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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 2005



# ENROLLED

COMMITTEE SUBSTITUTE  
FOR

## House Bill No. 2592

(By Delegates Beane, Spencer, Cann and Michael)



Passed March 30, 2005

In Effect July 1, 2005

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COMMITTEE SUBSTITUTE

FOR

## H. B. 2592

(BY DELEGATES BEANE, SPENCER, CANN AND MICHAEL)

[Passed March 30, 2005; in effect July 1, 2005.]

AN ACT to amend and reenact §5-22A-2, §5-22A-3, §5-22A-4, §5-22A-5, §5-22A-6, §5-22A-7, §5-22A-8, §5-22A-10, §5-22A-11, §5-22A-12 and §5-22A-15 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §5-22A-9a, all relating to the Design-Build Procurement Act; definitions; authorizing reimbursement of expenses for Design-Build Board members; clarifying the duties of the Board; modifying requirements for approval of design-build projects; clarifying that authority to enter into design-build contracts terminates when Board terminates; requiring monthly progress reports on design-build projects; requiring annual reports; revising rule-making authority and requirements; specifying requirements for performance criteria developers; establishing requirements for issuing invitations for qualifications and proposals; providing for selection of qualified design-

builders; revising proposal requirements; revising submission requirements; and changing the continuation date for the Board.

*Be it enacted by the Legislature of West Virginia:*

That §5-22A-2, §5-22A-3, §5-22A-4, §5-22A-5, §5-22A-6, §5-22A-7, §5-22A-8, §5-22A-10, §5-22A-11, §5-22A-12 and §5-22A-15 of the Code of West Virginia, 1931, as amended, be amended and reenacted; that said article be amended by adding thereto a new section, designated §5-22A-9a, all to read as follows:

**ARTICLE 22A. DESIGN-BUILD PROCUREMENT ACT.**

**§5-22A-2. Definitions.**

1 For the purpose of this article:

2 (1) “Agency” means all state departments, agencies,  
3 authorities, quasi-public corporations and all political subdivi-  
4 sions, including cities, counties, boards of education and public  
5 service districts and the individual representatives of the agency  
6 appointed to oversee or supervise the project.

7 (2) “Board” means the design-build board established  
8 pursuant to section four of this article to determine whether a  
9 public project satisfies the requirements of this article.

10 (3) “Design-build” is defined as providing responsibility  
11 within a single contract for design, construction or alteration of  
12 a building or buildings, together with incidental approaches,  
13 structures and facilities to be constructed, in which services  
14 within the scope of the practice of professional engineering or  
15 architecture, as defined by the laws of the State of West  
16 Virginia, are performed by an engineer or architect duly  
17 licensed in the State of West Virginia and in which services  
18 within the scope of construction contracting, as defined by the  
19 laws of the State of West Virginia, are performed by a contrac-

20 tor qualified and licensed under the applicable statutes. The  
21 design-build method of construction may not be used for any  
22 other construction projects, such as highway, water or sewer  
23 projects.

24 (4) “Design-build contract” means the contract between an  
25 agency and a design-builder to furnish the architecture, engi-  
26 neering, and related services as required, for a given public  
27 project, and to furnish the labor, materials and other construc-  
28 tion of services for the same public project. A design-build  
29 contract may be conditional upon subsequent refinements in  
30 scope and price, and may permit the agency to make changes in  
31 the scope of the project without invalidating the design-build  
32 contract.

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

39 (6) “Firm” means any individual, firm, partnership,  
40 corporation, limited liability company, limited liability partner-  
41 ship, association, joint venture or other legal entity permitted by  
42 law to practice engineering, architecture or construction  
43 contracting in the State of West Virginia.

44 (7) “Invitation for proposals” means the document or  
45 publication by which an agency solicits proposals for a design-  
46 build project.

47 (8) “Invitation for qualifications” means the document or  
48 publication by which an agency solicits a statement of qualifi-  
49 cations from potential design-builders in order to select three to  
50 five design-builders to respond to the agency’s invitation for  
51 proposal.

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

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

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

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

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

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

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

78 (16) "Substantial completion" means the stage in the  
79 progress of the work when the work or designated portion  
80 thereof is sufficiently complete in accordance with the design-

81 build contract so the agency can occupy or utilize the work for  
82 its intended use.

83 (17) "Technical review committee" means the group of  
84 individuals who have education and experience in the design,  
85 construction, operation, administration, and finance require-  
86 ments of the project and users of the project selected by the  
87 agency to review, evaluate and score the statement of qualifica-  
88 tions and invitation for proposal.

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

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

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

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

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

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

15 the public project or projects and adheres to this article and the  
16 rules; and

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

21 (c)When the Design-Build Board, established pursuant to  
22 section four of this article, is terminated pursuant to the acts of  
23 the Legislature, no agency may enter into a design-build  
24 contract: *Provided*, That agencies may pursue and complete any  
25 design-build projects approved by the board prior to its termina-  
26 tion date.

