

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

Department of Administration and
Division of Rehabilitation Services

AGENCY: _____ TITLE NUMBER: 186

RULE TYPE: Legislative; CITE AUTHORITY W. Va. Code Section 5A-3A-4

AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Procedural Rules for Fair Market Price
Determination: Committee for the Purchase of Commodities and Services
from the Handicapped

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

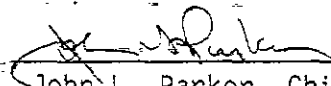
TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON September 17, 1992 AT 4:30 p.m.

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Division of Rehabilitation Services
P. O. Box #50890, State Capitol Complex
Charleston, WV 25305
Attn: John L. Parker
Chief, Workshop Support

THE ISSUES TO BE HEARD SHALL BE
LIMITED TO THIS PROPOSED RULE.


John L. Parker, Chief, Workshop Support

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

3.60



STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION

State Capitol
Charleston, WV 25305

Gaston Caperton
Governor

Chuck Polan
Secretary

July 31, 1992

Honorable Ken Hechler
Secretary of State
Suite 157-K
Capitol Building
Charleston, West Virginia 25305

Re: Legislative Rules for the Fair Market
Price Determination

Dear Mr. Hechler:

Approval is hereby given for filing of legislative rules of the Committee for the Purchase of Commodities and Services from the Handicapped, entitled "Legislative Rules for the Fair Market Price Determination," as enclosed, in accordance with West Virginia Code 5A-3A-4.

Sincerely,

A handwritten signature in dark ink, appearing to read "Chuck Polan".

Chuck Polan
Secretary

CP:jb

Enclosure

SUMMARY OF PROPOSED RULE

These legislative rules cover the process of how the Committee for the Purchase of Commodities and Services from the Handicapped will determine the fair market price of commodities, printing, and services produced by non-profit workshops and how these services will be offered for sale by the Central Non-Profit Agency (CNA) to the State and its political subdivisions.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Legislative Rules for Fair Market Price Determination

TYPE OF RULE: X Legislative Interpretive Procedural
 Division of

Agency Rehabilitation Services Address P. O. Box 50890, State

Captiol Complex, Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter

Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services					0
Current Expense					0
Repairs and Alterations					0
Equipment					0
Other					0

2. Explanation of above estimates: No additional costs are anticipated by promulgating these rules.

3. Objectives of these rules: To provide legislative rules for the determination of fair market price determination by the Committee for the Purchase of Commodities, printing, and services produced by non-profit workshops.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Employment of more of our state's citizens with disabilities who were formerly either earning reduced wages in the state's sheltered workshops or no wages at all.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

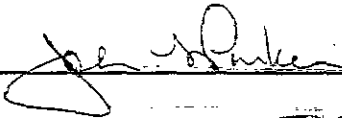
Encourage these political subdivisions to participate in the State Use program and derive benefit from it. Impact on specific industries is not known. The impact is also not known on specific groups of citizens.

C. Economic Impact on Citizens/Public at Large.

Not known.

Date: August 18 1992

Signature of Agency Head or Authorized Representative

_____

TITLE 186
LEGISLATIVE RULES
GOVERNOR'S COMMITTEE
FOR THE PURCHASE OF COMMODITIES
AND SERVICES FOR THE HANDICAPPED

SERIES 1
RULES AND REGULATIONS FOR
FAIR MARKET PRICE DETERMINATION

§186-1-1. General.

1.1. Scope. -- The scope of these legislative rules involves the determination by the Committee for the Purchase of Commodities and Services from the Handicapped, of the fair-market price of commodities and services produced or supplied by non-profit workshops and rehabilitation facilities and offered for sale by the Central Non-Profit Agency, "CNA", to the State and its political subdivisions.

1.2. Authority. -- West Virginia Code Section 5A-3A-4.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal of former rule. -- This legislative rule repeals and replaces WV 186CSR1 "Rules and Regulations for Fair Market Price Determination" filed September 19, 1990 and effective October 19, 1990.

§186-1-2. Definitions.

2.1. "CNA" -- means Central Nonprofit Agency.

2.2. "Committee" -- means the Governor's Committee for the Purchase of Commodities and Services from the Handicapped.

2.4. "Commodities" -- means supplies, material, equipment, contractual services, and any other things used by or furnished to a department, agency or institution of state government.

2.5. "Director" -- means the director of the division referred to in the heading of the article in which the word appears.

