



WEST VIRGINIA DEPARTMENT OF HIGHWAYS

1900 Washington Street, East
Charleston, West Virginia
25305

John D. Rockefeller IV
GOVERNOR

Fred VanKirk
STATE HIGHWAY ENGINEER
ACTING COMMISSIONER

July 20, 1984

Honorable A. James Manchin
Secretary of State
State Capitol Building
Charleston, West Virginia 25305

Dear Secretary Manchin:

Pursuant to West Virginia Code 29A-3-6 hereinafter set forth are two (2) copies of evidence of comments adduced at the Public Hearings on Series III, Section 12, "Disqualification and Suspension of Prequalified Contractors" conducted on May 23, 1984 and July 18, 1984 and the amendments which were adopted by the Department of Highways.

The proposed rules were filed in your office June 18, 1984.

Please stamp and return one copy of the comments to this office.

Very truly yours,

Philip A. Shucet
Executive Secretary -
Planning Manager

PAS:mm

Enclosure

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

THIS DATE July 20, 1984
Administrative Law Division

THIS DATE _____
Administrative Law Division

Section 12. Disqualification and Suspension of Prequalified Contractors

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

12.02. Definitions. --

(1) Suspension - An exclusion or bar from contracting with or bidding on contracts let by the Department for a temporary period of time, pending the completion of an investigation or legal or disqualification proceedings.

(2) Disqualification - 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 Department for a specified period of time.

(3) Debarment - An exclusion or bar from contracting with or bidding on contracts let by the Department.

(4) Prequalified Contractor - 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 Department.

(5) Department - The West Virginia Department of Highways, a corporation.

(6) Commissioner - West Virginia Commissioner of Highways or an authorized representative or employee.

(7) Admission - 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.

(8) Conviction - 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.

(9) Judgment - A judgment in a civil action by any court of competent jurisdiction.

(10) Bidding Crime - 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.

12.03. Disqualification. -- The Commissioner may, in his sole discretion, disqualify a prequalified contractor or its

affiliates from bidding on Department contracts for any of the following causes:

(1) 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.

(2) 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 Department.

(3) Debarment by the Federal Highway Administration.

(4) Deliberate and repeated violation of regulations promulgated by the Commissioner in accordance with the West Virginia Code.

(5) Any other cause affecting the performance of contract work for the Department that is of a serious and compelling nature.

12.04. Suspension. --

(1) The Commissioner may, in his sole discretion, suspend the Certificate of Qualification of a prequalified contractor where there is reasonable belief that any of the reasons set forth in Section 12.03 for disqualification is present. If the Commissioner determines a

suspension is proper he shall furnish written notice by registered mail to the contractor and any named affiliates stating:

- (a) that a suspension has been imposed;
- (b) the effective date of the suspension;
- (c) the cause or causes giving rise to the

suspension;

- (d) that the suspension is for a temporary period pending the completion of an investigation and any ensuing legal or disqualification proceedings;

- (e) that the prequalified contractor may within ten (10) days of receipt of the notice, request in writing an informal hearing, which will be held no later than sixty (60) days subsequent to the receipt of the prequalified contractor's request for an informal hearing.

(2) 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.

12.05. Disqualification Procedures. --

(1) After determining that cause exists under Section 12.03 to disqualify a prequalified contractor, the Commissioner or his duly authorized representative shall furnish written notice of a hearing to the prequalified contractor and any named affiliates. The notice shall state:

- (a) that disqualification is being considered;
- (b) the facts giving rise to the proposed disqualification;
- (c) the cause or cause under Section 12.03 relied upon for proposing disqualification;
- (d) the time, place and date of the hearing;
- (e) the name and mailing address of the hearing examiner;
- (f) if a suspension is not in effect before the notice is sent, that contracts may not be awarded to the contractor by the Department pending the decision of the hearing examiner.

(2) The hearing will be conducted in accordance with Series I, Section 3 of the West Virginia Department of Highways Rules and Regulations. 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.

(3) 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 determination in writing. If the determination is to impose disqualification, the determination shall set forth the period of time for which disqualification is imposed.

(4) 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.

12.06. Period of Disqualification. --

(1) The Commissioner may disqualify a prequalified contractor for a period commensurate with the seriousness of the causes.

(2) 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:

(a) the degree of culpability of the disqualified contractor;

(b) restitution by the disqualified contractor to the Department for any overcharges or other damages;

(c) cooperation by the disqualified contractor with any investigation undertaken by appropriate State agencies or other sovereign bodies;

(d) elimination of the causes for which the disqualification was imposed.

12.07. 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.

12.08. 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.