**§5-22A-4. Design-build board and members; appointments;  
expense reimbursement; meetings.**

1 (a) The design-build board is continued within the Depart-  
2 ment of Administration and is composed of the following nine  
3 members who are appointed by the Governor with the advice  
4 and consent of the Senate: Two contractors licensed in the State  
5 of West Virginia; one architect licensed in the State of West  
6 Virginia; one professional engineer licensed in the State of  
7 West Virginia; the Secretary of the Department of Administra-  
8 tion, ex officio; one representative from labor; and three other  
9 members of the public at large. Members of the board are not  
10 entitled to compensation for services performed as members,  
11 but may be reimbursed for actual and necessary expenses  
12 incurred for each day in which he or she is engaged in the  
13 discharge of official business, in accordance with rules promul-  
14 gated pursuant to section eleven, article three, chapter twelve of  
15 this code and travel management policies adopted by the  
16 Department of Administration. Each member of the board shall  
17 take and subscribe to the oath or affirmation required pursuant  
18 to section five, article IV of the Constitution of West Virginia.

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

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

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

1 (a) Upon receipt of information that an agency wants to  
2 pursue the design-build method of project delivery, the board,  
3 with the administrative support of the Secretary of the Depart-  
4 ment of Administration, shall notify the agency that failure to  
5 comply with the requirements of this article is a violation of  
6 state law. The board shall notify the Secretary of the Depart-  
7 ment of Administration of any agency knowingly proceeding  
8 without meeting the requirements of this article.

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

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

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

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

20 (4) The agency requires early cost commitments;

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

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

28 (c) Upon project approval under subsection (b) of this  
29 section, the agency shall submit to the board monthly reports  
30 detailing the progress of the approved project. The reports shall  
31 continue until the start of construction to ensure that the agency  
32 has complied with any requirements established by the board in  
33 its approval of the project. If any requirement is not satisfied,  
34 the board may withdraw its approval of the project at any time  
35 prior to the start of construction. If the board withdraws its  
36 approval, the agency may not proceed with the project as a  
37 design-build project until the requirements set forth in the

38 board's approval and the requirements of this article are met, as  
39 determined by the board.

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

**§5-22A-6. Design-build rules.**

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

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

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

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

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

13 (5) The procedures for preparing and submitting proposals;

14 (6) The procedures for evaluating proposals;

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

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

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

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

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

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

4       (b) Each design-builder may:

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

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

15       (c) Each design-builder may contract to provide profes-  
16 sional services or construction services to the agency that the  
17 design-builder is not licensed, registered or otherwise autho-  
18 rized to provide so long as those services are assigned or sublet  
19 to a firm that is registered, licensed and qualified to provide  
20 those services.

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

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

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

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

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

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

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

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

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

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

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

12 (B) Bonding ability;

13 (C) Experience and technical expertise;

14 (D) History of past performance;

15 (E) Qualifications, experience and licenses of key manage-  
16 ment and professional staff including contractors, architects and  
17 engineers;

18 (F) Staffing capabilities;

19 (G) Current workload;

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

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

24 (b) The agency shall review the statements of qualifications  
25 and select not fewer than three nor more than five of the most  
26 qualified design-builders to participate in the invitation for  
27 proposals. If fewer than three design-builders are determined to

28 be qualified, the agency shall seek approval of the design-build  
29 board to continue with the selection process.

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

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

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

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

6 (2) The procedures to be followed for submitting proposals,  
7 the criteria for evaluation of proposals and their relative weight,  
8 and the procedures for making awards, including a reference to  
9 the requirements of this article, the legislative rules promul-  
10 gated pursuant to Section six of this article and any specific  
11 requirements of the agency;

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

14 (4) The performance criteria;

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

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

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

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

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

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

#### **§5-22A-11. Proposals.**

1 (a) Proposals shall be submitted in two separate, clearly  
2 identified, sealed packages, with the first containing the  
3 technical submission and the second containing the cost  
4 submission. If the technical submission and cost submission are  
5 not submitted in two separate, clearly identified sealed pack-  
6 ages, the board shall disqualify the submission.

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

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

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

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

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

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

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

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

1 (a) The design-builder shall submit the proposal to the  
2 agency as required in the invitation for proposals. Clarifications  
3 may be required to ensure conformance of proposals with the

4 performance criteria. In seeking clarifications, the performance  
5 criteria developer may not reveal any aspect of any proposal to  
6 any other design-builder. The performance criteria developer  
7 must certify that the proposal complies with the performance  
8 criteria.

9 (b) In the event the agency receives fewer than three  
10 proposals, the board shall, in consultation with the Secretary of  
11 the Department of Administration, determine whether the  
12 agency may proceed or shall start the invitations for qualifica-  
13 tions process over.

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

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

22 (e) The board shall ascertain that the technical submissions  
23 comply with the requirements of this article and shall notify the  
24 agency of its approval. The agency shall open the cost submis-  
25 sions and accept the proposal that receives the best score, as set  
26 forth in the legislative rules promulgated pursuant to section six  
27 of this article.

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

**§5-22A-15. Continuation of design-build board.**

1 Pursuant to the provisions of article ten, chapter four of this  
2 code, the Design-Build Board shall continue to exist until the  
3 first day of July, two thousand eight, unless sooner terminated,  
4 continued or reestablished.

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

*Sandy White*  
Chairman Senate Committee

*D. Robert Berry*  
Chairman House Committee

Originating in the House.

In effect July 1, 2005.

*Harriet Holmes*  
Clerk of the Senate

*Bryon G. Siv*  
Clerk of the House of Delegates

*Carl Ray Knebler*  
President of the Senate

*[Signature]*  
Speaker of the House of Delegates

The within *is approved* this the *18<sup>th</sup>*  
day of *April*, 2005.

*[Signature]*  
Governor

PRESENTED TO THE  
GOVERNOR

*12<sup>th</sup>*

APR ~~10~~ 2005

Time

3:00 p