be furnished him or her. All storage sites shall be restored to their original condition by the contractor at his or her expense, except for the stripping and storing of topsoil, or to other materials salvaged from the work.

8.5.a. Care shall be exercised to protect finished concrete surfaces from being stained from storing or placing materials, including but not limited to reinforcing bars or mesh or unpainted structural steel, on same. Any such material so stored shall be adequately protected from weather. Any stains resulting from storage of materials on finished concrete surfaces shall be removed by the contractor at his or her expense.

8.5.b. Aggregate stockpiles may be made on ground that is denuded of vegetation, hard, and well drained. If necessary, the ground shall be covered with two inch plank. Different kinds and sizes of aggregates shall be kept separate during transportation, handling, and storage until batched. If necessary, partitions of suitable height and strength shall be constructed between stockpiles to prevent different materials from becoming mixed. Care must be taken to prevent segregation of the coarse and fine particles of aggregates from taking place during handling or hauling. The inclusion of foreign materials will not be permitted. Aggregates placed directly on the ground shall not be removed from the stockpiles within one foot of the ground until the final cleaning up on the work, and then only the clean aggregate will be permitted to be used.

8.6. Handling Materials. All materials shall be handled in such manner as to preserve their quality and fitness for the work. Aggregates shall be transported from the storage site to the work in tight vehicles, so constructed as to prevent loss or segregation of materials after loading and measuring, in order that there may be no inconsistencies in the quantities of materials intended for incorporation in the work as loaded and the quantities as actually received at the place of operations.

8.7. Unacceptable Materials.

8.7.a. Acceptance or Rejection. Following the application of the appropriate

acceptance plan, the decision of the engineer will be final as to the acceptance, rejection, or acceptance at an adjusted price of sampled lots or sub-lots.

8.7.b. Disposition of Lots or Sub-lots. Lots or sub-lots not conforming to specification requirements may be reworked or removed and replaced and resubmitted for acceptance. All nonconforming lots or sub-lots evaluated as unsatisfactory for the use intended shall be reworked or removed and replaced and resubmitted for acceptance. When the evaluation indicates the lots or sub-lots may satisfactorily remain in place, acceptance will be at an adjusted price as stated in the specifications or as directed by the engineer.

8.8. Division-Furnished Material. The contractor shall furnish all materials required to complete the work, except those specified to be furnished by the division.

8.8.a. Materials furnished by the division will be delivered or made available to the contractor at the points specified in the contract.

8.8.b. The cost of handling and placing all materials after they are furnished to the contractor shall be considered as included in the contract price for the item in connection with which they are used.

8.8.c. The contractor will be held responsible for all material delivered to him or her, and deductions will be made from any monies due him or her to make good any shortages and deficiencies, from any cause whatsoever, and for any damage which may occur after such delivery, and for any demurrage charges.

8.9. Silence of Specifications. The apparent silence of the specifications, supplemental specifications, plans and special provisions as to any detail, or the apparent omission from them of a detailed description concerning any point shall be regarded as meaning that only material and workmanship of acceptable quality are to be used.

'§157-3-9. Legal Relations and Responsibility to Public.

9.1. Laws to be Observed. The contractor shall keep fully informed of all federal and state laws, all local laws, ordinances, and regulations and all orders and decrees of bodies or tribunals having any jurisdiction or authority, which in any manner affect those engaged or employed on the work, or which in any way affect the conduct of the work. The contractor shall at all times observe and comply with all such laws, ordinances, regulations, orders and decrees; and shall protect and indemnify the state and its representatives against any claim or liability arising from or based on the violation of any such laws, ordinances, regulations, orders, or decrees, whether by himself or herself, his or her subcontractors or his or her employees.

9.2. Permits, Licenses and Taxes. The contractor shall procure all permits and licenses, pay all charges, fees, and taxes, and give all notices necessary and incidental to the due and lawful prosecution of the work.

9.2.a. Should the contractor's plan of operation contemplate stream obstruction or interruption of natural flow conditions such as low water bridge construction, diversion, filling, dredging, restricting flow, cribbing or other similar effect for facilitating the contractor's operations, but not specifically required as permanent work under the contract, a permit authorizing such proposal shall be obtained from the Public Land Corporation, (West Virginia Division of Natural Resources) Charleston, West Virginia, 25305. An authentic copy of the permit shall be furnished to the engineer prior to initiation of such change.

9.3. Patented Devices, Materials, and Processes. If the contractor employs any design, device, material, or process covered by letters of patent or copyright, he or she shall provide for such use by suitable legal agreement with the patentee or owner. The contractor and the surety shall indemnify and save harmless the division, any affected third party, or political subdivision from any claims for infringement by reasons of the use of any such patented design, device, material or process, or any trademark or copyright, and shall indemnify the division for any costs, expenses, and damages which it may be obligated to pay by reason of any infringement, at any time during the

prosecution or after the completion of the work.

9.4. Restoration of Surfaces Opened by Permit. The right to construct or reconstruct any utility service in the highway or street or to grant permits for same, at any time, is hereby expressly reserved by the division for the proper authorities of the municipality in which the work is done, and the contractor shall not be entitled to any damages either for the digging up of the street or for any delay occasioned thereby.

9.4.a. Any individual, firm, or corporation wishing to make an opening in the highway must secure a permit from the division. The contractor shall allow parties bearing such permits, and only those parties, to make openings in the highway. The contractor shall, when ordered by the engineer, make in an acceptable manner all necessary repairs due to such openings and such necessary work will be paid for as "Extra Work", or as provided in these specifications, and will be subject to the same conditions as original work performed.

9.5. Federal-Aid Provisions. When the United States government pays any portion of the cost of a project, the federal laws and the rules and regulations made pursuant to such laws must be observed by the contractor, and the work shall be subject to the inspection of the appropriate federal agency.

9.5.a. Such inspection shall in no sense make the federal government a party to the contract and will in no way interfere with the rights of either party hereunder.

9.6. Sanitary Provisions. The contractor shall provide and maintain in a neat, sanitary condition such accommodations for the use of his or her employees as may be necessary to comply with the requirements of the state and local boards of health, or of other bodies or tribunals having jurisdiction. The contractor shall not create, commit, or maintain a public nuisance.

9.7. Public Convenience and Safety. The contractor shall at all times so conduct his or her work as to assure the least possible obstruction to traffic. The safety and convenience of the general public and the residents along the highway and the protection of persons and property shall be provided for by the contractor as specified under subsection 6.5 of this rule.

9.7.a. The contractor shall comply with all applicable federal, state and local laws governing safety, health and sanitation. The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions, on his or her own responsibility, or as the engineer may determine, reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

9.7.b. The contractor and any subcontractor shall not require any laborer or mechanic employed in performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his or her health or safety, as determined under construction safety and health standards (Title 29, Code of Federal Regulations, Part 1926, formerly Part 1518, as revised from time to time), promulgated by the United States Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (83 Stat. 96).

9.8. Railway-Highway Provisions. The contractor shall, in addition to all other clauses and covenants to this contract and related documents, be governed by the following provisions when performing any operations adjacent to or within the existing right of way of railroad(s).

9.8.a. The division will reimburse the railroad for the cost of all reasonable and necessary engineering services rendered on the project by the railroad.

9.8.b. All work to be performed by the contractor shall be performed in a manner agreeable to the engineer or an authorized representative. The contractor shall at all times use all reasonable care and diligence to cooperate with officials of the railroad in order to avoid accidents, damages or unnecessary delay to, or interference with trains of the railroad.

9.8.c. The contractor shall perform no work upon the railroad's tracks and shall not place or operate any equipment, nor place any material closer than 10 feet from the centerline of the nearest track without first obtaining authority from the railroad's chief engineer or his or her authorized representative. This also applies to any equipment working, or presenting the possibility of being worked, in such a position that failure of the same, with or without load, will obstruct the track.

9.8.d. The contractor shall submit to the Railroad's Chief Engineer, with a copy to the division, information regarding methods and procedures for performing work, i.e., plans and specifications for shoring and sheeting, and for protective shields covering all railroad facilities. The contractor shall obtain railroad approval before commencing said work.

9.8.e. The contractor shall bear all cost of protecting railroad traffic affected by his or her operations and shall give the railroad's chief engineer or his or her authorized representative at least 48 hours advance notice of the contractor's need for protective services.

9.8.f. The railroad will furnish such protective services and use personnel, and devices that, in the opinion of the railroad, are required to promote safety and insure continuity of railroad traffic during the contractor's operations. The railroad will promptly bill the contractor for such protective services.

9.8.g. The contractor shall promptly reimburse the railroad upon receipt of the bill for the services rendered in connection with the project. The cost for furnishing railroad protective services shall be incidental to the items in the contract and no separate payment shall be made. The division will withhold final payment to the contractor until the division has proof that such bills have been paid.

9.8.h. If the contractor desires a temporary grade crossing of the railroad's tracks, to use an existing private grade crossing, or to use an existing public grade crossing with unlicensed construction equipment, the contractor shall make such arrangements, in writing, with the railroad. If required by the railroad, the contractor shall execute the regular form of private grade crossing agreement and pay all construction, maintenance, removal or other costs.

9.8.i. Insurance. The contractor shall secure and provide, until all work under the terms of the project are satisfactorily completed and accepted, the following types of insurance in the amounts and form as hereinafter set forth.

9.8.i.1. Contractor's Public Liability Insurance: With respect to the operations he or she performs, this insurance shall provide a limit of not less than $2,000,000 per occurrence, bodily injury and/or property damage combined, for damages arising out of bodily injuries to or death of all persons in any one occurrence, and for damage to or destruction of property, including the loss of use thereof, in any one occurrence. A signed copy of the policy shall be provided to the Railroad.

9.8.i.2. Contractor's Protective Public Liability Insurance: With respect to the operations performed by subcontractors, the contractor must carry in his or her own behalf this insurance providing a limit of not less than $2,000,000 single limit, bodily injury and/or property damage combined for damages arising out of bodily injuries to or death of all persons in any one occurrence, and for damage to or destruction of property, including the loss of use thereof, in any one occurrence. A signed copy of the policy shall be provided to the railroad.

9.8.i.3. Railroad Protective Liability Insurance: With respect to the operations he or she or any of his or her subcontractors perform, the contractor must provide in the name of the railroad a policy providing a limit of $2,000,000 per occurrence of bodily injury, death and property damage combined. Said insurance shall be furnished with an aggregate of $6,000,000 applying separately to each annual period. The original copy of the policy shall be provided to the railroad.

9.8.j. The contractor shall remove from the railroad's property all equipment, surplus material, and other debris and shall leave the

property in a condition satisfactory to the engineer or his or her authorized representative.

9.9. Bridges Over Navigable Waters. All work on navigable waters shall be so conducted that free navigation of the waterways will not be interfered with and that the existing navigable depths will not be impaired except as allowed by permit issued by the U. S. Army Corps of Engineers.

9.10. Barricades and Warning Signs. The contractor shall provide, erect, and maintain all necessary barricades, suitable and sufficient lights, danger signals, signs, and other traffic control devices, except as provided by subsection 6.5 of this rule, and he or she shall take all necessary precautions for the protection of the work and safety of the public. Highways closed to traffic shall be protected by effective barricades, and obstructions shall be illuminated during hours of darkness. Suitable warning signs shall be provided to properly control and direct traffic.