12.09. Notice to Contractors. -- A copy of these rules and regulations shall be mailed to each prequalified contractor.



WEST VIRGINIA DEPARTMENT OF HIGHWAYS

1900 Washington Street, East
Charleston, West Virginia
25305

JOHN D. ROCKEFELLER IV
GOVERNOR

CHARLES L. MILLER
COMMISSIONER

June 15, 1984

M E M O R A N D U M

TO: Fred Vankirk
State Highway Engineer

FROM: Phil Shucet
Executive Secretary - *Phil*
Planning Manager

SUBJECT: Disqualification and Suspension of
Prequalified Contractors
Rules and Regulations

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 7-20-84
Administrative Law Division

On May 23, 1984, 10:00 a.m., the Department of Highways held a public hearing for the purpose of obtaining comments on emergency rules and regulations for the Disqualification and Suspension of Prequalified Contractors. The only comments received at the hearing were those of Mr. Mike Clowser, Executive Director of the WV Contractors Association. A copy of Mr. Clowser's comments are attached. The hearing record was held open for 10 days and no further comments were received.

I solicited a review of the attached comments from CL, HS and SC. In making a final review of the comments, and in concert with the review made by the above noted three offices, it is my recommendation that our previously issued emergency rules and regulations remain in effect as proposed rules and regulations with one exception; that being the addition of a definition in Section 12.02 for a hearing examiner. As suggested by HS and concurred with by CL, that definition would be; "A person designated by the Commissioner to conduct a hearing as set forth in Series III, Section 12.05."

Mr. Clowser offered four additional comments which are addressed as follows:

1) Section 12.03, Disqualification - The use of the term, "... in his sole discretion..." is included here and also in Section 12.04 to emphasize that the Commissioner, and only the Commissioner, has the ultimate authority to disqualify or suspend a prequalified contractor. The remaining sections of the regulation establish how the Commissioner shall gather facts prior to the exercise of his authority.

Thus, no revisions to Section 12.03 or 12.04 are recommended.

EQUAL OPPORTUNITY EMPLOYER

2) Section 12.03 (1) - The comments offered by Mr. Clowser indicate an assumption of disqualification if an individual "... acts solely on his own to commit a crime." The reasons listed in Section 12.03, items 1 through 5, are instances for which a firm may be disqualified. Thus, it is conceivable that a firm may not be disqualified if it were satisfactorily proven that an individual engaged in criminal activity solely on his and of his own free will.

No revision to Section 12.03 (1) is recommended.

3) Section 12.03 (5) - It is suggested that a definition for "... of a serious and compelling nature" be added. Item 5 exists for the very reason that a situation may arise which, although it does not readily fall under items 1 through 4, is of such nature as to require consideration of disqualification or suspension.

No revision to Section 12.03 (5) is recommended.

4) Section 12.04 (1) (e) - The use of the word "may" lends flexibility to both the Department and the contractor. Changing "may" to "shall" could prove unduly restrictive. Also, the fact that the Department has 60 days to hold the hearing is meant for all parties best interests. Requiring the hearing to be held within 10 days of a request could result in a lack of sufficient information at the hearing.

While I would agree that a hearing, once requested, should be held as soon as appropriate, no revisions to Section 12.04 (1) (e) are recommended.

With your approval, we will proceed with the above suggested revision and file the appropriate documents with the Secretary of State's office so that our proposed rules and regulations may be considered by the Legislature for permanent rules and regulations.

PAS:mm

Attachment

cc: EX, CL, CP, HS, SC

PRESENTATION OF REMARKS
ON
WEST VIRGINIA ADMINISTRATIVE REGULATIONS
CHAPTER 17, ARTICLE 2A, SERIES III,
SECTION 12, 1984

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

THIS DATE 7-20-84
Administrative Law Division

Michael L. Clowser
Executive Director
CAWV
May 23, 1984

My name is Michael L. Clowser and I am Executive Director of the Contractors Association of West Virginia. We are a non-profit trade association representing over 350 firms in the construction industry.

We appreciate the opportunity to speak on the Department of Highways' West Virginia Administrative Regulations Chapter 17, article 2A, series III, section 12, 1984.

We applauded the DOH's efforts to protect the public interest by allowing only responsible bidders to work on public contracts, and we agree with most parts of the proposed regulations.

We do, however, have some questions regarding five segments of the regulations that we believe should be addressed.

First, on page 2 under Definitions, there is no definition for Hearing Examiner. A hearing examiner is mention under 12.05, Disqualification-Procedures, but it is not spelled out who qualifies as a hearing examiner and what his duties will be.

Second, under section 12.03, Disqualification, it states the "Commissioner may, in his sole discretion, disqualify a prequalified contractor." We believe this is broad powers for the commissioner and should be changed to read: "The commissioner may, in findings established by facts, disqualify a prequalified contractor."

Third, under section 12.03, paragraph 1, Conviction, a construction firm is disqualified even if an employee of the company acts solely on his own to commit a crime. We do not necessarily believe that if an employee, by his own admission, undertakes a criminal act, gets caught, and is convicted, that the entire company should be disqualified from bidding.

Fourth, under section 12.03, paragraph 5, we believe the statement "of a serious and compelling nature" is too broad and should be defined to note what constitutes grounds for disqualification. The statement as is, is too open for interpretation and should therefore be stricken from the regulations.