2.6. "Nonprofit workshop" -- means an establishment (a) where any manufacture or handiwork is carried on, (b) which is operated either by a public agency or by a cooperative or by a nonprofit private corporation or nonprofit association, in which no part of the net earnings thereof inures, or may lawfully inure, to the

benefit of any private shareholder or individual, (c) which is operated for the primary purpose of providing remunerative employment to blind or severely disabled persons who cannot be absorbed into the competitive labor market, and (d) which shall be approved, as evidenced by a certificate of approval, by the state board of vocational education, division of vocational rehabilitation.

2.7. "Prevailing Wage Determination (PWD)" -- is the pay rate upon which a workers compensation is based in accordance with United States Department of Labor regulations (29 CFR, Part 525). Essentially the PWD is the result of a salary survey of non-entry level pay of private sector employers doing essentially the same kind of work.

2.8 "Rehabilitation Facility" -- means a facility that is operated for the primary purpose of providing vocational rehabilitation services to individuals with handicaps and that provides singly or in combination one or more of the following services:

2.8.1. Vocational rehabilitation services, including under one management, medical, psychiatric, psychological, social and vocational services.

2.8.2. Testing, fitting, or training in the use of prosthetic orthotic devices.

2.8.3. Prevocational conditioning or recreational therapy;

2.8.4. Physical and occupational therapy;

2.8.5. Speech and hearing therapy;

2.8.6. Psychiatric, psychological and social services;

2.8.7. Evaluation of rehabilitation potential;

2.8.8. Personal and work adjustment;

2.8.9. Vocational training with a view toward career advancement (in combination with other rehabilitation services);

2.8.10. Evaluation and control of specific disabilities;

2.8.11. Orientation and mobility services and other adjustment services to blind individuals;

2.8.12. Transitional or extended employment for those individuals with disabilities who cannot be readily absorbed in the competitive labor market;

2.8.13. Psychological rehabilitation services for individuals with chronic mental disabilities;

2.8.14. Rehabilitation engineering services.

2.9. "Scope of Work" -- is the requirement for a particular commodity or service as defined by the purchasing entity. It includes specifications, time tables, worker qualifications, materials and shipping regulations.

2.10. "Services" -- means a product by labor when that product is not deemed a tangible commodity. Services include, but are not limited to, janitorial service, printing, food service, microfilming, temporary labor, and grounds maintenance.

2.11. "Workshop" -- means a particular type of vocational rehabilitation facility where any manufacture or handiwork is carried on and which is operated by public agency or by a private corporation or association, no part of the net earning of which inure or may lawfully inure to the benefit of any private shareholder or individual, or by a cooperative, for the primary purpose of providing remunerative employment to disabled persons (a) as an interim step in the rehabilitation process for those who cannot be readily absorbed in the competitive labor market; (b) during such time as employment opportunities for them in the competitive labor market do not exist; or (c) for providing vocational evaluation and work adjustment services for disadvantaged persons.

§186-1-3. General Rules.

3.1. Committee responsibility.

3.1.1. The Committee, subject to acceptance by the Director of Purchasing, shall determine the price of all commodities manufactured and services provided by approved workshops or rehabilitation facilities and offered for sale to State agencies, political subdivisions, or instrumentalities of the State. The Committee must have made a prior determination that the commodities and services provided by the workshop or rehabilitation facility are suitable for use.

3.2. Definition of the Fair Market Price (FMP).

3.2.1. The price set by the Committee shall be a (FMP). The FMP shall be a reasonable price which shall recover for the qualified workshop or rehabilitation facility the cost of raw materials, labor, capital, overhead, CNA service charges and delivery costs. In determining the FMP of commodities or services offered for sale under W. Va. Code, §§ 5A-3A et seq. and 5A-3-10 the Committee shall give due consideration to the following type of factors:

3.2.1.a. To the extent applicable, the amounts being paid for similar articles in similar quantities by federal agencies purchasing the commodities or services under the authorized federal program of like effect to the State program authorized in W. Va. Code, § 5A-3A-1 et seq.;

3.2.1.b. Commodities or services in similar quantities if purchased from a reputable in-state vendor engaged in the business of selling similar commodities;

3.2.1.c. To the extent applicable, the amount paid by the State in any recent purchases of similar commodities or services in similar quantities, making due allowance for general inflationary or deflationary trends;

3.2.1.d. The actual cost to the workshop or rehabilitation facility of manufacturing or providing the commodity or service with adequate weight to be given to legal and moral imperatives to pay severely disabled workers equitable wages;

3.2.1.e. The usual, customary and reasonable costs of manufacturing, marketing and distribution; and

3.2.1.f. The FMP of a commodity or service, determined after consideration of relevant factors of the foregoing types, may not be excessive or unreasonable; however, the FMP may include a reasonable charge for overhead and profit.