9.10.a. The contractor shall erect warning signs in advance of any place on the project where operations may interfere with the use of the road by traffic and at all intermediate points where the new work crosses or coincides with an existing road. Such warning signs shall be erected in accordance with the plans furnished.

9.10.b. All barricades, warning signs, lights, temporary signals, and other protective devices must conform with the latest edition of the manual "Traffic Control for Street and Highway Construction and Maintenance Operations," published by the West Virginia Division of Highways, and the provisions of 715.9, Standard Specifications, Roads and Bridges" adopted 1993.

9.11. Use of Explosives. When the use of explosives is necessary for the prosecution of the work, the contractor shall exercise the utmost care not to endanger life or property, including new work. The contractor shall be responsible for any and all damage resulting from the use of explosives.

9.11.a. All explosives shall be stored in a secure manner, in compliance with all laws and ordinances, and all such storage places shall be clearly marked. Where no local laws or ordinances apply, storage shall be provided satisfactory to the engineer and in general not closer than 1,000 ft. from the road or from any building or camping area or place of human occupancy.

9.11.b. The contractor shall notify each public utility company, having structures in proximity to the site of work, of his or her intention to use explosives and such notice shall be given sufficiently in advance to enable the companies to take such steps as they may deem necessary to protect their property from injury.

9.12. Protection and Restoration of Property and Landscape. The contractor shall be responsible for the preservation of all public and private property and shall protect carefully from disturbance or damage all land monuments and property marks until the engineer has witnessed or otherwise referenced their location and shall not move them until directed.

9.12.a. The contractor shall be responsible for all damage or injury to property of any character, during the prosecution of the work, resulting from any act, omission, neglect, or misconduct in his or her manner or method of executing the work, or at any time due to defective work or materials, and this responsibility will not be released until the project shall have been completed and accepted.

9.12.b. When or where any direct or indirect damage or injury is done to public or private property by or on account of any act, omission, neglect, or misconduct in the execution of the work, or in consequence of the non-execution thereof by the contractor, he or she shall restore, at his or her own expense, such property to a condition similar or equal to that existing before such damage or injury was done, by repairing, rebuilding or otherwise restoring as may be directed, or he or she shall make good such damage or injury in an acceptable manner.

9.13. Forest Protection. In carrying out work within or adjacent to state or national forests, the contractor shall comply with all regulations of the State Fire Marshal, Division of Natural Resources,

or any other authority having jurisdiction, governing the protection of forests and the carrying out of work within forests, and shall observe all sanitary laws and regulations with respect to the performance of work in forest areas. The contractor shall keep the areas in an orderly condition, dispose of all refuse, obtain permits for the construction and maintenance of all construction camps, stores, warehouses, residences, latrines, cesspools, septic tanks, and other structures in accordance with the requirements of the Forest Supervisor.

9.13.a. The contractor shall take all reasonable precaution to prevent and suppress forest fires and shall require his or her employees and subcontractors, both independently and at the request of forest officials, to do all reasonably within their power to prevent and suppress and to assist in preventing and suppressing forest fires and to make every possible effort to notify a forest official at the earliest possible moment of the location and extent of any fire seen by them.

9.14. Responsibility for Damage Claims. The contractor shall indemnify and save harmless the division, its officers and employees, from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property on account of the operations of the contractor; or on account of or in consequence of any neglect in safeguarding the work; or through use of unacceptable materials in constructing the work; or because of any act or omission, neglect, or misconduct of the contractor; or because of any claims or amounts recovered from any infringements of patent, trademark, or copyright; or from any claims or amounts arising or recovered under the "Workman's Compensation Act," or any other law, ordinance, order, or decree; and so much of the money due to the contractor under and by virtue of his or her contract as may be considered necessary by the division for such purpose may be retained for the use of the division, or, in case no money is due, his or her surety may be held until such suit or suits, action or actions, claim or claims for injuries or damages as aforesaid shall have been settled and suitable evidence to the effect furnished to the division; except that money due the contractor will not be withheld when the contractor produces satisfactory evidence that he or she is adequately protected by public liability and property damage insurance.

9.15. Opening Sections of Project to Traffic. At the option of the engineer, certain sections of the work may be opened for traffic. Such opening will not constitute acceptance of the work, or any part thereof, or a waiver of any provisions of the contract; provided however, that on such portions of the project as are accepted for use of traffic, the contractor shall not be required to assume any expense entailed in maintaining the roadway for traffic. Such expense will be borne by the division or will be compensated for in the manner provided hereinafter in subsection 11.4 of this rule. Any damage to the highway not attributable to traffic which might occur on such section, except slides, shall be repaired by the contractor at his or her expense. The removal of slides shall be performed by the contractor and payment will be in accordance with subsection 6.3 of this rule.

9.15.a. If the contractor is dilatory in completing shoulders, drainage structures, or other features of the work, the engineer may order all or a portion of the project open to traffic, but in such event the contractor shall not be relieved of his or her liability and responsibility during the period the work is so opened prior to final acceptance. The contractor shall conduct the remainder of his or her construction operations so as to cause the least obstruction to traffic.

9.16. Contractor's Responsibility for Work. Until final written acceptance of the project by the engineer, the contractor shall have the charge and care thereof and shall take every precaution against injury or damage to any part thereof by the action of the elements, or from any other cause, whether arising from the execution or from the nonexecution of the work. The contractor shall rebuild, repair, restore, and make good all injuries or damages to any portion of the work occasioned by any of the above causes before final acceptance and shall bear the expense thereof except damage to the work due to unforeseeable causes beyond the control of and without the fault of or negligence of the contractor, including but not restricted to acts of God, of the public enemy or governmental authorities.

9.16.a. In case of suspension of work from any cause whatever, the contractor shall be responsible for the project and shall take such precautions as may be necessary to prevent damage to the project, provide for normal drainage and to erect any necessary temporary structures, signs, or other facilities at his or her expense. During such period of suspension of work, the contractor shall properly and continuously maintain in an acceptable growing condition all living material in newly established plantings, seedings, and soddings furnished under his or her contract, and shall take adequate precautions to protect new tree growth and other important vegetative growth against injury.

9.17. Contractor's Responsibility for Utility Property and Services. At points where the contractor's operations are adjacent to properties of railway, telegraph, telephone, and power companies, or are adjacent to other property, damage to which might result in considerable expense, loss, or inconvenience, work shall not be commenced until all arrangements necessary for the protection thereof have been made.

9.17.a. The contractor shall cooperate with the owners of any underground or overhead utility lines in their removal and rearrangement operations in order that these operations may progress in a reasonable manner, that duplication of rearrangement work may be reduced to a minimum, and that services rendered by those parties will not be unnecessarily interrupted.

9.17.b. In the event of interruption to water or utility services as a result of accidental breakage, or as a result of being exposed or unsupported, the contractor shall promptly notify the proper authority and shall cooperate with such authority in the restoration of service. If water service is interrupted, repair work shall be continuous until the service is restored. No work shall be undertaken around fire hydrants until provisions for continued service have been approved by the local fire authority.

9.18. Furnishing Right-Of-Way. The division will be responsible for securing all necessary rights-of-way in advance of construction. Any exceptions will be indicated in the contract.

9.19. Personal Liability of Public Officials. In carrying out any of the provisions of these specifications, or in exercising any power or authority granted to them by or within the scope of the contract, there shall be no liability upon the commissioner, engineer, or their authorized representatives, either personally or as officials of the state, it being understood that in all such matters they act solely as agents and representatives of the division.

9.20. No Waiver of Legal Rights. The division shall not be precluded or estopped by any measurement, estimate, or certificate made either before or after the completion and acceptance of the work and payment therefore, from showing the true amount and character of the work performed and materials furnished by the contractor, nor from showing that any such measurement, estimate or certificate is untrue or is incorrectly made, nor that the work or materials do not in fact conform to the contract. The division shall not be precluded or estopped, notwithstanding any such measurement, estimate, or certificate and payment in accordance therewith, from recovering from the contractor or his or her sureties, or both, such damage as it may sustain by reason of his or her failure to comply with the terms of the contract. Neither the acceptance by the division or any representative of the division, nor any payment for or acceptance of the whole or any part of the work, nor any extension of time, nor any possession taken by the division, shall operate as a waiver of any portion of the contract or of any power herein reserved or of any right to damages. A waiver of any breach of the contract shall not be held to be a waiver of any other or subsequent breach.

9.21. Protection of Rivers, Streams, and Impoundments, Pollution Control Quality: The contractor shall provide and maintain a pollution control plan detailing the methods of sampling and testing of waters on the project. This pollution control plan shall conform to all requirements of the specifications, MP 642.03.50 and the manual entitled "West Virginia Department of Highways Erosion and Sediment Control".

9.21.a. Erosion and Siltation Control. The contractor shall exercise every reasonable

precaution throughout the life of the project to prevent silting of rivers, streams, and impoundments such as lakes, reservoirs, etc. Construction of drainage facilities as well as performance of other contract work which will contribute to the control of siltation shall be carried out in conjunction with earthwork operations or as soon thereafter as is practicable.

9.21.a.1. The manual entitled "WVDOT, Division of Highways Erosion and Sediment Control Manual, November 1, 1993", is made a part of the Contract. Where any provision of said manual is in conflict with any special erosion and sediment control provision set out and contained in the proposal and/or in the plans of a project, the proposal and/or plans shall prevail.

9.21.b. The contractor shall determine prior to the initiation of work, the quality of the water in the existing rivers, streams, impoundments or other natural or man-made channels in the project limits, and the water quality of the receiving rivers, streams, impoundments or other natural or man-made channels. Subsequent to initiation of work, should the quality of the water not meet the limits prescribed herein, the contractor shall take immediate action to initiate, improve or repair whatever measures are necessary to bring the water quality within the limits specified. If the quality of water has not been determined prior to initiation of work, the quality of the rivers, streams, impoundments or other natural or man-made channels will be determined where applicable at a point above or below the limits of construction and these values used to determine pre-existing quality.

9.21.c. The contractor shall monitor the surface water being received by the project and within the project and the receiving streams to determine the quality of the water both prior to and during construction. The quality of surface water affected by construction shall meet the requirements of MP 642.03.50.

9.21.d. Prior to suspension of construction operations for any appreciable length of time, the contractor shall shape the top of earthwork in such a manner as to permit the runoff of rainwater and shall construct earth berms along the top edges of embankments to intercept runoff water. The berm construction shall not be permitted to decrease the stability of the embankment section. Temporary slope drains shall be provided to carry runoff from embankments which are located in the immediate vicinity of rivers, streams, and impoundments. The slope drains shall be located at approximate 500-ft. intervals and shall be stabilized by paving or coverings with waterproof materials. Preventive measures taken under this paragraph shall be adequate to control any runoff or erosion products from adjacent cut slopes. Should such preventive measures fail and an appreciable amount of material begins to erode into a river, stream or impoundment, the contractor shall act immediately to bring the siltation under control.

9.21.e. The erosion control measures shall be continued until the permanent drainage facilities have been constructed and until the project is accepted.

9.21.f. Unless otherwise approved in writing by the Engineer, construction operations in rivers, streams, and impoundments shall be restricted to those areas where channel changes are shown on the plans and to those areas which must be entered for the construction of temporary or permanent structures. Rivers, streams, and impoundments shall be promptly cleared of all falsework, piling, debris, or other obstructions placed therein or caused by the construction operations.