Fifth, section 12.04, paragraph 1 subsection (e), states the "prequalified contractor may within 10 days.....request..... an informal hearing." The word may means the contractor does not have to request a hearing within 10 days, and if he doesn't, does it mean he forfeits his right to request hearing at a later date. Possibly the word "shall" could be substituted for "may."

Also under subsection (e), we believe that 60 days is too long to wait for an informal hearing. A contractor could be penalized from participating in a number of lettings awaiting a hearing. This waiting period should be reduced to 10 days.

This concludes our comments on the proposed regulations. Again, we thank you for the opportunity to present the views of the construction industry.

August 10, 1984

On July 31, 1984, a Public Hearing was held concerning the proposed amendments, additions and/or deletions to Series III of the West Virginia Department of Highways' Rules and Regulations.

This is to advise that no one appeared to make comments regarding these proposed regulations. A period of ten (10) days following the hearing was held open for written comments, and as of this date, the Department has not received written comments.

JAR 8/10/84



WEST VIRGINIA DEPARTMENT OF HIGHWAYS

1900 Washington Street, East
Charleston, West Virginia
25305

John D. Rockefeller IV
GOVERNOR

Fred VanKirk
STATE HIGHWAY ENGINEER
ACTING COMMISSIONER

August 10, 1984

Honorable A. James Manchin
Secretary of State
State Capitol Building
Charleston, West Virginia 25305

Dear Secretary Manchin:

Pursuant to West Virginia Code 29A-3-6 hereinafter set forth are two (2) copies of evidence of comments adduced at the Public Hearing on proposed amendments, additions and deletions to Series III of the Department of Highways' Rules and Regulations.

The proposed rules were filed in your office June 18, 1984.

Please stamp and return one copy of the comments to this office.

Very truly yours,

A handwritten signature in cursive script, appearing to read "P. A. Shucet".

Philip A. Shucet
Executive Secretary -
Planning Manager

PAS/h

Enclosure

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 8-14-84
Administrative Law Division

EQUAL OPPORTUNITY EMPLOYER



WEST VIRGINIA DEPARTMENT OF HIGHWAYS

JOHN D. ROCKEFELLER IV
GOVERNOR

1900 Washington Street, East
Charleston, West Virginia
25305

CHARLES L. MILLER
COMMISSIONER

June 15, 1984

The Honorable A. James Manchin
Secretary of State
State Capitol Building
Charleston, West Virginia 25305

Dear Secretary Manchin:

Pursuant to Chapter 29A-3-5 of the West Virginia Code, 1931, as amended, enclosed please find (3) copies of proposed amendments, additions, and deletions to Series III of the West Virginia Department of Highways' Rules and Regulations.

Be advised that this letter, pursuant to 29A-3-5 constitutes notice that the West Virginia Department of Highways is proposing to promulgate the above mentioned rules.

Be also advised that this letter, pursuant to 29A-3-7 constitutes notice that the West Virginia Department of Highways is seeking public comment on the merits of the proposed rules.

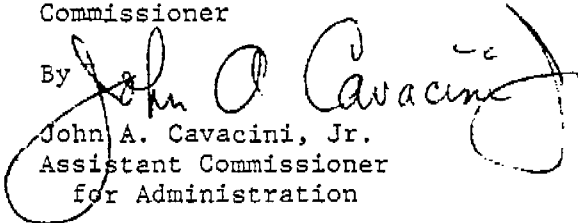
Persons desiring to make comments are encouraged to do so by presenting a copy of their written comments at the hearing. Written comments will be accepted for a period of ten days following the hearing.

I hereby certify that the enclosed pages of amendments, additions, and deletions are true and accurate copies of Series III that are to be filed as proposed regulations. Please stamp and return one copy to this office.

Very truly yours,

Charles L. Miller
Commissioner

By


John A. Cavacini, Jr.
Assistant Commissioner
for Administration

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

THIS DATE June 18, 1984
Administrative Law Division

CLM/Ch

Enclosures

EQUAL OPPORTUNITY EMPLOYER

FILING OF LEGISLATIVE RULES
BY THE
DEPARTMENT OF HIGHWAYS
PROMULGATION HISTORY ABSTRACT

RULE TITLE: Construction and Reconstruction of State Roads, Series III

RULE TYPE: Legislative

FILED NOTICE OF PUBLIC HEARING: June 18, 1984

PUBLIC HEARING HELD: July 18, 1984

FILED EMERGENCY REGULATIONS: February 24, 1984 & August 15, 1984

FILED AGENCY APPROVED REGULATIONS: August 14, 1984

FILED AGENCY APPROVED REGULATIONS WITH LRMRC: August 14, 1984

ACTION BY LRMC: Modified and Approved on October 4, 1984, Filed
Modification on October 5, 1984

LEGISLATIVE ACTION: Amended and Passed S. B. 399, 64-2-17(2a)(8) and
64-2-17(4)(19) passed April 13, 1985, effective
from passage

FINAL REGULATION FILED WITH SECRETARY OF STATE: June 12, 1985

EFFECTIVE DATE: June 12, 1985