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**WEST VIRGINIA LEGISLATURE**  
**Legislative Rule-Making Review Committee**

OFFICE OF THE SECRETARY OF STATE

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April 18, 1999

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NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Alan Cuervo  
Administrative Procedures Supervisor  
Building 5, Room 715  
Capitol Complex

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Construction and Reconstruction of State Roads, 157CSR3**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule
  - (a) as originally filed \_\_\_\_\_
  - (b) as modified by the agency       /
2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. \_\_\_\_\_
3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. \_\_\_\_\_
4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached. \_\_\_\_\_
5. Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached. \_\_\_\_\_

**ANALYSIS OF PROPOSED LEGISLATIVE RULES**

**Staff Counsel:** Rita A. Pauley  
**Date:** April 12, 1999  
**Agency:** Division of Highways  
**Subject:** Construction and Reconstruction of State Roads,  
157 CSR 3

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**PERTINENT DATES**

Filed for public comment: October 9, 1998  
Public comment period ended: November 9, 1998  
Filed following public comment period: November 16, 1998  
Filed LRMRC: November 16, 1998  
Filed as emergency: N/A

Fiscal Impact: None

**ABSTRACT**

This current Legislative rule specifies the procedures for the construction and reconstruction of roads and bridges. It also governs the contracts for the provision of materials and supplies to the Division of Highways. This rule has not been revised since 1988, therefore, there have been numerous technical as well as substantive changes proposed for the rule. The majority of the substantive changes are being made to adopt the current language of Division 100, General Provisions of Highways Standard Specifications Roads and Bridges Manual.

The rule is a current legislative rule. The following is a synopsis of the proposed changes to the rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule.

Section 2 should be a separate definitions section. Forty-three definitions have been added to this section for a total of one hundred one definitions. The remainder of section 2 should become a new section 3 dealing with plains and specifications for the construction and reconstruction of state roads.

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Section 3 establishes requirements and conditions for bids. Subsection 3.6 has been amended to allow bidders to submit an approved computer generated proposal in lieu of Highways' Schedule of Items. Also, all proposals must comply with the West Virginia Contractor Licensing Act. Subsection 3.7 expands the reasons a bid can be rejected as irregular. One addition was to allow for the use of a computer proposal but permit its rejection if it is not properly formatted or contains errors.

Section 4 deals with the award and execution of contracts. Subsection 4.1 has been amended by removing the provisions addressing proposals containing special provisions for bidders designated as a disadvantaged or women's business enterprise. Subsection 4.5 has been revised to clarify and update the language on the bonding requirements. In addition to surety and cash bonds, treasury bonds and certificates of indebtedness, successful bidders may give the State Treasurer a safe keeping receipt from a West Virginia bank as security. As bonds or coupons mature or interest is earned the income is to be paid by the Treasurer to the contractor.

Subsection 4.6 has been amended by adding a requirement that all insurance policies required of a contractor must be occurrence policies. All certificates of insurance must be endorsed by a licensed West Virginia resident agent.

Section 5 sets forth the scope of work included in the contract. This section has been substantially revised, the requirements for alterations of plans are now in subsections 5.3, 10.3 and 9.6. Under certain circumstances the nature and scope of the work to be performed under a contract may be changed or increased as extra work.

Subsections 5.9 relating to differing site conditions; 5.10 dealing with suspension of work ordered by the engineer; 5.11 relating to significant changes in the character of the work; and 5.12 on value engineering have been added.

Section 6 discusses control of the work performed in relation to the authority of the engineer and the contractor. It has been amended to clarify that the contractor is responsible for determining where utilities are located in the project area. The contractor must notify a utility of any damage or disruption in service caused by the contractor and is responsible for any costs, charges or claims for interruption and repair of utility lines.

Section 7 deals with material and quality control. Subsection 7.10 on the use of domestic and foreign steel has been moved to

subsection 7.1. This subsection requires that federal guidelines for use of domestic and foreign steel be followed.

Section 8, Legal Relations and Responsibility to Public, has been amended to update the references to various manuals that contractors must follow. The amendments add three additional manuals or federal regulations for contractors to follow the "West Virginia Division of Highways, Best Management Practice for Containment/Disposal of Waste Products Generated During Bridge Cleansing and Painting Activities"; Section 404 of the Clean Water Act; and 29 CFR Part 1296, Lead Exposure in Construction.

Section 9 entitled "Prosecution of the Work" covers the requirements for completing work under the contract. It has been amended to clarify the provisions for termination of a contract by the State. The contract may be terminated, in whole or in part if the engineer determines it is in the best interest of the Division to do so. Upon notice of termination the contractor must immediately stop work, terminate any work being done by subcontractors, transfer title and deliver to the Division parts, plans, supplies and other materials. If only part of the contract is terminated the contractor must continue with the remainder of the work. Upon termination the contractor is to be paid for work completed at the contract price. If there are additional costs or damages the contractor must submit a claim within 60 days of the termination date. If the Division and the contractor do not agree on the total amount to be paid the rule sets forth what will be paid for under an additional cost review.

Section 10 sets forth the requirements for measurement of quantities of materials and work performed and the basis for payment. Subsections 10.4, Force Account Work has been replaced with a new subsection 10.4 relating to payment for extra or unforeseen work and 10.9, Price Adjustment of Asphalt Cement has been deleted. Subsection 10.10, Price Adjustment of Load Limit Violations has been added. A price reduction is to be assessed on each load of material that exceeds its allowable gross weight at \$25.00 per ton or portion thereof. No adjustment will be made if the load is over weight by less than 500 lbs.

AUTHORITY

Statutory authority: W.Va. Code, §17-2A-8(24), which provides, in part, as follows:

§17-2A-8.

(24) Make and promulgate rules and regulations for the government and conduct of personnel, for the orderly and efficient administration and supervision of the state road program and for the effective and expeditious performance and discharge of the duties and responsibilities placed upon him by law.

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ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has suggested technical modifications.