9.21.g. Excavation from the roadway, channel changes, cofferdams, etc., shall not be deposited in or so near to rivers, streams, or impoundments that it will be washed away by high water or runoff.

9.21.h. Frequent fording of live streams with construction equipment will not be permitted; therefore, temporary bridges or other structures shall be used wherever an appreciable number of stream crossings are necessary. Unless otherwise approved in writing by the engineer, mechanized equipment shall not be operated in live streams except as may be required to construct channel changes and temporary or permanent structures.

9.21.i. The location of all material pits,

other than commercially operated sources, and all waste areas shall be subject to the approval of the engineer, and construction operations in these areas shall be so scheduled and conducted that during and after completion of the work, erosion will not result in water pollution.

9.21.j. Pollution. The contractor shall exercise every reasonable precaution throughout the life of the project to prevent pollution of rivers, streams, or impoundments. Pollutants such as chemicals, fuels, lubricants, bitumens, raw sewage, products associated with bridge cleaning and painting, and other harmful waste shall not be discharged into or alongside of rivers, streams, impoundments or into natural or man-made channels leading thereto. The quality of the surface waters affected by construction shall meet the requirements of the West Virginia Administrative Regulations, State Water Resources Board, developed in accordance with W. Va. Code "20-5 and 20-5A.

9.21.j.1. The manual entitled, "West Virginia Division of Highways, Best Management Practice for Containment/Disposal of Waste Products Generated During Bridge Cleaning and Painting Activities". January 1, 1994 as amended is made part of the contract as a guide to follow for containment/disposal activities.

9.21.k. Basis of Payment. Except when pay items are specifically described and furnished as pay items in 642, Temporary Project Water Pollution Control, Standard Specifications Road and Bridges, Adopted 1993, the water pollution and erosion and siltation control requirements set forth herein shall be at the expense of the contractor.

9.22. Plant Pest Regulations. The indiscriminate movement of nursery stock, hay or straw mulch, equipment and soil samples into and out of West Virginia constitutes a potential hazard to state and national agriculture. Therefore, it shall be the responsibility of the prime contractor to comply with all applicable state and federal Plant Pest Regulations in the fulfillment of this contract.

9.22.a. Information regarding these regulations may be obtained from Plant Pest Control Division, West Virginia Department of Agriculture, Charleston, West Virginia 25305, or United States Department of Agriculture, Agriculture Research Service, Plant Pest Control Division, P. O. Box 1257, Roanoke, Virginia, 24001.

9.23. Air Pollution Control. The contractor shall exercise every reasonable precaution throughout the life of the project to keep air pollution to a minimum. The contractor shall also comply with the applicable regulations of the West Virginia Air Pollution Control Commission. During times of limited dispersion, construction operations may be suspended.

9.23.a. All plants in West Virginia producing bituminous concrete for the division shall obtain a permit or certification from the West Virginia Air Pollution Control Commission.

9.24. Clean Water Act/Wetlands. The contractor will comply with all aspects of 33 USC 1344 (Section 404 of the Clean Water Act) including any and all regards to wetlands on all work associated with the project. A wetland will not be filled or disturbed on the project or any work related to the project such as a haulroad, waste area, borrow pit or any other activity without a permit.

9.25. Lead Exposure In Construction. The contractor will comply with all aspects of 29 CFR Part 1296, Lead Exposure in Construction, by the United States Department of Labor, Occupational Safety and Health Administration.

§157-3-10. Prosecution and Progress.

10.1. Subletting of Contract. The contractor shall not sublet, sell, transfer, assign, or otherwise dispose of the contract or contracts or any portion thereof, or of his or her right, title, or interest therein, without written approval of the engineer prior to any of the subject work being performed. The contractor will be permitted to sublet a portion thereof but shall perform, with his or her own organization, work amounting to not less than ~~50~~ 30 percent of the total contract cost, except that any items designated in the contract as ~~A~~speciality

items@ may be performed by subcontract and the cost of any such specialty items so performed by subcontract may be deducted from the total cost before computing the amount of work required to be performed by the contractor with his or her own organization. No subcontracts, or transfer of contract, shall in any case release the contractor of his or her liability under the contract and bonds.

10.1.a. The contractor shall request the approval of each subcontractor, including lower-tier subcontractors. Each subcontract, including lower-tier subcontracts, shall be in writing and shall physically contain all the applicable provisions, requirements, and specifications and shall be available for review at the contractor's project office. The contractor may certify that the terms of the subcontract are contained in a written document with all the applicable contract and labor provisions physically incorporated in the subcontract. Requests for approval of Disadvantaged Business Enterprise (DBE) subcontractors, however, shall also be accompanied by a copy of the proposed subcontract without the required attachments.

10.1.b. Roadside production of materials is construed to be the production of crushed stone, gravel, or other materials with portable or semi portable crushing, screening or washing plants established or re-opened in the vicinity of the work for the purpose of supplying materials to be incorporated into the work on a designated project or projects and in all cases, unless performed by the contractor, is considered subcontracting.

10.1.c. The purchase of sand, gravel, crushed stone, crushed slag, batched concrete aggregates, ready mixed concrete or any other materials produced at and furnished from established and recognized commercial plants, together with the delivery of such materials to the site of work by means of vehicles owned or operated by such plants or by recognized commercial hauling companies, is not considered subcontracting under these provisions.

10.1.d. Except as hereinafter stated, all hauling of materials from roadside production sources, or from railroad or water delivery points, to batching plants, mixing plants, or directly to their place of use in the road, and all hauling of materials from batching plants and mixing plants to their place of use in the road, unless done by the contractor's own equipment or by recognized hauling companies, is considered subcontracting under these provisions.

10.1.e. If batching plants or mixing plants are set up at rail or water delivery points and materials in part supplied to such plants by rail or water transportation companies, the remaining materials required at such batching or mixing plants may be hauled to such plants without such hauling is considered subcontracting.

10.2. Notice to Proceed. The "Notice to Proceed" will stipulate the date on which it is expected the contractor shall begin the construction and from which date contract time will be charged. Commencement of work by the contractor may be deemed and taken as a waiver on his or her part of this notice.

10.3. Performance of the Work.

10.3.a. General. The contractor shall provide sufficient materials, equipment, and labor to guarantee the completion of the project in accordance with the Plans and Specifications within the time set forth in the Proposal. Should the performance of the work for any reason be discontinued, the contractor shall notify the engineer at least 24 hours in advance of resuming operations.

10.3.a.1. The contractor shall furnish a schedule showing how he or she proposes to perform the work to complete the project by the date set for completion. The schedule shall be either a bar-graph type conforming to the requirements of subdivision 10.3.b of this rule or a network schedule conforming to the requirements of subdivision 10.3.c of this rule. Progress schedules will not be required for projects on which the major portion of the work is resurfacing, landscaping, signing, lighting, installing signals, guardrail or bridge painting or on which the contract amount is $300,000 or less.

10.3.b. Progress Schedule When the contractor elects to use the bar-graph type of

schedule, the contractor shall submit, at the pre-construction conference, three (3) copies of the progress schedule on forms provided by the division. The progress schedule shall show the contractor's best estimate of the time required to perform the several items of work, and shall incorporate any contract requirements regarding the order of performance of the work. The contractor shall use all practical means to make the progress of the work conform to that shown on the progress schedule.

10.3.b.1. The progress schedule shall include a bar-graph for each activity, showing graphically the calendar time each activity is scheduled for work. The percent complete for each activity for each month, based on the monetary value of the work, shall be listed in numbers above the bar-graph.

10.3.b.2. During the progress of the work, if the contractor's operations are materially affected by changes in the plan or in the amount of work, or if the contractor has failed to comply with the approved schedule, the contractor shall submit a revised progress schedule showing how he or she proposes to prosecute the balance of the work. Such revised progress schedule shall either be initiated by the contractor and submitted by the contractor to the division with a formal request in writing for approval, or shall be prepared and submitted by the contractor when requested to do so by the engineer. The contractor shall submit the revised progress schedule within ten (10) days after the date of the request.

10.3.c. Network Scheduling. When the contractor elects to use the network scheduling approach, the work shall be scheduled by the Critical Path Method (CPM), Project Evaluation and Review Technique (PERT), or other approved method.

10.3.c.1. The scheduling of construction is the responsibility of the contractor. The contractor shall take into consideration all conditions facing him or her in carrying out the work, and shall schedule the work to complete it by the required completion date.

10.3.c.2. Network diagrams shall be prepared on paper not exceeding 24 inches in width and not more than 36 inches in length. Diagrams shall show the order and interdependence of activities, and the sequence and quantities in which the work is to be accomplished as planned by the contractor. The critical path shall be distinguished from other paths on the network.

10.3.c.3. The contractor shall submit for approval three (3) copies of a preliminary plan and schedule of contract operations, using network diagrams, at the pre-construction conference. The network will be reviewed by the division for logic and conformance to the requirements as set forth herein, and for the conformance to any special notations in the plans pertaining to sequence of operations and seasonal limitations. After evaluation by the division, the network will be returned to the contractor either approved or with recommended changes.

10.3.c.4. The contractor shall resubmit four (4) copies of the finalized network schedule within three (3) weeks, including mailing time involved, after receipt of the preliminary schedule returned by the division.

10.3.c.5. During the progress of the work, if major changes develop which necessitate changes in the original plan, the contractor shall change the network schedule so as to show the current mode of operation. Such change shall either be made by a formal request in writing by the contractor to the division, or when requested to do so by the engineer. Schedule changes will be handled in the same manner, including time requirements for processing, as the original submission.

10.3.d. Progress Reports. The contractor shall submit each month a report of actual progress of the work. These progress reports shall be made for all projects for which either a progress schedule or network scheduling is required. The reports shall be made on forms provided by the division, and shall show the percent complete for the total contract and for each activity listed on the progress schedule or network schedule. The percentage figures shall be based on the monetary value of the work completed. The first report shall cover the

work completed from the beginning of the project until the end of the first full month after the notice to proceed is issued. Subsequent reports shall show the total percent complete from the beginning of the work to the end of the month for which the report is prepared. All reports shall be submitted within seven days after the end of the month.

10.4. Limitation of Operations. The contractor shall conduct the work at all times in such manner and in such sequence as will assure the least interference with traffic. The contractor shall have due regard to the location of detours and to the provisions for handling traffic. The contractor shall not open up work to the prejudice or detriment of work already started, and the engineer may require the contractor to finish a section on which work is in progress before work is started on any additional sections if the opening of such section is essential to public convenience.

10.5. Character of Workers; Methods and Equipment. The contractor shall at all times employ sufficient labor and equipment for prosecuting the several classes of work to full completion in the manner and time required by these specifications.

10.5.a. All employees shall have sufficient skill and experience to perform properly the work assigned to them. Employees engaged in special work or skilled work shall have sufficient experience in such work and in the operation of the equipment required to perform all work properly and satisfactorily.

10.5.b. Any person who, in the opinion of the engineer, does not perform his or her work in a proper and skillful manner or is intemperate or disorderly shall, at the request of the Engineer, be removed forthwith. Any contractor or his or her subcontractor employing such person shall not reemploy such person on the project without the written approval of the engineer.

