# WEST VIRGINIA CODE CHAPTER 5 ARTICLE 22A

WV Legislature

## §5-22A-1. Short title; applicability of article.

This article shall be known and may be cited as the "West Virginia Design-Build Procurement Act."

The provisions of this article must be used to select design-builders for authorized projects that are constructed and owned, potentially owned, or ultimately owned by any agency.

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## §5-22A-2. Definitions.

For the purpose of this article:

(1) "Agency" means all state departments, agencies, authorities, quasi-public corporations and all political subdivisions, including cities, counties, boards of education and public service districts and the individual representatives of the agency appointed to oversee or supervise the project.

(2) "Board" means the Design-Build Board established pursuant to section four of this article to determine whether a public project satisfies the requirements of this article.

(3) "Design-build" is defined as providing responsibility within a single contract for design, construction or alteration of a building or buildings, together with incidental approaches, structures and facilities to be constructed, in which services within the scope of the practice of professional engineering or architecture, as defined by the laws of the State of West Virginia, are performed by an engineer or architect duly licensed in the State of West Virginia and in which services within the scope of construction contracting, as defined by the laws of the State of West Virginia, are performed by a contractor qualified and licensed under the applicable statutes. The design-build method of construction may not be used for any other construction projects, such as highway, water or sewer projects.

(4) "Design-build contract" means the contract between an agency and a design-builder to furnish the architecture, engineering, and related services as required, for a given public project, and to furnish the labor, materials and other construction of services for the same public project. A design-build contract may be conditional upon subsequent refinements in scope and price, and may permit the agency to make changes in the scope of the project without invalidating the design-build contract.

(5) "Design-builder" means the entity, whether natural person, partnership, joint venture, corporation, professional corporation, business association or other legal entity, that proposes to design and construct any public project governed by the procedures of section seven, article six of this chapter and this article.

(6) "Firm" means any individual, firm, partnership, corporation, limited liability company, limited liability partnership, association, joint venture or other legal entity permitted by law to practice engineering, architecture or construction contracting in the State of West Virginia.

(7) "Invitation for proposals" means the document or publication by which an agency solicits proposals for a design-build project.

(8) "Invitation for qualifications" means the document or publication by which an agency solicits a statement of qualifications from potential design-builders in order to select three to five design-builders to respond to the agency's invitation for proposal.

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(9) "Performance criteria" means the requirements for the public project, including as appropriate, aesthetics, capacity, durability, production standard, ingress and egress requirements or other criteria for the intended use of the public project, expressed in performance-oriented drawings and specifications suitable to allow the design-builder to make a proposal.

(10) "Performance criteria developer" means an architect or engineer licensed under the laws of this state and, if applicable, the architect's or engineer's employer, company, partners, joint venturers, affiliates or subcontractors retained by the agency to develop performance criteria and to serve as the agency's technical advisor.

(11) "Project" means that project described in the public announcement.

(12) "Proposal" means an offer to enter into a design-build contract, as further defined in this article.

(13) "Qualified design-builder" means one of the three to five design-builders selected by the agency to respond to the invitation for proposals.

(14) "Responsive proposal" means a proposal that scores a minimum of seventy points out of a possible one hundred points in the qualitative evaluation.

(15) "Statement of qualifications" means descriptive information or other data submitted by a design-builder indicating its ability to satisfy the requirements set forth in the invitation for qualifications.

(16) "Substantial completion" means the stage in the progress of the work when the work or designated portion thereof is sufficiently complete in accordance with the design-build contract so the agency can occupy or utilize the work for its intended use.

(17) "Technical review committee" means the group of individuals who have education and experience in the design, construction, operation, administration, and finance requirements of the project and users of the project selected by the agency to review, evaluate and score the statement of qualifications and invitation for proposal.

(18) "Work" means the design, construction and services required by the design-build contract, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the design-builder to fulfill the design-builder's obligations. The work may constitute the whole or a part of the project.

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## §5-22A-3. Public policy; conditions for contract.

(a) Recognizing that the design-bid-build method provides a viable delivery method for public projects, it is the public policy of this state to permit an agency to enter into design-build contracts for public projects.

(b) An agency may not enter into a design-build contract for a public project unless:

(1) The Department of Administration promulgates and publishes legislative rules pursuant to section six of this article, and consistent with this article for the solicitation and award of design-build contracts and adheres to this article and those rules;

(2) The agency, for each public project or projects procured pursuant to this article, determines that it is in the best interest of the public to enter into a design-build contract to complete the public project or projects and adheres to this article and the rules; and

(3) The Board established pursuant to section four of this article determines that the public project is appropriate as a design-build project utilizing the mandatory criteria as provided in section five of this article.

