

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #4

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Purchase of Commodities & Services TITLE NUMBER: 186

CITE AUTHORITY §5A-3A-5

AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

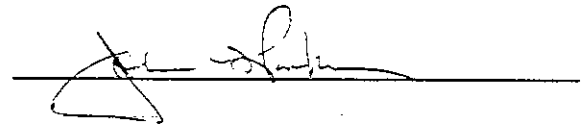
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Fair Market Price Determination

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

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.



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TITLE 186
LEGISLATIVE RULES
COMMITTEE
FOR THE PURCHASE OF COMMODITIES
AND SERVICES FROM 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 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. -- W. Va. Code, § 5A-3A-5.

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. "Approved Workshops or Rehabilitation Facilities -- means nonprofit organizations who are surveyed by the Division of Rehabilitation Services using the "Standards for Community Workshops" established by the State Board of Rehabilitation. These organizations are approved by the State Board of Rehabilitation for program participation as evidenced by a certificate of approval.

2.2. "Certified Workshops or Rehabilitation Facilities -- means nonprofit organizations who apply to the Division of Rehabilitation Services for participation in the program and whose documents have been reviewed by the Divisions staff. These organizations are accepted by the State Board of Rehabilitation as evidenced by a certificate of certification.

2.3. "CNA" -- means the Central Nonprofit Agency.

2.4. "Committee" -- means the Committee for the Purchase of Commodities and Services from the Handicapped.

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

2.6. "Costing" -- means the determination made by the CNA and workshops or rehabilitation facilities of the monies needed to be expended to produce a commodity or provide a service. This determination includes the cost of raw materials, supplies, labor (using Federal prevailing wage guidelines), fringe benefits, capital expenditures, equipment maintenance, overhead, administrative costs, CNA service charges, delivery costs, and other usual, customary, and reasonable costs of manufacturing, marketing, and distribution of a commodity or service.

2.7. "Director" -- means the director of purchasing.

2.8. "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 prevailing wage determination is the result of a salary survey of non-entry level pay of private sector employees doing essentially the same kind of work.

2.9. "Procurement List" -- means a list of commodities and services offered by the CNA and qualified workshops or rehabilitation facilities for which a purchasing agency or purchasing division has entered into an agreement. The list may also contain items that the Director of Purchasing and the Committee determines are suitable for procurement.

2.10. "Qualified Workshops or Rehabilitation Facilities" -- means organizations which must be either approved or certified by the State Board of Rehabilitation and have been notified by the Committee that they meet all committee qualifications for program participation.

2.11. "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:

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

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

2.11.3. Prevocational conditioning or recreational therapy;

2.11.4. Physical and occupational therapy;

2.11.5. Speech and hearing therapy;

2.11.6. Psychiatric, psychological and social services;

2.11.7. Evaluation of rehabilitation potential;

2.11.8. Personal and work adjustment;

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

2.11.10. Evaluation and control of specific disabilities;

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

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

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

2.11.14. Rehabilitation engineering services.

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

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

2.14. "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 insure 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, is to 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 is to be the Fair Market Price. The Fair Market Price is a reasonable price which can 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 Fair Market Price of commodities or services offered for sale under W. Va. Code, §§ 5A-3A et seq. and 5A-3-10 the Committee is to give due consideration to the following 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 pursuant to 41 U.S.C. § 46-48(c);

3.2.1.b. To the cost of 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

3.2.2. The Fair Market Price of a commodity or service, determined after consideration of relevant factors of the foregoing types, may not be excessive or unreasonable; however, the Fair Market Price 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 Fair Market Price, the Fair Market Price 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 Fair Market Price set by the Committee, a waiver can be granted by the Committee or its designee so that the goods may be obtained on the open marketplace.