10.5.c. Should a contractor fail to remove such person or persons as required above, or fail to furnish suitable and sufficient personnel for the proper prosecution of the work, the engineer may suspend the work by written notice until such order is complied with.

10.5.d. All equipment which is proposed to be used on the work shall be of sufficient size and in such mechanical condition as to meet requirements of the work and to produce a satisfactory quality of work. Equipment used on any portion of the project shall be such that no injury to the roadway, adjacent property, or other highways will result from its use.

10.5.e. When the methods and equipment to be used by the contractor in accomplishing the construction are not prescribed in the contract, the contractor is free to use any methods or equipment that the contractor demonstrates to the satisfaction of the engineer will accomplish the contract work in conformity with the requirements of the contract.

10.5.f. When the contract specifies that the construction be performed by the use of certain methods and equipment, such methods and equipment shall be used unless others are authorized by the engineer. Should the contractor desire to use a method or type of equipment other than specified in the contract, the contractor shall request authority from the engineer to do so. The request shall be in writing and shall include a full description of the methods and equipment proposed to be used and an explanation of the reasons for desiring to make the change. If approval is given, it will be on the condition that the contractor shall be fully responsible for producing construction work in conformity with contract requirements. If, after trial use of the substituted methods or equipment, the engineer determines that the work produced does not meet contract requirements, the contractor shall discontinue the use of the substitute methods or equipment and shall complete the remaining construction with the specified methods or equipment. The contractor shall remove the deficient work and replace it with work of specified quality, or take such other corrective action as the engineer may direct. No change will be made in basis of payment for the construction items involved nor in contract time as result of authorizing a change in method or equipment under these provisions.

10.6. Determination and Extension of Contract Time.

10.6.a. General. Contract time will be determined by the division and specified in the contract in working days or as a fixed calendar date. No request for an extension of time will be considered that is based on any claim that the contract period as originally established was inadequate.

10.6.b. Extension of Contract Time. The number of days for performance allowed in the contract is based on the original quantities as defined in section 4.4 of this rule. If satisfactory fulfillment of the contract requires performance of work in greater quantities than those set forth in the proposal, the contract time allowed for performance will be increased on a basis commensurate with the amount and difficulty of the added work.

10.6.b.1. When the notice to proceed is delayed more than 30 days after the letting of the contract due to delays which are the responsibility of the division, the contractor will be given an extension of time equal to the amount of the delay in excess of 30 days.

10.6.b.2. When the notice to proceed is delayed by acts or omissions which are the responsibility of the contractor, such as failure to make a prompt submission of an acceptable on-the-job training program or temporary pollution control program as required, an extension of time will not be granted for this delay. The normal time required for the division to take action on required programs submitted by the contractor is considered to be seven calendar days after receipt of the program.

10.6.b.3. If the contractor finds it impossible for reasons beyond his or her control to complete the work within the contract time as specified or as extended in accordance with the provision herein, he or she may, at any time prior to the expiration of the contract time as specified or as extended, make a written request to the engineer for an extension of time, setting forth therein the reasons which he or she believes will justify the granting of his or her request. If the engineer finds that the work was delayed because of conditions beyond the control and without the fault of the contractor, he or she may extend the time for completion in such amounts as the conditions justify. The extended time for completion shall then be in full force and effect the same as though it were the original time for completion.

10.6.b.4. Delays in obtaining materials which are classified as critical due to the national defense efforts will be given consideration for an extension of time. Time extension for delays in delivery of other materials or energy will not be given consideration unless some unusual market condition such as an industry wide strike, natural disaster or area wide shortage arises after bids are taken and prevents procurement of materials within the contract time limitations. In order for any consideration to be given for delays resulting from the contractor's inability to procure materials when needed, the contractor shall furnish documentation supporting that shortages exist and that delays are being caused by the shortages. The contractor shall notify the division immediately when a certain shortage of materials is delaying the work and shall take all possible steps to alleviate the shortage.

10.6.b.5. Losses of time due to acts of God, acts of the division, strikes, freight embargoes, adverse weather in excess of 20 percent of the working days each month, and a state of national emergency may be given consideration for time extension. A potential working day is every day on the calendar except Saturday, Sunday and holidays as set forth in subsection 2.12 of this rule.

10.6.b.6. When the work is substantially complete so that it could be opened to the safe and convenient use of the traveling public, as determined by the engineer, time charges may be discontinued prior to final acceptance being made by the engineer as prescribed in subsection 7.16 of this rule.

10.6.b.7. From April 1st to November 30th, consideration will be given to loss of time due to weather only for the number of days lost each month in excess of 20 percent of the total number of working days each month, as defined in

subsection 2.112 of this rule. Time extension for adverse weather will not be granted after the completion date. When approved time extensions move the completion date beyond November 30, the extension will not be applied to any date between November 30 and April 1 of the following year.

10.6.b.8. When the contract time is on a working day basis, the engineer will furnish the contractor a weekly statement showing the number of days charged to the contract for the preceeding week and the number of days specified for completion of the contract. The contractor will be allowed one week in which to file a written protest setting forth in what respect the weekly statement is considered incorrect; otherwise, the statement will be deemed to have been accepted by the contractor as correct.

10.7. Failure to Complete on Time and Liquidated Damages. Time is an essential element of the contract and it is important that the work be completed within the time specified. The cost to the division of the administration of the contract, including engineering, inspection and supervision, will increase as the time required to complete the work is increased.

10.7.a. Therefore, the division will assess liquidated damages against the contractor for each calendar day any work remains uncompleted during the months of April through November after the contract time specified for completion of the work, subject to such extensions of contract time required or permitted in subsection 10.6 of this rule. Daily charges will be deducted for each calendar day, as defined in subsection 2.13 of this rule, on all contracts, except daily charges will not be deducted on any contract between November 30, and April 1. When specification restrictions prohibit work during other periods of the year, no daily charges will be deducted during the periods

SCHEDULE OF LIQUIDATED DAMAGES		
ORIGINAL CONTRACT AMOUNT		DAILY CHARGE
~~From~~ROM ~~More~~ORE ~~Than~~HAN	T~~o~~O ~~and~~ AND ~~Including~~NCLUDING	PER CALENDER DAY
$ 0	$ 25,000	~~$ 100~~ 120
25,000	100,000	~~175~~ 150
100,000	500,000	~~325~~ 290
500,000	1,000,000	~~575~~ 490
1,000,000	2,000,000	~~950~~ 840
2,000,000	5,000,000	~~1,475~~ 1,390
5,000,000	10,000,000	~~2,400~~ 2,220
10,000,000	----------	~~4,000~~ 3,870

which the contractor is prohibited from performing work on the controlling item or operations. The total amount of daily charges, calculated from the schedule below, will be deducted from any monies due the contractor, not as a penalty, but as liquidated damages.

10.8. Default and Termination of Contract. If the contractor:

10.8.a. fails to begin the work under the contract within the time specified in the "Notice to Proceed",

10.8.b. fails to perform the work with sufficient workmen and equipment or with sufficient materials to assure the prompt completion of the work,

10.8.c. performs the work unsuitably or neglects or refuses to remove materials or to perform anew such work as may be rejected as unacceptable and unsuitable,

10.8.d. discontinues the prosecution of the work,

10.8.e. fails to resume work, which has been discontinued, within a reasonable time after notice to do so,

10.8.f. becomes insolvent or is declared bankrupt, or commits any act of bankruptcy or insolvency,

10.8.g. allows any final judgment to stand against him or her unsatisfied for a period of ten (10) days,

10.8.h. makes an assignment for the benefit of creditors, or

10.8.i. for any other cause whatsoever, fails to carry out the contract terms in an acceptable manner, the engineer will give notice in writing to the contractor and his or her surety of such delay, neglect or default.

10.8.j. If the contractor or surety, within a period of ten (10) days after such notice, shall not proceed in accordance therewith, then the division will, upon written notification from the engineer of the fact of such delay, neglect or default and the contractor's failure to comply with such notice, have full power and authority, without violating the contract, to take the performance of the work out of the hands of the contractor. The division may appropriate or use any or all materials and equipment on the ground as may be suitable and acceptable and may enter into an agreement for the completion of the contract according to the terms and provisions thereof, or use such other methods as in the opinion of the engineer will be required for the completion of the contract in an acceptable manner.

10.8.k. All cost charges incurred by the division, together with the cost of completing the work under contract, will be deducted for any monies due or which may become due the contractor. If such expense exceeds the sum which would have been payable under the contract, then the contractor and the surety shall be liable and shall pay to the division the amount of such excess.

10.9. Termination of Contract for Convenience of the State. The performance of work under a contract may be terminated by the state in whole, or from time to time in part whenever the Commissioner with the approval of the Federal Highway Administration, where applicable, shall determine that such termination is in the best interest of the state. Any such termination shall be effected by delivery to the contractor of a notice of termination specifying the extent to which performance of work under the contract is terminated and the date upon which such termination becomes effective.

10.9.a. The division may terminate the entire contract or any portion thereof, if the engineer determines that a termination is in the division=s interest. The engineer will deliver to the contractor a notice of termination specifying the extent of termination and the effective date.

10.9.b. Submittals and Procedures. After receipt of a notice of termination, the contractor shall immediately proceed with the following obligations:

10.9.b.1. Stop work as specified in the notice.

10.9.b.2. Place no further subcontracts or orders for materials, services, or facilities, except as necessary to complete the continued portion of the contract.

10.9.b.3. Terminate all subcontracts to the extent they relate to the work terminated.

10.9.b.4. Settle all outstanding liabilities and termination settlement proposals arising from the termination of the contract or portion thereof.

10.9.b.5. Transfer title and deliver to the division (1) fabricated, partially fabricated, or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (2) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be

furnished to the division.

10.9.b.6. Complete performance of the work not terminated.

10.9.b.7. Acceptable materials obtained by the contractor for the project that have not been incorporated in the work shall be inventoried in conjunction with the engineer at a date identified by the engineer.

10.9.b.8. Take any action necessary, or that the engineer may direct, for the protection and preservation of the property related to the contract that is in the possession of the contractor and in which the division has or may acquire an interest.

10.9.c. Settlement Provisions. When the division orders termination of all or a part of the contract effective on a certain date, completed items of work as of that date will be paid for at the contract bid price. Payment for partially completed work will be made either at agreed prices or under the provisions below. Items that are eliminated in their entirety by such termination shall be paid for as provided in subsection 109.5.

10.9.c.1. Additional Costs. Within sixty working days of the effective termination date, the contractor shall submit a claim for additional damages or costs not covered above or elsewhere in the contract. Such claim may include such cost items as reasonable idle equipment time, mobilization efforts, bidding and project investigative costs, overhead expenses attributable to the project terminated, legal and accounting charges involved in claim preparation, subcontractor costs not otherwise paid for, actual idle labor cost if work is stopped in advance of termination date, guaranteed payments for private land usage as part of the original contract, and any other cost or damage for which the contractor feels reimbursement should be made. Anticipated profits will not be considered as part of any settlement.

10.9.c.1.A. The contractor and the division may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. The agreed amount may not exceed the total contract price as reduced by the amount of payments previously made, and the contract price of work not terminated. The contract shall be amended, and the contractor paid the agreed amount.