3.3. Committee Stewardship to the State and the Disabled.

3.3.1. The Committee has a duty to exercise stewardship of the State's limited resources as well as to the interests of the disabled. Since other market factors as well as workshop costs are used to determine the FMP, the FMP is not computed so as to guarantee a profit to the workshop or rehabilitation facility, nor to cover rehabilitation costs which would not normally be considered a production cost by a private business. In the event that no workshop or rehabilitation facility can produce the commodity or services for the FMP set by the Committee, a waiver will be granted by the Committee or its designee so that the goods may be obtained on the open marketplace.

3.4. Revisions of FMP's.

3.4.1. In the event of a workshop or rehabilitation facility request for a FMP change, the Committee shall review the requested FMP change in accordance with changing cost factors. FMP changes shall be effective on or after the effective date of the change approved by the Committee, the Director of Purchasing, and the Office of the Attorney General. The Executive Secretary and CNA shall work with the purchasing agency to complete paperwork necessary to effect the change.

3.5 Recommendations for FMP's.

3.5.1. The Committee shall consider recommendations from procuring agencies (PA) the Division of Purchasing (PD) and the CNA. Recommendations for pricing of times or services or changes thereto shall be submitted by the workshop to the CNA. The CNA shall analyze the data and submit a recommended reasonable FMP to the Committee. The CNA shall make available to the Committee data regarding the cost of raw materials, labor, capital, overheard, delivery costs and other related factors. In the event that such recommended price is not in accordance with guidelines adopted by the federal handicapped employment program (of similar design to the State program) established pursuant to the Javits Wagner O'Day Act, a detailed justification necessary to support the recommended price must be submitted by the CNA.

3.6. FMP Subcommittee.

3.6.1. A standing subcommittee, to be known as the "Fair Price Subcommittee" (FMP Subcommittee), is hereby established to assist the Committee in the determination of FMP. The FMP Subcommittee shall be composed of the Committee chairperson or designee and another member appointed by the Chairperson, in consultation with the Executive Secretary, a representative of the PA and/or PD, and the CNA. The workshop must concur in any FMP determinations made by the Subcommittee.

3.6.2. Determinations of the FMP Subcommittee shall be unanimous and shall be final in the case of the FMP determination of commodities or services with a dollar value of less than ten thousand dollars (\$10,000) or in the case of services with a duration of less than sixty (60) days regardless of the dollar value. In the event a unanimous decision cannot be reached, the matter shall be referred to the full Committee for a FMP determination.

3.6.3. In order to prevent the discontinuance of a service or depletion of supply of a commodity, the FMP Subcommittee shall unanimously determine a temporary FMP for a commodity or services which shall remain in effect until the full Committee sets the FMP and places the commodity or service on the procurement list at the next regular meeting. In no way shall this exception be interpreted as an allowance for the PA to fail to provide adequate lead time in notification of solicitations to the Committee or CNA to accomplish its work or as an allowance for competitive bidding.

3.7. CNA as exclusive agent.

3.7.1. The CNA is the exclusive designated agent to represent the workshops or rehabilitation facilities to the Committee and to PAs. As such, the CNA is solely authorized to negotiate prices and terms with the PAs of contracts procured in

accordance with provisions of the West Virginia Code, provided that no workshop or rehabilitation facility shall be required to do work at a price that is unacceptable. Workshops and rehabilitation facilities wishing to make joint presentations with the CNA to the Committee or PA when a matter affecting the workshop or rehabilitation facility is under deliberation may do so. Nothing in this section shall be interpreted to prohibit workshops and rehabilitation services from bidding competitively on the open market to sell commodities or services to the State. In such cases, the services of the Committee or CNA are not mandated.

33.8. Pricing guidelines established by Committee.

3.8.1. Pricing guidelines shall be established by the Committee. The following initial guidelines have been established:

3.8.1.a. The prices included in the procurement list are the FMP's established by the Committee.

3.8.1.b. Unless otherwise provided, FMP's for commodities include delivery cost (FOB destination). Delivery costs may include packaging, packing and parking.

