SB 666

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1999

ENROLLED

COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 666

(By Senator BOWMAN)

PASSED MARCH 9, 1999

In Effect NINETY DAYS FROM Passage

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 666

(SENATOR BOWMAN, *original sponsor*)

[Passed March 9, 1999; in effect ninety days from passage.]

AN ACT to amend chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article twenty-two-a, all relating to the West Virginia design-build procurement act; short title; applications; definitions; public policy; conditions for contract; design-build board and members; appointments; meetings; authority to promulgate rules; duties of the board; design-build regulations; design-builder qualifications; rights and powers; development of performance criteria; scope of project; solicitation of proposals; proposals; acceptance of design-build proposal; construction and final certification; withdrawal of proposals; termination provisions; and severability.

Be it enacted by the Legislature of West Virginia:

That chapter five of the code of West Virginia, one thousand

nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article twenty-two-a, to read as follows:

ARTICLE 22A. DESIGN-BUILD PROCUREMENT ACT.

§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.

§5-22A-2. Definitions.

For the purpose of this article:

"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.

"Board" means the review board established pursuant to section four of this article to determine whether a public project can be constructed under the design-build method of construction.

"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, where 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 registered in the state of West Virginia and where 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.

"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.

"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 article six, section seven of this chapter and this article.

"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.

"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.

"Performance criteria developer" means an architect or engineer duly registered in accordance with 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.

"Project" means that project described in the public announcement.

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

"Request for proposals" means the document or publica-

tion whereby an agency solicits proposals for a design-build contract.

"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.

"Work" means the 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.

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

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

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

(1) The department of administration or appropriate governing body, prior to issuing requests for proposals, promulgates and publishes rules consistent with this article for the solicitation and award of design-build contracts and shall adhere to this article and those rules;

(2) The agency, for each public project or projects procured pursuant to this article, must determine 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

(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 for in section five of this article.

§5-22A-4. Design-build board and members; appointments; meetings; authority to promulgate rules.

(a) There is hereby created the design-build board and shall be composed of the following nine members who are to be 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 and 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. Each member of the board must take and subscribe to the oath or affirmation required pursuant to section five, article IV of the Constitution of West Virginia.

(b) Within thirty days of the effective date of this section, the governor shall make the initial appointments to the design-build board. Of the initial appointments to the board, four will be for a term ending two years after the effective date of this section and four for a term ending three years after the effective date of this section. Thereafter, terms of office are for three years, each term ending on the same day of the same month of the year as did the term which it succeeds. Each member will hold 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, it must be filled 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 must meet within thirty days of the initial appointments to the board at a time and place to be determined by the governor, who must designate a member to preside at that meeting until a chairman is elected. At its first meeting, the board shall elect a chairman and such other officers as are necessary. The board shall within ninety days after its first meeting adopt rules for its procedures. Five members of the board constitute a quorum. Except as may otherwise be provided in this section, a majority of the total membership is necessary to act at all times. Meetings of the board shall be upon the call of the secretary of the department of administration.

(d) The board shall promulgate rules to carry out the purposes of this article. Any rules adopted by the board prior to the first day of October, one thousand nine hundred ninety-nine are exempt from the provisions of article three, chapter twenty-nine-a of this code: *Provided,* That the board shall file a copy of any rule so exempted from the provisions of chapter twenty-nine-a of this code with the legislative rule-making review committee created pursuant to section eleven, article three of said chapter prior to the thirtieth day of November, one thousand nine hundred ninety-nine.

§5-22A-5. Duties of board.

Prior to allowing an agency to enter into design-build contracts 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 requires a project design and construction time line that is faster than the traditional design-bid-build process would allow;

(2) The project requires close coordination of design and construction expertise or an extreme amount of coordination; and

(3) The agency requires early cost commitments.

§5-22A-6. Design-build regulations.

The department of administration shall adopt rules consistent with this article for the award of design-build contracts. Any rules so adopted by the department of administration prior to the first day of October, one thousand nine hundred ninety-nine are exempt from the provisions of article three, chapter twenty-nine-a of this code: *Provided,* That the department of administration shall file a copy of any rule so exempted from the provisions of chapter twenty-nine-a of this code with the legislative rule-making review committee created pursuant to section eleven, article three of said chapter prior to the thirtieth day of November, one thousand nine hundred ninety-nine. The rules must consist of, but not be limited to:

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

(2) The procedures for the preparation and contents of requests for proposals;

(3) The procedures for preparing and submitting proposals;

(4) The procedures for evaluating proposals;

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

(6) The procedures for awarding and executing design-build contracts.

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

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

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

Each design-builder must be duly licensed and registered to do business in this state and be a licensed architect or engineer or a general contractor.

Each design-builder must have the following rights and powers:

(1) The design-builder must assign or sublet the responsibility for professional design services to a firm duly licensed and registered to provide professional design services in this state. The firm must carry, at all times, professional design liability insurance in an appropriate amount as designated by the agency. This professional may be a full or part-time employee of the design-builder.

(2) The design-builder must assign or sublet responsibility for construction or other services requiring a contractor's license to persons or entities duly registered, licensed or otherwise qualified to provide those services in this state.

(3) The design-builder may contract with the agency to provide professional services or construction services that the design-builder is not itself licensed, registered or otherwise authorized to provide so long as those services are assigned or sublet to a firm that is a member of the design-build team and is registered, licensed and qualified to provide those services.