(c) When the Design-Build Board, established pursuant to section four of this article, is terminated pursuant to the Acts of the Legislature, no agency may enter into a design-build contract: Provided, That agencies may pursue and complete any design-build projects approved by the board prior to its termination date.

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## §5-22A-4. Design-Build Board and members; appointments; expense reimbursement; meetings.

(a) The Design-Build Board is continued within the Department of Administration and is composed of the following nine members who are appointed by the Governor with the advice and consent of the Senate: Two contractors licensed in the State of West Virginia; one architect licensed in the State of West Virginia; one professional engineer licensed in the State of West Virginia; the Secretary of the Department of Administration, ex officio; one representative from labor; and three other members of the public at large. Members of the board are not entitled to compensation for services performed as members, but may be reimbursed for actual and necessary expenses incurred for each day in which he or she is engaged in the discharge of official business, in accordance with rules promulgated pursuant to section eleven, article three, chapter twelve of this code and travel management policies adopted by the Department of Administration. Each member of the board shall take and subscribe to the oath or affirmation required pursuant to section five, article IV of the Constitution of West Virginia.

(b) Terms of office are for three years, which are staggered in accordance with the initial appointments under prior enactment of this section, each term ending on the same day of the same month of the year as did the term which it succeeds. Each member holds office from the date of his or her appointment or until his or her successor qualifies for office. When a vacancy occurs as a result of death, resignation or removal in the membership of the board, the Governor shall fill the vacancy by an appointment within thirty days of the vacancy for the unexpired portion of the term in the same manner as original appointments.

(c) The Board shall elect a chairperson and other necessary officers. The Board shall adopt rules for its procedures. Five members of the board is a quorum. A majority of the total membership is necessary to act at all times. Meetings of the board shall be held upon the call of the Secretary of the Department of Administration, the call of the chairperson or the call of any two members of the board: Provided, That the board shall meet at least four times each calendar year and all meetings of the board must be held in accordance with the open governmental proceedings act as set out in article nine-a, chapter six of this code.

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## §5-22A-5. Duties of board to approve and monitor projects.

(a) Upon receipt of information that an agency wants to pursue the design-build method of project delivery, the board, with the administrative support of the Secretary of the Department of Administration, shall notify the agency that failure to comply with the requirements of this article is a violation of state law. The Board shall notify the Secretary of the Department of Administration of any agency knowingly proceeding without meeting the requirements of this article.

(b) Prior to an agency issuing an invitation for qualifications for public projects, the board must determine that the public project is appropriate as a design-build project in accordance with all of the following:

(1) The agency has the appropriate legal authority to enter into a design-build contract;

(2) The agency requires a project design and construction time line that is faster than the traditional design-bid-build process would allow;

(3) The project requires close coordination of design and construction expertise or an extreme amount of coordination;(4) The agency requires early cost commitments;

(5) The agency provides a written plan for funding the project including, but not limited to, the funding necessary to pay for design services and construction costs; and

(6) The agency has completed and submitted a written application for approval to the board and requested a meeting with the board to present its request for approval from the board.

(c) Upon project approval under subsection (b) of this section, the agency shall submit to the board monthly reports detailing the progress of the approved project. The reports shall continue until the start of construction to ensure that the agency has complied with any requirements established by the board in its approval of the project. If any requirement is not satisfied, the board may withdraw its approval of the project at any time prior to the start of construction. If the board withdraws its approval, the agency may not proceed with the project as a design-build project until the requirements set forth in the board's approval and the requirements of this article are met, as determined by the board.

(d) On or before January 1, of each year, the board shall file an annual report with the Joint Committee on Government and Finance, and a copy of the report with the Legislative Librarian, setting forth a description of the projects approved during the preceding year, including copies of monthly monitoring reports submitted to the board pursuant to subsection (c) of this section.

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## §5-22A-6. Design-build rules.

The Department of Administration shall propose rules for legislative approval pursuant to article three, chapter twenty-nine-a of this code and consistent with this article for the award of design-build contracts, which provide, at a minimum:

(1) The procedures to select or designate a performance criteria developer and prepare performance criteria;

(2) The application process for approval of a design-build project;

(3) The procedures for selecting the most qualified design-builders prior to the release of the invitation for proposals;

(4) The procedures for the preparation and contents of invitations for proposals;

(5) The procedures for preparing and submitting proposals;

(6) The procedures for evaluating proposals;

(7) The procedures for negotiations between the agency and those submitting proposals prior to the acceptance of a proposal, if any such negotiations are contemplated;

(8) The procedures for awarding and executing design-build contracts;

(9) The procedures for awarding design-build contracts in the event of public emergencies as defined in the applicable statutes; and

(10) The procedures for acting on formal protests relating to the solicitation or award of design-build contracts.