10.9.c.2. Additional Cost Review. If the contractor and the division fail to agree on the whole amount to be paid the contractor because of the termination of work, the division will pay the amounts determined as follows, but without duplication of any amounts agreed upon above:

10.9.c.2.A. For contract work performed before the effective date of termination, the total (without duplication of any items) of:

10.9.c.2.A.1. The cost of work performed;

10.9.c.2.A.2. The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the termination portion of the contract if not included in subparagraph 1 above; and

10.9.c.2.A.3. A sum, as profit on (1) above determined by the division to be fair and reasonable. The division shall allow no profit under this subdivision if the contractor=s costs incurred on work performed exceed the bid item payments made.

10.9.c.2.B. The reasonable costs of settlement of the work terminated, including:

10.9.c.2.B.1. Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and support data;

10.9.c.2.B.2. The termination and settlement of subcontracts (excluding the amounts of such settlements); and

10.9.c.2.B.3. Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

10.9.c.2.C. Except for normal spoilage, and to the extent that the division expressly accepts the risk of loss, division will exclude from the fair value, as that is destroyed, lost, stolen, or damaged so as to become undeliverable to the division or to the buyer.

10.9.c.2.D. In arriving at the amount due the contractor under this clause, there will be deducted--

10.9.c.2.D.1. All unliquidated advances or other payments to the contractor under the terminated portion of the contract;

10.9.c.2.D.2. Any claim that the division has against the contractor under the contract; and

10.9.c.2.D.3. The agreed price for, or the proceeds from the sale of materials, supplies, or other things acquired and sold by the contractor not recovered by or credited to the division.

10.9.c.2.E. If termination is partial, the contractor may file a proposal with the division for an equitable adjustment of the price(s) of the continued portion of the contract. The division will make any equitable adjustment agreed upon. Any proposal for an equitable adjustment under this clause shall be requested within sixty working days from the effective date of termination unless extended in writing by the engineer.

10.9.c.2.F. The division may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the contractor for the termination portion of the contract, if these payments will not exceed the amount to which the Contractor is entitled.

10.9.c.2.G. The contractor shall maintain and make available all project cost records to the division for audit to the extent necessary to determine the validity and amount of each item claimed. This includes all books and other evidence bearing on the contractor=s costs and expenses under the contract. These records and documents shall be made available to the division at the contractor=s office, at all reasonable times, without any direct charge. If approved by the division, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents. Termination of the contract or portion thereof shall not relieve the contractor of contractual responsibilities of the work completed, nor shall it relieve the Surety of its obligation for and concerning any just claim arising out the work performed.

'§157-3-11. Measurement and Payment.

11.1. Measurement of Quantities. All work completed under the contract will be measured by the engineer according to United States standard measure.

11.1.a. The method of measurement and computations to be used in determination of quantities of materials furnished and of work performed under the contract will be those methods generally recognized as conforming to good engineering practice.

11.1.b. Unless otherwise indicated, the requirements prescribed hereinafter shall govern.

11.1.c. Earthwork will be computed by the average end area method, using the horizontal length measured along the centerline as the distance between sections, applying corrections for curvature where the apparent error exceeds 25 percent of the volume in any one cut. Other acceptable methods may be used.

11.1.d. Unless otherwise specified, longitudinal measurements for area computations will be made horizontally and no deductions will be made for individual fixtures having an area of nine square feet or less. Unless otherwise specified, transverse measurements for area computations will be the neat dimensions shown on the plans or ordered in writing by the engineer.

11.1.e. Structures will be measured according to neat lines shown on the plans or as altered to fit field conditions.

11.1.f. All items which are measured by

the linear foot, such as pipe culverts, guardrail, underdrains, etc., will be measured parallel to the base or foundations upon which such structures are placed. The term "gage," when used in connection with the measurements of plates, will mean the U. S. Standard Gage.

11.1.g. The galvanized sheet thicknesses to be used in the manufacture of metal cribbing, corrugated iron or steel culvert pipe, underdrain pipe, plate pipe, pipe arches, plate pipe arches and plate arches shall be as specified in AASHTO M 36 or AASHTO M 167.

11.1.h. The sheet thicknesses to be used in the manufacture of corrugated aluminum alloy culvert pipe, underdrain pipe, plate pipe, pipe arches, plate pipe arches and plate arches shall be as specified in AASHTO M 196 or AASHTO M 219.

11.1.i. The "size number" used in the measurement of wire will be as specified in AASHTO M 32 or AASHTO M 225.

11.1.j. The term ton will mean the short ton consisting of 2,000 lb. All materials which are measured or proportioned by weight shall be weighed on approved scales by competent, qualified personnel. Scales for weighing shall be of either the beam type, springless-dial type or digital recorder type.

11.1.k. All plant and truck scales and metering devices shall be inspected, approved and sealed in accordance with the requirements of the West Virginia Division of Labor, Bureau of Weights and Measures, or other appropriate agencies of the state or its political subdivisions. Poises shall be designed to be locked in any position to prevent unauthorized changes. When the beam type scales are used, provisions for a "telltale" dial shall be made for indicating to the operator that the required load in the weighing hopper is being approached. A device on the weighing beams shall clearly indicate the critical position.

11.1.l. If material is shipped by rail, the car weight may be accepted provided the actual weight of material only will be paid for. However, car weights will not be acceptable for material to be passed through mixing plants. Trucks used to haul materials being paid for by weight shall be weighed empty prior to each load, except at automatic batch plants approved to operate without truck scales.

11.1.m. Devices, used to meter or measure component or other materials in a simultaneous manner, shall be located so as to be readily accessible and visible to a single inspector, unless otherwise directed by the engineer.

11.1.n. Materials to be measured by volume in the hauling vehicle shall be hauled in approved vehicles and measured therein at the point of delivery. Vehicles for this purpose may be of any size or type acceptable to the engineer, provided that the body is of such shape that the actual contents may be readily and accurately determined. All vehicles shall be loaded to at least their water level capacity, and all loads shall be leveled when the vehicles arrive at the point of delivery.

11.1.o. When approved by the engineer, material specified to be measured by the cubic yard may be weighed and these weights converted to cubic yards for payment purposes. Further, when it is impractical to measure the material by weighing, or in its original position, the material will be measured in its final position and adjusted by a volume change factor. These conversion factors will be determined by the engineer and shall be agreed to by the contractor before these methods of measurement are used.

11.1.p. When bituminous material is measured by volume, the measured volume at loading temperature shall be converted to volume at 60F using the temperature correction factors in 705 for asphaltic materials and 706 (West Virginia Division of Highways Standard Specifications, Roads and Bridges, Adopted 1993) for tar materials, except that when volume is measured by an approved temperature compensated metering device, no further volume correction for temperature shall be required. When bituminous material is measured by weight, the actual specific gravity, API gravity, or weight per gallon of the material shall be used to convert the measured

weight to volume at 60F. The contractor shall furnish all information necessary as determined solely by the division to determine the amount of bituminous material actually incorporated into the project.

11.1.q. Net certified scale weights or weights based on certified volumes in the case of rail shipments will be used as a basis of measurement, subject to correction when bituminous material has been lost from the car or the distributor, wasted, or otherwise not incorporated in the work.

11.1.r. When bituminous materials are shipped by truck or transport, net certified weights or volume, subject to correction for loss or foaming, may be used for computing quantities.

11.1.s. Cement will be measured by the cwt (hundredweight = 100 lb). For the purpose of determining the total amount used in the mixture, one bag of cement shall be considered as weighing 0.94 cwt, and one barrel of cement shall be considered as weighing 3.76 cwt.

11.1.t. Timber will be measured by the thousand feet board measure (mfbm) actually incorporated in the structure. Measurement will be based on nominal widths and thickness and the extreme length of each piece.

11.1.u. The term "lump sum" when used as an item of payment will mean complete payment for the work described in the Contract.

11.1.v. When a complete structure or structural unit (in effect, "lump sum" work) is specified as the unit of measurement, the unit will be construed to include all necessary fittings and accessories.

11.1.w. When standard manufactured items are specified such as fence, wire, plates, rolled shapes, pipe conduit, etc., and these items are identified by gage, unit weight, section dimensions, etc., such identification will be considered to be nominal weights or dimensions. Unless more stringently controlled by tolerances in cited specifications, manufacturing tolerances established by the industries involved will be accepted.

11.2. Scope of Payment. The contractor shall receive and accept compensation provided for in the Contract as full payment for furnishing all materials and for performing all work under the contract in a complete and acceptable manner and for all risk, loss, damage, or expense of whatever character arising out of the nature of the work or the prosecution thereof, subject to the provisions of subsection 9.20 of this rule.

11.2.a. If the "Basis of Payment" clause in the specifications relating to any unit price in the bid schedule requires that the unit price cover and be considered compensation for certain work or material essential to the item, this work or material will not also be measured or paid for under any other pay item which may appear elsewhere in the specifications, except as provided in subsection 6.6 of this rule.

11.2.b. When the contract specifies payment of an item or of a portion of an item on a plan quantity basis, the quantities for payment will be those shown on the Plans with deductions from or additions to such quantities resulting from authorized deviations from the plans.

11.2.c. If the contractor believes that a quantity which is specified for payment on a plan quantity basis is incorrect, he or she may request the division in writing to check the questionable quantity. The request shall be accompanied by calculations, drawings, or other evidence indicating why the plan quantity is believed to be in error. If the plan quantity is found to be in error, payment will be made in accordance with the corrected plan quantity.

11.2.d. The division reserves the right to check the quantity of an item which is specified for payment on a plan quantity basis if there is reason to believe that it is inaccurate. If the quantity is found to be in error, payment will be made in accordance with the corrected plan quantity.

11.2.e. Should the division determine during construction that conditions have varied from those anticipated in design to the extent that actual measurement of a plan quantity item is

warranted, the Division will make such measurement, and payment will be based thereon in lieu of the plan quantity.

11.2.e.1. General Basis of Adjusted Payment

11.2.e.1.A. Single Deficiency: In the case of the single characteristic deficiency, the resulting deficiency shall be used directly to determine an adjusted price.

11.2.e.1.B. Multiple Deficiency: In the case of a multiple deficiency, the related adjusted percentage of contract price as determined by the acceptance plan for each characteristic shall be determined and the resulting percent of contract price to be paid shall be the product of these related adjusted percentages.

11.2.e.2. Basis of Charges for Additional Testing. When additional acceptance testing is performed by the division for reworked lots or sub-lots in accordance with subsection 8.2 of this rule the cost of such testing will be deducted on current estimates from the amount due the contractor by the division. The cost of such testing will be determined in accordance with the unit costs per test as shown in Table 9-1, published in MP 109.00.20.

11.3. Compensation for Altered Quantities. When the accepted quantities of work vary from the quantities in the bid schedule, the contractor shall accept as payment in full, so far as contract items are concerned, payment at the original contract unit price for the accepted quantities of work done. No allowance except as provided in subsection 6.2 of this rule will be made for any increased expense, loss of expected reimbursement, or loss of anticipated profits suffered or claimed by the contractor resulting either directly from such alterations or indirectly from unbalanced allocation among the contract items of overhead expense on the part of the bidder and subsequent loss of expected reimbursements therefore or from any other cause.

11.3.a. Increased work involving supplemental agreements will be paid for as stipulated in such agreements. The contractor shall furnish substantiating data required in the preparation of these agreements.