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

(a) Each request for proposal must contain performance criteria prepared by an architect or engineer duly registered in accordance with the laws of this state, referred to as the "performance criteria developer." If the performance criteria developer is not an employee of the agency, then the performance criteria developer and his or her employer, company, partners, joint venturers, affiliates or consultants are disqualified from submitting a proposal to enter into the design-build contract and the design-builder will not be permitted to delegate services under the design-build contract to the performance criteria developer or its consultants. The performance criteria developer must be retained by the agency through final completion of the project to monitor adherence to the performance criteria.

(b) The performance criteria developer may be an employee of the agency, and to the extent allowed by law may delegate the development of specific aspects of the design criteria to an architect or engineer duly registered with this state and his or her employer, company, partners, joint venturers, affiliates or other consultants. If the performance criteria developer is not an employee of the agency, the performance criteria developer shall be selected in accordance with the requirements of article one, chapter five-g of this code.

§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

6 request for proposals, given the nature of the public
7 project and the level of design to be provided in the
8 proposal.

9 (b) The performance criteria developer shall review the
10 program furnished by the agency to ascertain the require-
11 ments of the project and shall arrive at a mutual under-
12 standing of such requirements with the agency.

13 (c) Based on the mutually agreed-upon program, sched-
14 ule and construction budget requirements, the perfor-
15 mance criteria developer shall prepare for approval by the
16 agency documents indicating the scale and relationship of
17 project components.

§5-22A-10. Solicitation of proposals.

1 Proposals must be solicited from not less than three
2 design-builders. A request for proposal must be prepared
3 for each design-build contract and shall consist of, but not
4 be limited to:

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

7 (2) The procedures to be followed for submitting propos-
8 als, the criteria for evaluation of proposals and their
9 relative weight, and the procedures for making awards,
10 including a reference to the requirements of this article,
11 the rules promulgated herein and any regulations pertain-
12 ing to the agency;

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

15 (4) The performance criteria;

16 (5) The description of the drawings, specifications or
17 other submittals to be submitted with the proposal, with
18 guidance as to the form and level of completeness of the
19 drawings, specifications or submittals that will be accept-
20 able;

21 (6) A schedule for planned commencement and comple-
22 tion of the design-build contract;

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

24 (8) Design-builder qualifications; and

25 (9) Requirements for performance bonds, payment bonds
26 and insurance.

27 The request for proposals may include any other infor-
28 mation that the agency, at its discretion, chooses to supply,
29 including, but not limited to, surveys, soils reports,
30 drawings or models of existing structures, environmental
31 studies, photographs or references to public records.

32 Notice of requests for proposals must be advertised as
33 prescribed by the procedures utilized by the purchasing
34 division pursuant to article three, chapter five-a of this
35 code.

§5-22A-11. Proposals.

1 Proposals must be sealed and may not be opened until
2 expiration of the time established for making proposals as
3 set forth in the request for proposals. Requests for propos-
4 als must require and be accompanied by a bid bond not to
5 exceed five percent of the maximum cost of the design-
6 build contract, as established by the proposal. In the event
7 the proposal is accepted and the design-builder fails to
8 execute the design-build contract, the bid bond will be
9 forfeited.

10 To the extent required, the request for proposal must
11 identify each firm to whom the design-builder proposes to
12 sublet obligations under the design-build contract. At a
13 minimum, each proposal must identify each firm responsi-
14 ble for the design and primary construction and their
15 affiliation to the design-builder. Proposals must establish
16 a cost of the design-build contract that will not be ex-
17 ceeded if the proposal is accepted without change. After
18 award of the proposal, the maximum cost of the proposal
19 may be converted to fixed prices by negotiated agreement
20 between the agency and the design-builder.

21 Prior to the award of the design-build contract, all
22 drawings, specifications and other information submitted
23 in the proposal shall remain the property of the design-

24 builder submitting the proposal. Additionally, prior to the
25 award of the design-build contract, the agency shall
26 maintain the secrecy and confidentiality of all information
27 contained in the proposal. Once a proposal is accepted, the
28 disclosure of the proposal and the information in the
29 proposal, and the ownership of the drawings, specifica-
30 tions and information therein, shall be determined in
31 accordance with existing law and the terms of the design-
32 build contract.

33 Proposals may not be amended during the review
34 process.

35 At the discretion of the agency, a stipend may be paid to
36 the design-builders not ultimately selected.

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

1 Proposals must be submitted to the purchasing division
2 or agency, as applicable. Clarifications may be required to
3 ensure conformance of proposals with the performance
4 criteria. In seeking clarifications, the performance criteria
5 developer may not reveal any aspect of any proposal to
6 any other design-builder. The performance criteria
7 developer must certify each proposal in regard to compli-
8 ance with the performance criteria. No proposal or
9 design-build contract may be accepted unless the purchas-
10 ing division or agency, as applicable, determines that there
11 was adequate competition for the contract.

12 After receiving and evaluating all proposals submitted
13 based upon the criteria and procedures set forward in the
14 request for proposals, the purchasing division or agency,
15 as applicable, must accept the proposal that receives the
16 best score, as set forth in the rules provided for in section
17 six of this article.

18 Acceptance of a proposal shall be by written notice to
19 the design-builder which submitted the accepted proposal.
20 At the same time notice of acceptance is delivered, the
21 purchasing division or agency, as applicable, shall also
22 inform, in writing, the nonsuccessful design-builders that
23 their proposals were not accepted. When a design-builder
24 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 best score and all other factors used or considered in the selection process.

§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.

§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.

§5-22A-15. Termination provision.

Pursuant to the provisions of article ten, chapter four of this code, the design-build board shall continue to exist until the first day of July, two thousand four.

§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.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the Senate.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within ..... approved ..... this the 25th

Day of ..... March ....., 1999

Governor

PRESENTED TO THE

GOVERNOR

Date 3/23/99

Time 10:20 am