3.4. Revisions of Fair Market Price.

3.4.1. In the event of a workshop or rehabilitation facility request for a Fair Market Price change, the Committee is to review the requested Fair Market Price change in accordance with changing cost factors. Fair Market Price changes are 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 the CNA are to work with the purchasing agency or purchasing division to complete paperwork necessary to effect the change.

3.5 Recommendations for Fair Market Price's.

3.5.1. The Committee is to consider recommendations from purchasing agencies the division of purchasing and the CNA. Recommendations for pricing of times or services or changes thereto are to be submitted by the workshop or rehabilitation facility to the CNA. The CNA is to analyze the data and submit a recommended reasonable Fair Market Price to the Committee. The CNA is to make available to the Committee data regarding the cost of raw materials, labor, capital, overhead, delivery costs and other related factors. In the event that the 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 416 U.S.C. § 46-48(c), a detailed justification necessary to support the recommended price must be submitted by the CNA.

3.6. Fair Market Price Subcommittee.

3.6.1. A standing subcommittee, to be known as the "Fair Market Price Subcommittee" is hereby established to assist the Committee in the determination of Fair Market Price. The Fair Market Price 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 purchasing agencies and/or purchasing division, and the CNA. The workshop or rehabilitation facility must concur in any Fair Market Price determinations made by the Subcommittee.

3.6.2. Determinations of the Fair Market Price Subcommittee are to be unanimous and are final in the case of the Fair Market Price 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 subcommittee shall refer the matter to the full Committee for a Fair Market Price determination.

3.6.3. In order to prevent the discontinuance of a service or the depletion of the supply of a commodity, the Fair Market Price Subcommittee shall unanimously determine a temporary Fair Market Price for a commodity or services which is to remain in effect until the full Committee sets the Fair Market Price and places the commodity or service on the procurement list at the next regular meeting. Procuring agencies must still provide adequate lead time in notifying the committee or CNA of the solicitations.

3.7. CNA as negotiating agent.

3.7.1. Unless instructed otherwise by the Committee, the CNA is the designated agent to represent the workshops or rehabilitation facilities to the Committee, to the purchasing agencies, and to the purchasing division. As such, the CNA is authorized to negotiate prices and terms with the purchasing agencies or purchasing division of contracts procured in accordance with provisions of the W. Va. Code, provided that no workshop or rehabilitation facility is 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 purchasing agencies when a matter affecting the workshop or rehabilitation facility is under deliberation may do so. Nothing in this section is to be interpreted as prohibiting 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.

3.8. Pricing guidelines established by Committee.

3.8.1. Pricing guidelines are established by the Committee. The guidelines are as follows:

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

3.8.1.b. Unless otherwise provided, Fair Market Prices for commodities include delivery cost (FOB destination). Delivery costs may include packaging, packing and parking.

3.8.1.c. The Fair Market Price established by the Committee for a service or commodity on the Procurement List remains in effect until the Committee approves a new Fair Market Price. The new Fair Market Price 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 (prevailing wage determination) 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. Fair Market Price 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 is to continue providing the service or commodity in accordance with the scope of work which was the basis for establishing the old Fair Market Price. Any implementing agreements entered into by the purchasing agencies or purchasing division 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 is to conform to the Fair Market Price and conditions approved by the Committee. The purchasing agency or purchasing division has no authority to pay or to contract to pay to the workshop or rehabilitation facility any price other than the Fair Market Price set by the Committee except as provided in Section 3.8.1.e. of this rule.

3.8.1.e. During the service period, the purchasing agencies or purchasing division 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 Fair Market Price 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 W. Va. Code, § 5A-3-1 et seq.

3.9. Actions required of the Purchasing Agency or Purchasing Division.

3.9.1. The following information reporting is required of the purchasing agency or purchasing division in order to assist the committee in Fair Market Price determination.