3.8.1.c. The FMP established by the Committee for a service or commodity on the Procurement List shall remain in effect until the Committee approves a new FMP. The new FMP shall be based on (1) any changes in the scope of work or in tasks required by the procuring agency, (2) changes resulting from a new prevailing wage determination (PWD) applicable to the service or commodity and (3) a pass through of any changes in other elements of workshop and rehabilitation facility costs.

3.8.1.d. FMP established by the Committee shall usually apply for a period of one year (or other "service period" determined by the contract). Until a new price has been approved by the Committee, the workshop or rehabilitation facility shall continue to provide the service or commodity in accordance with the scope of work which was the basis for establishing the old FMP. Any implementing agreements entered into by the PA and the workshop or rehabilitation facility regarding the details of the provision of a service or commodity under the authority of the Committee's program shall conform to the FMP and conditions approved by the Committee. The PA has no authority to pay or to contract to pay to the workshop or rehabilitation facility any price other than the FMP set by the Committee except as otherwise by (e) below.

3.8.1.e. During the service period, the PA and CNA may, by mutual agreement, make minor modifications in the scope of work and total price of the service, provided the total price adjustment resulting from such modifications during the normal service period does not affect the total FMP approved by the Committee by more than twenty percent (20%) or two thousand dollars

(\$2,000). A report of the agreement shall be made to the Committee by the CNA. Changes in scope which result in a change of more than twenty percent (20%) or two thousand (\$2,000) of the total annual price shall be processed as a price change for approval by the Committee. Such agreements shall be processed in accordance with the provisions of West Virginia Code, Section 5A-3-1 et seq.

3.9. Actions required of the Procuring Agency (PA) or Purchasing Division (PD).

3.9.1. The following information reporting is required of the PA or PD in order to assist the committee in FMP determination.

3.9.1.a. Under consideration by the Committee which require an initial FMP determination, and when the service or commodity has been procured competitively in the past, the PA or PD shall provide to the CNA a copy of the most recent solicitation for the service or commodity. Attached thereto the PA or PD shall provide a tabulation of all bids received annotated to show which bid amount and bidder received the award and any bid amounts and bidders that were declared not responsible or not responsive. This information shall be made available to the CNA within ten (10) days after receipt of a request.

3.9.1.b. In the event that the PA or PD wishes to change specifications from the last solicitation for the service or commodity, the PA or PD shall notify the CNA in writing of specific changes in the scope of work or other conditions which will be required during the new service period.

3.9.1.c. The CNA shall send a copy of its initial FMP recommendation and subsequent FMP change requests to the PA and/or PD for comment or concurrence. If the PA and/or PD objects to the proposed FMP, it/they shall notify the CNA by telephone and confirm the objection in writing within ten (10) working days of receipt of the request.

\$186-1-4. Initial FMP Determination Procedures.

4.1. The following procedure shall be used in developing Initial FMP's recommended by the CNA to the Committee for services and commodities.

4.1.1. If the service is currently being procured competitively, the CNA's recommended price for the service shall be determined by the method used by the federal CNA of like effect to the State CNA created in West Virginia Code, Section 5A-3A-1 et seq. For commodities and services previously procured by the State, the FMP recommended by the CNA to the Committee may be the median of those bids on the most recent solicitation which are not more than thirty five percent (35%) above the award price or the

award price increased by five percent (5%), whichever is greater. An exception to this guideline may be made when the scope of work (i.e., man hours required or a contract specification change) is greater or lesser than the scope under which the most recent procurement was made.

4.1.2. The PA or PD shall provide the Executive Secretary and the CNA with a copy of the solicitation and annotated bid tabulation (as per 2.9 above) covering the current contract period or most recent solicitation. Additionally, the PA or PD shall provide the CNA with the new scope of work, if any, covering the initial period the workshop or rehabilitation facility would provide the service or commodity.

4.1.3. The prices established under 4.1.1. above shall be adjusted to provide for any changes in the scope of work to be performed which affect the cost to provide the service or commodity. Such adjustments shall be made based on the difference in workshop costs.

4.1.4. The workshop or rehabilitation facility cost shall the proposed contract to ensure the CNA's recommended FMP would recover the cost of providing the specific services utilizing the prescribed costing methods and forms.

4.1.5. The CNA shall validate and verify the workshop's or rehabilitation facility's costing of the service or commodity. If the CNA determines that the recommended price does not recover to the workshop or rehabilitation facility the cost of providing the specified service or commodity, the CNA may negotiate a price or specification change with the workshop, PA and PD, subject to Committee approval.