11.4. Force Account Work. If directed by the division, as provided for in subsection 6.3 of this rule, the contractor shall perform extra or unforeseen work on a force account basis and shall be compensated in the following manner:

11.4.a. Labor. For all labor and for foremen and superintendence in direct charge of the specific force account operations, the contractor or subcontractor shall receive the actual current local rate of wage, agreed to in writing before beginning work, paid for each and every hour that the labor and foremen are actually engaged in the work.

11.4.a.1. The contractor or subcontractor shall also receive the actual costs paid to, or in behalf of, workmen by reason of subsistence and travel allowances, Worker's Compensation insurance premiums, unemployment insurance contributions, Social Security and Medicare taxes, health and welfare benefits, and pension fund benefits when such amounts are required by employment contract generally applicable to the classes of labor employed on the work. The contractor or subcontractor shall furnish satisfactory evidence of the rate or rates and the amount paid for insurance premiums and taxes.

11.4.a.2. For overhead and profit, an amount equal to sixteen percent of the sum of the above labor costs shall also be paid to the contractor or subcontractor.

11.4.b. Materials For all materials used in the specific force account operation and incorporated into the project, the contractor or subcontractor shall receive the actual cost of materials delivered including labor charges for employees of the material supplier who are required to perform an incidental amount of work in conjunction with the material furnished and freight charges paid exclusive of equipment rentals as hereinafter set forth. The contractor or subcontractor shall furnish invoices to document actual materials costs; however, if materials used on the force account work are not specifically purchased for such work but are taken from the

contractor's or subcontractor's inventory, then in lieu of the invoices the contractor or subcontractor shall furnish an affidavit certifying that such materials were taken from inventory, that the quantity claimed was actually used, and that the price and freight claimed represent the contractor's or subcontractor's actual cost.

11.4.b.1. For overhead and profit, an amount equal to sixteen percent of the sum of the above materials costs shall also be paid to the contractor or subcontractor. All materials paid for will become the property of the division.

11.4.c. Equipment. The movement of equipment to and from the specified force account operation shall be as directed by the engineer. All equipment must be in good operating condition to qualify for rental payment. For all contractor or subcontractor equipment either rented or owned, the rental rates and operating costs include full compensation for major repairs, repairs due to normal wear and tear, labor and parts needed for routine daily servicing of the equipment, operating expendables such as fuel, lubricants, tires and ground engaging components, and the percentage of mechanic's wages and related maintenance vehicles chargeable to preventive and field maintenance.

11.4.c.1. Payable time periods shall not include time elapsed before the engineer has advised the contractor or subcontractor that the equipment is required for use in the force account or time elapsed after the engineer has advised the contractor or subcontractor that the equipment is no longer needed exclusive of costs for transportation, assembly and disassembly set forth in paragraph 11.4.c.4 of this rule, time elapsed while equipment is broken down or time spent repairing equipment. No separate payment will be made for any type of repairs to equipment.

11.4.c.2. When equipment is rented from a rental agency which the contractor or subcontractor owns or is part owner, the equipment shall be treated as owned equipment and rental rates determined accordingly.

11.4.c.3. Rented Equipment. For required equipment which is not owned and must be obtained by rental, the contractor or subcontractor shall be paid the actual rental cost for the equipment for the time that the equipment is required solely for use in the force account work. The contractor or subcontractor shall furnish invoices to document actual equipment rental costs. Estimated operating costs shall also be paid for each hour the rented equipment is actually operated in the force account work, not to exceed the estimated operating cost per hour set forth for the equipment in the current Rental Rate Blue Book for Construction Equipment published by Dataquest, Inc.

11.4.c.3.A. For overhead and profit, an amount equal to sixteen percent of the sum of the above costs for rented equipment shall also be paid to the contractor or subcontractor.

11.4.c.4. Owned Equipment. For owned equipment, other than small tools costing less than $500 each, the contractor or subcontractor shall be paid a rental rate determined from the current Rental Rate Blue Book for Construction Equipment published by Dataquest, Inc. The hourly rate shall be determined by dividing the monthly rate set forth in the Rental Rate Blue Book by 176 with appropriate adjustments made for age and region. The hourly rate for overtime work shall be determined by dividing the monthly rate set forth in the Rental Rate Blue Book by 176 with appropriate adjustments made for age and region. The estimated operating cost per hour set forth in the Rental Rate Blue Book shall also be paid for each hour the equipment is actually operated in the force account work.

11.4.c.4.A. If the owned equipment is not referred to in the current Rental Rate Blue Book, the hourly rental rate will be an agreed amount not to exceed the hourly rate computed as follows: A monthly rental rate equivalent to six percent of the contractor's or subcontractor's original acquisition cost of the equipment shall be established. The hourly rental rate shall then be determined by dividing this monthly rental rate by 176. Operating costs in such cases shall be a reasonable agreed-upon amount for each hour the equipment is actually operated in the force account work.

11.4.c.4.B. For overhead and profit, an amount equal to sixteen percent of the sum of the above costs for owned equipment shall also be paid to the contractor or subcontractor.

11.4.c.5. Idle Equipment. For required equipment held on the site of force account work on an idle basis at the request of the engineer, the contractor or subcontractor shall be paid for such idle time at an adjusted hourly rental rate exclusive of estimated operating costs. For owned equipment, such payment shall be made at one-half the hourly rate determined by dividing the monthly rate set forth in the Rental Rate Blue Book by 176 with appropriate adjustments made for age and region.

11.4.c.5.A. Payment of idle time for owned equipment on force account work shall not exceed 8 hours each day less the hours the equipment operates that day. Payment for idle time shall not be made on Saturday, Sunday, holidays set forth in subsection 2.51 of this rule, when equipment is operated more than 8 hours per day or 40 hours per week, when equipment is idle due to the contractor's or subcontractor's decision not to work on potential working days or when equipment is idle due to weather.

11.4.c.5.B. For overhead and profit, an amount equal to sixteen percent of the sum of the above costs for idle owned equipment shall also be paid to the contractor or subcontractor.

11.4.c.6. Miscellaneous. Transportation charges for owned or rented equipment to and from the site of the force account work shall be paid provided the equipment is obtained from the nearest approved source, the return charges do not exceed the delivery charges, haul rates do not exceed the established rates of licensed haulers, and charges are restricted to those units of equipment not already available and not on or near the project. In the case of owned equipment, the contractor or subcontractor shall be paid idle time rates for the equipment being hauled in addition to the applicable rental rates for the hauling equipment. All costs associated with the assembly and disassembly of the equipment for transport shall also be paid. All charges by persons or firms other than the contractor or subcontractor shall be supported by satisfactory invoices.

11.4.d. Taxes. When the work is done by the contractor, the amount of state and municipal taxes related to the force account work required to be paid by the contractor will be reimbursed to the contractor. For work performed by a subcontractor, the amount of extra cost paid by both the contractor and the subcontractor for corporate and business taxes levied by the state and municipalities due to the force account work shall be paid to the contractor.

11.4.d.1. For overhead and profit, an amount equal to sixteen percent of the sum of the above costs for state and municipal taxes shall also be paid to the contractor or subcontractor.

11.4.d.2. For work performed by a subcontractor, the amount of extra cost incurred by the contractor for increased business and corporate taxes shall be computed on the gross amount of the force account work, exclusive of the increased corporate and business taxes incurred by the subcontractor.

11.4.e. Contract Bond. The cost of premiums for contract bond required by subsection 5.5 which is extra cost and related to the force account work will be paid to the contractor.

11.4.e.1. For overhead and profit, an amount equal to sixteen percent of the sum of the above costs for contract bond shall also be paid to the contractor or subcontractor.

11.4.f. Insurance. The cost of premiums for Contractor's Public Liability and Property Damage Liability Insurance required by 5.6.a and Contractor's Protective Public Liability and Property Damage Liability Insurance required by 5.6.b of this rule which is extra cost and related to the force account work will be paid to the Contractor.

11.4.f.1. For overhead and profit, an amount equal to sixteen percent of the sum of the above costs for insurance shall also be paid to the contractor or subcontractor.

11.4.f.2. When the force account work involves a railroad and the contractor is required to carry Railroad's Protective Public Liability Insurance or Railroad's Protective Property Damage Liability Insurance, or both, the cost of premiums for this insurance which is extra cost and related to the force account work will be paid to the contractor.

11.4.f.3. For overhead and profit, an amount equal to sixteen percent of the sum of the above costs for railroad insurance shall also be paid to the contractor or subcontractor.

11.4.g. Administrative. Allowance For force account work performed by an approved subcontractor, the contractor shall be paid an administrative allowance equal to sixteen percent of the total amount paid for all work performed by the subcontractor on the specific force account operation exclusive of additives paid for overhead and profit.

11.4.h. Records. The contractor's representative and the Engineer shall compare records daily of the cost of work done as ordered on a force account basis, and shall indicate agreement by signature on such records.

11.4.h.1. No payment will be made for work performed on a force account basis until the contractor has furnished the engineer an itemized statement of the cost of such force account work detailed as follows:

11.4.h.1.A. Name, classification, date, daily hours, total hours, wage rate, fringe benefit rate and extended amounts for each laborer and foreman.

11.4.h.1.B. Quantities of materials, unit prices and extended amounts.

11.4.h.1.C. Transportation of materials.

11.4.h.1.D. Designation, dates, daily hours, total hours, rental rate/hour, operating cost/hour, and extended amount for each unit of equipment.

11.4.h.1.E. Transportation of equipment.

11.4.h.1.F. Rates for property damage insurance, liability insurance, bond, municipal tax, subsistence and travel allowance, Worker's Compensation insurance, unemployment insurance, Social Security and Medicare taxes.

11.4.h.2. The contractor must also furnish satisfactory evidence of the actual cost for each of the charges listed on the itemized statement (excluding those charges for owned equipment determined from the Rental Rate Blue Book).

11.4.i. Basis of Payment. The compensation provided in subdivision 11.4.a to 11.4.g of this rule, inclusive, shall be received by the contractor as payment in full for extra work done on a force account basis, including all labor, materials, equipment, fuel, lubricants, maintenance of equipment, administration, overhead, use of small tools and equipment for which no rental is allowed, profit, taxes, bond costs, insurance premiums, unemployment contributions and any other expense arising from the performance of the force account work.

11.5. Eliminated Item. Should any items contained in the proposal be found unnecessary for the proper completion of the work, the engineer may, upon written order to the contractor, eliminate such items from the contract, and such action will in no way invalidate the contract. When a contractor is notified of the elimination of items, he or she will be reimbursed for actual work done and all costs incurred, including mobilization of materials prior to the notification.

11.6. Partial Payments. The engineer will make current estimates in writing, once each month on or before the date set by the engineer at the time of starting the work, or from time to time as the work progresses, of the materials complete in place and the amount of work performed in accordance with the contract, during the preceding month or period and the value thereof figured at the unit prices contracted. Current estimates may be prepared for payment on a semi-monthly basis at the discretion of the engineer when the amount

due the contractor for work during the semi-monthly period exceeds $10,000. Should there by any doubt by the engineer as to the integrity of any part of the completed work, the estimates for that portion will not be allowed until the cause for such doubt has been removed.

11.6.a. No partial payment will be made when the total value of the work done since the last estimate amounts to less than five hundred dollars.