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## §5-22A-7. Design-builder qualifications; duties and powers.

(a) Each design-builder shall be licensed to do business in this state and be a licensed architect or engineer or a general contractor.

(b) Each design-builder may:

(1) Assign or sublet the responsibility for professional design services to an architect or engineer licensed in this state. The architect or engineer shall carry, at all times, professional design liability insurance in an appropriate amount as designated by the agency. The architect or engineer may be a full or part-time employee of the design-builder; and

(2) Assign or sublet responsibility for construction or other services requiring a contractor's license to persons or entities licensed or otherwise qualified to provide those services in this state.

(c) Each design-builder may contract to provide professional services or construction services to the agency that the design-builder is not licensed, registered or otherwise authorized to provide so long as those services are assigned or sublet to a firm that is registered, licensed and qualified to provide those services.

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## §5-22A-8. Development of performance criteria.

(a) Each invitation for proposal must contain performance criteria prepared by an architect or engineer licensed under the laws of this state, referred to as the "performance criteria developer." The agency shall select the performance criteria developer in accordance with the requirements of article one, chapter five-g of this code, and shall retain the performance criteria developer through final completion of the project to monitor adherence to the performance criteria.

(b) The agency may use its own employees to determine whether the agency should seek to construct a project using the design-build method of construction. The agency may use an employee as its performance criteria developer on projects for which construction costs are estimated to be $1 million or less.

(c) The performance criteria developer and his or her employer, company, partners, joint venturers, affiliates or consultants may not submit a proposal to enter into the design-build contract and may not perform services under the design-build contract.

(d) The performance criteria developer may delegate the development of specific aspects of the design criteria to an architect or engineer licensed by this state and his or her employer, company, partners, joint venturers, affiliates or other consultants.

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## §5-22A-9. Scope of project.

(a) The agency, in consultation with the performance criteria developer, shall determine the scope and level of detail required for the performance criteria. The performance criteria must be detailed enough to permit qualified persons to submit proposals in accordance with the request for proposals, given the nature of the public project and the level of design to be provided in the proposal.

(b) The performance criteria developer shall review the program furnished by the agency to ascertain the requirements of the project and shall arrive at a mutual understanding of such requirements with the agency.

(c) Based on the mutually agreed-upon program, schedule and construction budget requirements, the performance criteria developer shall prepare for approval by the agency documents indicating the scale and relationship of project components.

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## §5-22A-9a. Invitation for qualifications; selection of design-builders.

(a) The agency shall publish an invitation for qualifications which provides, at a minimum:

(1) A descriptive narrative of the type, scope and size of the proposed work;

(2) The evaluation criteria for selecting the three to five qualified design-builders; and

(3) A request for descriptive information or data supporting a design-builder's claim to be able to perform the work, including, but not limited to:

(A) Licensing, insurance and evidence of good standing with the State of West Virginia and the agency;

(B) Bonding ability;

(C) Experience and technical expertise;

(D) History of past performance;

(E) Qualifications, experience and licenses of key management and professional staff including contractors, architects and engineers;

(F) Staffing capabilities;

(G) Current workload;

(H) Quality control and quality assurance policies and programs; and

(I) Safety record, including employee modification rating for the past three years.

(b) The agency shall review the statements of qualifications and select not fewer than three nor more than five of the most qualified design-builders to participate in the invitation for proposals. If fewer than three design-builders are determined to be qualified, the agency shall seek approval of the Design-Build Board to continue with the selection process.

(c) The agency shall make the results of the selection available to the design-builders within ten working days of the selection.

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## §5-22A-10. Invitation for proposals.

(a) The agency shall prepare an invitation for proposals for the qualified design-builders, which must provide at a minimum:

(1) The identity of the agency which will award the design-build contract;

(2) The procedures to be followed for submitting proposals, the criteria for evaluation of proposals and their relative weight, and the procedures for making awards, including a reference to the requirements of this article, the legislative rules promulgated pursuant to section six of this article and any specific requirements of the agency;

(3) The proposed terms and conditions for the design-build contract;

(4) The performance criteria;

(5) The description of the drawings, specifications or other information to be submitted with the proposal, with guidance as to the form and level of completeness of the drawings, specifications or submittals that will be acceptable;

(6) A schedule for planned commencement and completion of the design-build contract;

(7) Budget limits for the design-build contract, if any;

(8) Requirements or restrictions for the subletting of specific portions of the design-build contract, if any; and

(9) Requirements for performance bonds, payment bonds, insurance, professional liability insurance and workers' compensation coverage: Provided, That no officer or employee of this state or of any public agency, public authority, public corporation, or other public entity, and no person acting or purporting to act on behalf of such officer or employee or public entity shall require that any performance bond, payment bond, or bid bond required or permitted by this section be obtained from any particular surety company, agent, broker, or producer.