4.1.6. If a recommended FMP or specification change can not be negotiated which would ensure the recovery of the workshop's or rehabilitation facility's costs, the workshop or rehabilitation facility may elect to discontinue consideration of the project, or to accept the final FMP set by the Committee, provided all federal (U. S. Department of Labor) guidelines are met.

4.1.7. If there has been no prior procurement of the service or commodity the recommend FMP shall be established based on workshop costs, and shall include the CNA fee.

4.1.8. The workshop or rehabilitation facility shall submit its proposed price to the CNA for verification utilizing the prescribed costing methods and forms. The workshop or rehabilitation facility must make full disclosure to the CNA of known costs and make a good faith projection of anticipated future production or service costs. This disclosure shall include, but

may not be limited to, the cost of the following items: labor, fringe benefits, materials and/or supplies, equipment, maintenance, overhead, deliver, administration and other factors used in the workshops or rehabilitation facilities price determination.

4.1.9. The CNA shall submit the proposed FMP with the supporting data to the PA and/or PD for concurrence and/or comments.

4.1.10. The CNA shall submit a request for FMP determination with supporting data to the Committee. The request shall be on the form provided by the Committee and shall contain the following information:

4.1.10.a. A breakdown of service or commodity for the labor, material, overhead and other cost involved.

4.1.10.b. The opinion or comments of the PA and/or PD concerning the proposed price and a statement from the PA or PD indicating what changes in scope of work, if any, will be required in the new service period.

4.1.10.c. The federal PWD on which the proposed price is based.

4.1.10.d. When appropriate, a copy of the most recent solicitation for the service or commodity and an annotated tabulation of the bids received.

4.1.11. The Committee members shall review the information submitted and establish a FMP.

4.1.12. The Committee shall transmit the notice of the approved FMP to the CNA which shall in turn notify the PA and/or PD and the workshop of the Committee's action.

4.1.13. The PWD utilized to determine workshop labor costs will be prepared by workshops and rehabilitation facilities in accordance with the requirements of applicable U. S. Department of Labor regulations, or, in any case, shall be based upon the prevailing wages of experienced (non-entry level) non-handicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

\$186-1-5. FMP Changes Or Followup Determination Procedure.

5.1. The following procedure shall be used in developing subsequent or followup FMP's recommended by the CNA to the Committee for services and commodities:

5.1.1. In the event that the FMP for a service currently procured through the Committee is to be adjusted, the adjustment shall be based upon a pass-through of changes in the scope of the work, PWD and/or workshop costs. This procedure requires the workshop or rehabilitation facility to submit to the CNA a request for price change showing a breakdown of the change in the workshop costs using form provided by the Committee and appropriate documentation as requested by the CNA or Committee.

5.1.2. A base FMP is established upon the approval of the initial FMP for a service or commodity. A new base FMP for that service is established each time a subsequent FMP change is determined.

5.1.3. The CNA shall validate and verify the breakdown of the changes in the workshop's costs.

5.1.4. Prior to submission of the FMP change request to the Committee, the CNA shall submit a copy or summary of the FMP change request to the PA and/or PD for comments or concurrence.

5.1.5. The CNA shall submit the FMP change request with supporting data to the Committee. The request shall be accompanied by the following:

5.1.5.a. A breakdown of changes in workshop costs using the form attachments as requested by the CNA and/or Committee.

5.1.5.b. The objections and/or comments of the PA and/or PD concerning the proposed FMP change.

5.1.5.c. The PWD upon which the proposed recommended FMP is based.

5.1.5.d. A statement from the PA or PD indicating the change of scope of work, if any, upon which the proposed FMP change is based.

5.1.6. The Committee shall review the information submitted and establish the FMP.

5.1.7. The Committee shall transmit the notice of the approved FMP to the CNA which shall in turn notify the PA and/or PD and the workshop or rehabilitation facility of the Committee's action.

5.1.8. Prior to a request for a new FMP by a workshop or a rehabilitation facility, CNA must receive a PWD and new Scope of Work.

§186-1-6. Access To Information.

6.1. Requests for information.

6.1.1. The Committee may request from any agency, political subdivision, or instrumentality of the State such information in respect to bid history, product specification and service requirements to enable it to carry out the intent of West Virginia Code, Section 5A-3A-1 et seq.

6.2. Requests from Committee or CNA.

6.2.1. Unless otherwise stated in the Code, requested information shall be furnished to the Committee or the CNA within ten (10) working days of receipt of the request.