11.6.b. From the total of the amounts ascertained as payable, an amount equivalent to two percent of the whole will be deducted and retained by the division until completion of the entire contract in an acceptable manner. The balance, or an amount equivalent to 98 percent of the whole, less all previous payments, will be certified for payment.

11.6.c. When the work under contract has been completed and its acceptance is recommended by the engineer, and upon written request by the contractor accompanied by proper release by the contractor's surety, a part of the two (2) percent retained as outlined above, in an amount determined by the engineer, may be released and paid the contractor. A minimum of 1/2 percent of the approximate total final contract amount will be retained until payment of the final estimate.

11.6.d. Unless otherwise requested by the contractor in writing, all amounts retained by the division will be invested in the Consolidated Investment Fund of the State of West Virginia with interest accrued in the name of the contractor. Dividends will be paid annually and a service fee as determined by the fund will be deducted from the interest earned.

11.6.e. Substitution of Securities for Retainages:

11.6.e.1. The contractor may, from time to time, withdraw the whole or any portion of the amount retained for payments to the contractor, under the contract, with the written release from contractor's surety, pursuant to the terms of the contract, notwithstanding the provisions above, upon depositing with the state treasurer, United States Treasury Bonds, United States Treasury Notes, Unites States Treasury Certificates of Indebtedness or United States Treasury Bills, or bonds or notes of the State of West Virginia. A safe keeping receipt from a bank located in the State of West Virginia may be deposited with the state treasurer in lieu of any of the aforementioned definitive securities. No amount shall be withdrawn in excess of the market value of the securities at the time of deposit or of the par value of the securities, whichever is lower.

11.6.e.2. The state treasurer shall, on a regular basis, collect all interest or income on the obligations so deposited and shall pay the same, when and as collected, to the contractor who deposited the obligations. If the deposit is in the form of coupon bonds, the state treasurer shall deliver each coupon as it matures to the contractor.

11.6.e.3. Any amount deducted by the state, or by any public department or official thereof, pursuant to the terms of the contract, from the retainages due the contractor, shall be deducted, first from that portion of the retainages for which no security has been substituted then from the proceeds of any deposited security. In the latter case, the contractor shall be entitled to receive interest, coupons or income only from those securities which remain after such amount has been deducted.

11.6.e.4. Any contractor who has substituted a security or securities for retainages and the same matures before the completion and finalizing of the contract for which the security or securities were substituted for retainages may, from time to time, substitute another security or securities for the one or ones having so matured in the same manner that the original security or securities were substituted so long as the substituted security or securities are of a kind designated in 11.6.e.1. above, of equal value to the matured security or securities for which it is substituted. All interest and income accruing on such substituted security or securities shall be collected and paid and the security or securities themselves shall be held, handled and delivered by the state treasurer in the same manner, as is

provided in 11.6.e.2. and 11.6.e.3. above, for the original security or securities deposited.

11.6.f. Substitution of Surety Bond for Retainages. The contractor may at any time withdraw the amounts retained by the Division in accordance with subdivision 11.6.b and substitute therefore a surety bond, in a form acceptable to the Commissioner, in the amount of two percent of the contract bid amount plus all change order amounts approved as of the time of tender of the surety bond. This Surety Bond shall be in addition to, or an increase of, the performance bond required in subsection 5.5. The surety bond shall be conditioned upon the payment by the contractor of all applicable taxes imposed by W. Va. Code "11-13-1 et seq.; 11-21-1 et seq. and 11-24-1 et seq. as amended, and any applicable county and municipal business and occupation taxes. This surety bond will not be released, nor will final payment be made on the contract, until the Division receives from the Commissioner of Tax and Revenue, and the county commission or municipality, where applicable, a certificate declaring that all taxes levied or accrued have been paid or provided for.

11.7. Payment for Material on Hand. Partial payment may be made to the extent of the delivered costs of material to be incorporated into the work, provided the material meets the requirements of the plans and specifications when delivered in the vicinity of the project or at approved off-site locations. In any event, partial payment for material on hand will not exceed the bid price. Such material shall be stored in acceptable storage places, and the contractor shall furnish evidence of payment for the delivered cost of the material within 90 days of the cut-off date of the estimate on which this material was paid.

11.8. Acceptance and Final Payment. When the project has been accepted, as provided in subsection 7.16 of this rule, the engineer will prepare the final estimate of the quantities of the various classes of work performed. Before final payment is made, the contractor shall execute the statement of acceptance on the back of the final estimate. After the contractor executes such final estimate or if the contractor fails or declines to execute the final estimate within 30 days after receipt, the division will consider the estimate approved and accepted and he or she will be paid the entire sum found to be due after deducting all previous payments and all amounts to be retained or deducted under the provisions of the contract. Upon written request from the contractor received within 30 days of his or her receipt of the final estimate, the time for review and execution of the final estimate will be extended up to 60 additional calendar days. No time beyond the original 30 days allowed for this review will be considered for interest payment under the provisions in the following paragraphs. Should the contractor desire to reserve the right to file a claim with the state court of claims for any sum or compensation not included in the final estimate, growing out of the contract, then a reservation of right stipulating the nature, each item and the amount claimed shall be added at the end of the acceptance statement. This claim must be filed with the state court of claims within 120 days of execution of the final estimate.

11.8.a. The acceptance of final payment by the contractor shall be considered a release in full of all claims against the West Virginia Department of Transportation, Division of Highways, State of West Virginia arising out of said project, except for any claim reserved at the end of the acceptance statement on the back of the final estimate.

11.8.b. All prior partial estimates and payments will be subject to correction in the final estimate and payment.

11.9. Price Adjustment Of Fuels. Because of the uncertainty in estimating the costs of fuels that will be used during the life of this contract, adjustment in certain contract items is provided for as follows:

11.9.a. Product price quotations for bulk gasoline, unleaded (octane rating 87), and for fuel oil No. 2 (diesel fuel), as published in Platt=s Oilgram Price Report will be utilized to establish the contract base price as well as the monthly base price thereafter. These prices will be the average of the individual prices for the following locations:

Baltimore, Maryland
Norfolk, Virginia

Greensboro, North Carolina
Pittsburgh, Pennsylvania
Columbus, Ohio

as published for the first Monday of the month.

11.9.b. If the first Monday of the month falls on a holiday or the prices are otherwise not published for that date, the index (Ip) will be based on prices in the next edition of Platt's Oilgram in which these prices are listed.

11.9.c. Base prices applicable to this contract are contained in the contract documents under ANOTICE TO BIDDERS@ entitled *Base Prices For Fuels and Items to be Adjusted for Price of Fuels.*

11.9.d. Each month the engineer will be furnished with the current monthly base prices (Mbp) for gasoline and diesel fuel. When the ratio of the monthly base price (Mbp) divided by the contract base price (Cbp) is less than 0.950 or greater than 1.050, adjustments for fuel will be made in accordance with the following formula:

Pa = [(Mbp . Cbp) 1.00] x Cbp x Q

where:

Pa = Price adjustment
Mbp = Monthly Base Price
Cbp = Contract Base Price
Q = Gallons of fuel used in items of work performed during the estimate period, calculated in accordance with this Special Provision.

11.9.e. Adjustments in compensation for any period may be either plus or minus. If Mbp is greater than Cbp, the adjustment will be plus. If Cbp is greater than Mbp, the adjustment will be minus.

COST ADJUSTMENT FACTORS FOR FUEL USAGE

Class		Units	Diesel	Gasoline
1	Unclassified Excavation: Borrow Excavation	Gallons per cubic yard	0.39	0.18
2	Aggregates	Gallons per ton*	0.62	0.4
3	Bituminous Concrete	Gallons per ton	1.06	0
4	Portland Cement Concrete Pavement	Gallons per cubic yard	0.76	0.23

* Where the pay item for aggregate is in cubic yards, conversion to tons for the purpose of fuel price adjustment will be made on the basis that one cubic yard equals 1.75 tons.

11.9.f. The adjustments in compensation for petroleum fuels used for the listed items will be made on the separate items on the basis of the average fuel requirements for processing a unit of the item as shown in the following table:

11.9.g. Fuel requirements for the items listed above include the total of both diesel and gasoline.

11.9.h. The gallons of fuel for price adjustment (Q) will be determined by multiplying the factors listed above by the amount of acceptable work performed on the separate items during an estimate period.

11.9.i. Any difference between the checked final quantity and the sum of quantities shown on the monthly estimates for any item will be adjusted by the following formula:

FA = (FCQ. PRQ) x EA

where:

FA = Final Adjustment (dollars)
FCQ = Final Checked Quantity
PRQ = Total Quantity Previously Reported on Monthly Estimates
EA = Total Adjustment Shown on Monthly Estimates (dollars)

11.9.j. All adjustments will be made based on the gallons of fuel indicated in the above table and no changes will be made for variations between these usage factors and the actual factors.

11.9.k. The monthly base price for determining price adjustments for all work performed after the contract completion date, as revised by approved time extensions, will be the monthly base price (Mbp) at the time of the contract completion date (as extended) or at the time the work was performed, whichever is less.

11.9.l. The final adjustment will consider any error(s) that may have been made in the computation of monthly adjustments.

11.10. Price Adjustment for Load Limit Violations. The Allowable gross weight for any vehicle being used to haul materials on publicly maintained highways under the terms of this contract shall be as follows unless otherwise vested by law.

Vehicle Type	Allowable Gross Weight
Two - Axle Truck	34,000 LBS
Three - Axle Truck (Tandem Axle In Rear)	54,000 LBS
Four - Axle Truck (Tri - Axle in Rear)	63,000 LBS
Five - Axle Truck (Quad - Axle in Rear)	70,000 LBS
Five or More Axles (Combination Vehicle)	80,000 LBS

11.10.a. The Allowable gross weight shown above is the maximum gross weight that the majority of vehicles of that type can legally haul. Any vehicle that can legally have a gross weight different from that specified above may be inspected by the Division of Highways, Weight Enforcement Section and receive a certificate showing the maximum legal gross weight for that vehicle which shall be used in lieu of the allowable gross weight from this provision.

11.10.b. All materials from a commercial source or a batch plant are subject to a price adjustment for load limit violations. The Division of Highways is not enforcing the West Virginia Motor Vehicle Laws with this provision, however, it is enforcing a contractual requirement that makes reference only to the provisions that are described. Nothing in this provision relieves any party from compliance with the state law on load limits or any fines which may be assessed for violation of said law.

11.10.c. Material moved by the Division of Highways special permit for excess size or weight pursuant to W. Va. Code '17C-17-11 is exempt from this provision.

11.10.d. A weigh ticket shall be required with each load of material from a commercial

source which would normally have truck scales. This includes, but is not limited to, all asphalt paving materials and all aggregates regardless of the contract pay unit. The weigh ticket shall include gross, tare, and net weights, time and date of loading, item number or description of materials, contract number or project number, number of axles on haul unit, license number of haul unit, and signature of the weigher certifying that all information on the ticket is correct. The weigh ticket shall be used to determine the allowable gross weight and the actual gross weight for each load of material delivered by that haul unit.