(b) The agency shall provide, as applicable, additional information to the design-builder, including, but not limited to, surveys, soils reports, drawings or information regarding existing structures, environmental studies, photographs or references to public records, or other pertinent information.

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## §5-22A-11. Proposals.

(a) Proposals shall be submitted in two separate, clearly identified, sealed packages, with the first containing the technical submission and the second containing the cost submission. If the technical submission and cost submission are not submitted in two separate, clearly identified sealed packages, the board shall disqualify the submission.

(b) Proposals may not be opened until expiration of the time established for making proposals as set forth in the invitation for proposals.

(c) The design-builder shall furnish a bid bond not to exceed five percent of the maximum cost of the design-build contract. In the event the proposal is accepted and the design-builder fails to execute the design-build contract, the bid bond will be forfeited.

(d) To the extent required in the invitation for proposal, the design-builder shall identify each firm to whom the design-builder proposes to sublet obligations under the design-build contract. At a minimum, the design-builder shall identify each firm responsible for the design and primary construction and their affiliation to the design-builder.

(e) The design-builder shall specify in the proposal the cost of the design-build contract that will not be exceeded if the proposal is accepted without change. After award of the proposal, the maximum cost of the proposal may be converted to fixed prices by negotiated agreement between the agency and the design-builder.

(f) Prior to the award of the design-build contract, all drawings, specifications and other information submitted in the proposal shall remain the property of the design-builder submitting the proposal. Additionally, prior to the award of the design-build contract, the agency shall maintain the secrecy and confidentiality of all information contained in the proposal. Once a proposal is accepted, the disclosure of the proposal and the information in the proposal, and the ownership of the drawings, specifications and information therein, shall be determined in accordance with existing law and the terms of the design-build contract.

(g) Proposals may not be amended during the review process.

(h) At the discretion of the agency, a stipend may be paid to the design-builders not ultimately selected.

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## §5-22A-12. Acceptance of design-build proposal.

(a) The design-builder shall submit the proposal to the agency as required in the invitation for proposals. Clarifications may be required to ensure conformance of proposals with the performance criteria. In seeking clarifications, the performance criteria developer may not reveal any aspect of any proposal to any other design-builder. The performance criteria developer must certify that the proposal complies with the performance criteria.

(b) In the event the agency receives fewer than three proposals, the board shall, in consultation with the Secretary of the Department of Administration, determine whether the agency may proceed or shall start the invitations for qualifications process over.

(c) After receiving the proposals, the technical review committee shall evaluate and score the technical submissions based upon the criteria and procedures set forth in the invitation for proposals.

(d) The agency shall submit the technical submissions, including the scores of the technical submissions, to the board. The agency shall make the scores of the technical submissions available for public review.

(e) The Board shall ascertain that the technical submissions comply with the requirements of this article and shall notify the agency of its approval. The agency shall open the cost submissions and accept the proposal that receives the best score, as set forth in the legislative rules promulgated pursuant to section six of this article.

(f) The agency shall notify the design-builder in writing that its proposal was accepted. At the same time notice of acceptance is delivered, the agency shall also inform, in writing, the design-builders whose proposals were not accepted. When a design-builder receives notification that its proposal was not accepted, the design-builder may, within three days after receipt of such notification, request in writing a copy of the scores and all other factors used or considered in the selection process.

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## §5-22A-13. Construction and final certification.

The performance criteria developer must visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the work completed and to determine in general if the work is being performed in a manner indicating that work, when completed, will be in accordance with the design-build contract. On the basis of such on-site observations the performance criteria developer shall keep the agency informed of the progress of the work on the project and shall endeavor to guard the agency against defects and deficiencies in such work.

The performance criteria developer shall assist the agency in determining whether the agency shall reject work which does not conform to the design-build contract.

The performance criteria developer shall assist the agency in conducting inspections, to determine the date or dates of substantial completion and of final completion, and shall review and approve, or take other appropriate action regarding the contractor's list of items to be completed or corrected, and shall forward the list to the agency for final disposition. The performance criteria developer shall issue to the agency a final certification in writing with respect to final acceptance of the project.

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## §5-22A-14. Withdrawal of proposals.

At the option of the design-builder, proposals may be withdrawn for any reason at any time prior to their opening without forfeiture of the security. Once opened, a proposal may be withdrawn for any reason prior to acceptance with forfeiture of the bid bond.

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**§5-22A-15.**

Repealed.

Acts, 2010 Reg. Sess., Ch. 32.

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## §5-22A-16. Severability.

The provisions of subsection (cc), section ten, article two, chapter two of this code shall apply to the provisions of this chapter to the same extent as if the same were set forth in extension herein.

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