11.10.e. For material from a commercial source or a batch plant, which would not normally have truck scales, a weigh ticket documenting the tare weight, number of axles on the haul unit, license number of haul unit, date weighed, location of scales, and signature of the weigher certifying that all information on the ticket is correct, may be supplied for each haul unit as an alternate to the ticket required in the pervious paragraph. The tare weight ticket shall be supplied for each contract on a yearly basis and when modifications are made to the vehicle or combination of vehicles. In this situation the allowable gross weight shall be determined from the weight ticket information. The actual gross weight shall be determined by adding the tare weight of the haul unit to the weight of the material delivered. The weight of the material delivered shall be calculated and furnished by the vendor/supplier shipping the material to the project site or DOH facility. This includes, but is not limited to, concrete, structural steel, piling, reinforcing steel and all prepackaged material of known weight, such as cement, grout, fertilizer, lime, abrasives, etc.

11.10.f. If the haul unit is a combination of vehicles, the license number shall be supplied for each component. The tare weight shall be for the complete haul unit.

11.10.g. All weighing shall be done on scales approved and sealed by the West Virginia Division of Labor, Bureau of Weights and Measures. If the scales are moved or upon the request of the engineer, the scales shall be reapproved and sealed. The engineer shall be notified of any scale malfunctions. The Division of Highways may, at its option, accept inspection and sealing by out of state agencies when the material is being loaded outside West Virginia.

11.10.h. A price reduction shall be assessed for each load of material where the actual gross weight exceeds the allowable gross weight. The amount of the price reduction shall be twenty-five dollars ($25.00) per ton for each ton, or portion thereof, in excess of the allowable gross weight except that no reduction shall be assessed if the amount in excess of the allowable gross weight is less than 500 lbs. This amount shall be deducted as a price adjustment for load limit violations.

11.10.i. Any material, covered by this provision, which is delivered without the proper weigh ticket shall not be accepted by the Division of Highways.

'§157-3-12. Miscellaneous Provisions.

12.1. Common Carrier Rates. The common carrier rates and taxes thereon which are current on the date of opening the bids shall be considered as applicable to all items subject to transportation charges there under.

12.1.a. If such rates or taxes are thereafter increased by public authority on any materials entering into and forming a part of the contract, an amount equal to the sum of all such increases, when evidenced by receipted common carrier bills, will be paid to the contractor by the division. All claims for such payments shall be made within 60 days after final acceptance of the work.

12.1.b. If such rates or taxes thereafter reduced by public authority on any materials entering into and forming a part of the contract, an amount equal to the sum of all such decreases, when evidenced by receipted common carrier bills, will be deducted by the division from the monies due the contractor on the work performed under the contract.

12.1.c. When deliveries of materials are performed by means other than common carriers, an increase or decrease in price will not be allowed

or charged for changes in rates or methods of delivery.

12.2. Minimum Wage Determinations. All contracts are subject to the fair minimum wage rates determined by W. Va. Code '21-5A, 1931, as amended and/or the U.S. Department of Labor.

12.2.a. When the contract is subject to U. S. Department of Labor and West Virginia Division of Labor wage rates, the minimum wage rates for the Contract shall be the higher of the

12.3.a. The contractor and subcontractors shall provide equal employment opportunity for all qualified persons and shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin.

12.3.b. Contractors and subcontractors are required to give written notice to any labor union with which they have a collective bargaining or other agreement, that they have complied with the requirements of the executive orders by the Governor of the State of West Virginia, dated October 16, 1963, and December 15, 1965. These provisions shall be fully and effectively enforced and any breach of them will be regarded as a material breach of the Contract.

12.4. Provisions for West Virginia State Funds Contracts.

12.4.a. Applications. These contract provisions shall apply to all work performed on the contract by the contractor with his or her own organization and with the assistance of workmen under his or her immediate superintendence and to all work performed on the Contract by piece work, station work, or by subcontract.

12.4.b. Employment Lists, Labor Selection. A local public employment agency will be designated by the state to prepare the employment lists for the project. At, or prior to contract award, the contractor will be advised of the exact designation and location of the agency selected for this purpose, and the name and location of such agency will be inserted in the contract.

12.4.b.1. All qualified unskilled labor shall be employed inasofar as possible from lists

rates for each job classification.

12.2.b. The West Virginia fair minimum wage rates are available from the Division of Labor, 1800 Washington Street, East, Charleston, West Virginia 25305.

12.3. Nondiscrimination of Employees (Governor's Executive Order). During the performance of this contract for public work or for goods or services, the contractor agrees as follows:

furnished to the contractor by the employment agency designated in the contract. The contractor may avail himself or herself of the services of the employment agency for obtaining labor of the intermediate and skilled grade.

12.4.b.2. In the performance of this contract, the contractor shall not discriminate against any worker because of race, creed, color or national origin.

12.4.c. Payrolls. Submission by the contractor, or subcontractor, of payrolls, or copies thereof, is not required. Each contractor, or subcontractor, shall preserve his or her weekly payroll records for a period of three years from the date of completion of this contract. The payroll records shall set out accurately and completely the project number, name, classification, hourly wage rate of each employee, hours worked by him or her daily and weekly wages earned by him or her, any deductions made from such weekly wages, and the actual weekly wages paid to him or her. Such payroll records shall be made available at all times for inspection by authorized representatives of the division.

12.4.d. Payment of Predetermined Minimum Wages. The contractor shall pay not less than the fair minimum wage rates as determined by the West Virginia Department of Labor in accordance with subsection 12.2 of this rule.

12.4.d.1. The wages of all labor shall be paid in legal tender of the United States, except that this condition will be considered satisfied if payment is made by negotiable check, on a solvent bank, which may be readily cashed by the

employee in the local community for the full amount, without discount or collection charges of any kind. Where checks are used for payment, the contractor shall make all necessary arrangements for them to be cashed and shall give information regarding such arrangements.

12.4.d.2. The minimum wages specified herein shall be exclusive of any charges for medical examination, medical fees, or insurance, except as specifically required by state law. No individual employed on the project in other than an administrative position shall be paid less than the minimum rate for unskilled labor.

§157-3-13. Disqualification and Suspension of Pre-qualified Contractors.

13.1. General Purposes. This section provides procedures regarding the Division of Highways' disqualification and suspension of pre-qualified contractors in instances where there is cause to believe that a pre-qualified contractor is not complying with laws or regulations that pertain to the competition for or the performance of contract work awarded by the Division of Highways.

13.2. Disqualification. The Commissioner may, in his or her sole discretion, disqualify a pre-qualified contractor or its affiliates from bidding on division contracts for any of the following causes:

13.2.a. Conviction, judgment or admission of a bidding crime. This paragraph includes any admission in the presentation of testimony of an unindicted co-conspirator or any admission in testimony protected by a grant of immunity to the contractor in any jurisdiction.

13.2.b. Conviction, judgment or admission of any other crime for an illegal act(s) that pertains to competition for or performance of contract work for the division.

13.2.c. Debarment by the Federal Highway Administration.

13.2.d. Deliberate and repeated violation of regulations promulgated by the Commissioner in accordance with the West Virginia Code.

13.2.e. Any other cause affecting the performance of contract work for the division that is of a serious and compelling nature.

13.3. Suspension.

13.3.a. The Commissioner may, in his or her sole discretion, suspend the Certificate of Qualification of a pre-qualified contractor where there is reasonable belief that any of the reasons set forth in subsection 13.3 of this rule for disqualification is present. If the Commissioner determines a suspension is proper he or she shall furnish written notice by registered mail to the contractor and any named affiliates stating:

13.3.a.1. that a suspension has been imposed;

13.3.a.2. the effective date of the suspension;

13.3.a.3. the cause or causes giving rise to the suspension;

13.3.a.4. that the suspension is for a temporary period pending the completion of an investigation and any ensuing legal or disqualification proceedings;

13.3.a.5. that the pre-qualified contractor may within ten (10) days of receipt of the notice, request in writing an informal hearing, which will be held at a mutually agreeable date, but no later than sixty (60) days subsequent to the receipt of the pre-qualified contractor's request for an informal hearing.

13.3.b. A suspension shall be for a temporary period pending the completion of investigation or any ensuing legal or disqualification proceeding unless terminated by the Commissioner. A suspension shall not continue for more than six (6) months from its effective date, unless civil or criminal action regarding the alleged violation has been initiated within that period, or unless disqualification proceedings have been initiated. The suspension may continue until the legal or disqualification proceedings are completed.

13.4. Disqualification Procedures.

13.4.a. After determining that cause exists under subsection 13.3 of this rule to disqualify a pre-qualified contractor, the Commissioner or his or her duly authorized representative shall furnish written notice of a hearing to the pre-qualified contractor and any named affiliates. The notice shall state:

13.4.a.1. that disqualification is being considered;

13.4.a.2. the facts giving rise to the proposed disqualification;

13.4.a.3. the cause or causes under subsection 13.3 of this rule relied upon for proposing disqualification;

13.4.a.4. the time, place and date of the hearing;

13.4.a.5. the name and mailing address of the hearing examiner;

13.4.a.6. if a suspension is not in effect before the notice is sent, that contracts may not be awarded to the contractor by the division pending the decision of the hearing examiner.

13.4.b. The hearing will be conducted in accordance with 157 CSR 1-3 of the West Virginia Division of Highways' Rules. The hearing examiner may extend the date of any hearing upon request of the contractor, but the hearing shall not be extended to later than sixty (60) days from the date the notice was sent. A transcribed record of the hearing shall be made unless the Commissioner and the contractor waive that requirement. At the conclusion of the hearing, the hearing examiner shall issue to the Commissioner and the contractor and all named affiliates written findings of fact and the recommended administrative action.

13.4.c. The Commissioner after receiving the record, findings of fact and recommendations of the hearing official shall determine the administrative action to be taken. The Commissioner shall notify the named contractor or contractors of his or her determination in writing. If the determination is to impose disqualification, the determination shall set forth the period of time for which disqualification is imposed.

13.4.d. The determination made by the Commissioner may include all named affiliates of the contractor, provided that each decision to include an affiliate is made only after allowing the affiliate to participate in the hearing with the same procedural rights afforded the contractor.

13.5. Period of Disqualification.

13.5.a. The Commissioner may disqualify a pre-qualified contractor for a period of three months to three years.

13.5.b. At the sole discretion of the Commissioner the disqualification may be reduced, lifted or suspended at any time, if it is in the public interest to do so. Any mitigating circumstances may be considered in the decision to impose, reduce, lift or suspend disqualification and may include, but shall not be limited to:

13.5.b.1. the degree of culpability of the disqualified contractor;

13.5.b.2. restitution by the disqualified contractor to the Division for any overcharges or other damages;

13.5.b.3. cooperation by the disqualified contractor with any investigation undertaken by appropriate State agencies or other sovereign bodies;

13.5.b.4. elimination of the causes for which the disqualification was imposed.

13.6. Effect of Disqualification or Suspension by Other Jurisdictions. The Commissioner shall not be bound by the disqualification or suspension of a contractor by other jurisdictions, but may consider any and all information available from whatever source to determine if a contractor lacks the qualities of moral and/or ethical integrity so long as there is compliance with the procedures set forth in these regulations.

13.7. List of Disqualified or Suspended Contractors. The Commissioner shall maintain a

list of all contractors and affiliates who have been disqualified or suspended in accordance with these rules and regulations.

13.8. Notice to Contractors. A copy of these rules and regulations shall be mailed to each pre-qualified contractor.