3.9.1.a. When the Committee is attempting to make an initial Fair Market Price determination, and when the service or commodity has been procured competitively in the past, the purchasing agency or purchasing division is to provide to the CNA a copy of the most recent solicitation for the service or commodity. The purchasing agency or purchasing division are to attach the following information to the most recent bid solicitation: (1) A tabulation of all bids received, annotated to show bid amounts and bidder selected; and (2) The bid amounts and bidders determined by the purchasing agency or purchasing division to be not responsible or unresponsive to the bid solicitation.

3.9.1.b. In the event that the purchasing agency or purchasing division wishes to change specifications from the last solicitation for the service or commodity, the purchasing agency or purchasing division is to 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 is to send a copy of its initial Fair Market Price recommendation and subsequent Fair Market Price change requests to the purchasing agency and/or purchasing division for comment or concurrence. If the purchasing agency and/or purchasing division to the proposed Fair Market Price, it/are to 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 Fair Market Price Determination Procedures.

4.1. The CNA is to use the following procedure in developing the initial Fair Market Price 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 is determined by the method used by the federal CNA similar to the State CNA created in W. Va. Code, § 5A-3A-1 et seq. For commodities and services previously procured by the State, the Fair Market Price recommended by the CNA to the Committee is 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 purchasing agency or purchasing division is to provide the Executive Secretary of the Committee and the CNA with a copy of the solicitation and annotated bid tabulation (as required under Section 2.9 of this rule) covering the current contract period or most recent solicitation. Additionally, the purchasing agency or purchasing division is to 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 Section 4.1.1. of the rule above are to 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. The adjustments is to be made based on the difference in workshop costs.

4.1.4. The workshop or rehabilitation facility is to review the proposed contract to ensure that the CNA's recommended Fair Market Price is able to recover the cost of providing the specific commodities or services utilizing the prescribed costing methods and forms.

4.1.5. The CNA is required to 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 or rehabilitation facility, purchasing agencies and purchasing division, subject to Committee approval.

4.1.6. If a recommended Fair Market Price or specification change cannot 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 Fair Market Price 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 recommended Fair Market Price is based on workshop costs, and all includes the CNA fee.

4.1.8. The workshop or rehabilitation facility is required to 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 includes, but is not be limited to, the

cost of the following items: labor, fringe benefits, materials and/or supplies, equipment, maintenance, overhead, delivery, administration and other factors used in the workshops or rehabilitation facilities price determination.

4.1.9. The CNA is required to submit the proposed Fair Market Price with the supporting data to the purchasing agency and/or purchasing division for concurrence and/or comments.

4.1.10. The CNA is required to submit a request for Fair Market Price determination with supporting data to the Committee. The request shall be on the form provided by the Committee and is to 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 purchasing agency and/or purchasing division concerning the proposed price and a statement from the purchasing agency or purchasing division indicating what changes in scope of work, if any, will be required in the new service period.

4.1.10.c. The federal prevailing wage determination 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 review the information submitted and establish a Fair Market Price.

4.1.12. The Committee transmits the notice of the approved Fair Market Price to the CNA which shall in turn notify the purchasing agency and/or purchasing division and the workshop or rehabilitation facility of the Committee's action.

4.1.13. The prevailing wage determination utilized to determine workshop labor costs is to be prepared by workshops and rehabilitation facilities in accordance with the requirements of applicable U. S. Department of Labor regulations, or, in any case, 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. Fair Market Price Changes Or Followup Determination Procedure.

5.1. The following procedure is used in developing subsequent or followup Fair Market Prices recommended by the CNA to the Committee for services and commodities:

5.1.1. In the event that the Fair Market Price for a service or commodity 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, prevailing wage determination 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 or rehabilitation facility costs using forms provided by the Committee and appropriate documentation as requested by the CNA or Committee.

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

5.1.3. The CNA validates and verifies the breakdown of the changes in the workshop's or rehabilitation facility's costs.

5.1.4. Prior to submission of the Fair Market Price change request to the Committee, the CNA submits a copy or summary of the Fair Market Price change request to the purchasing agency and/or purchasing division for comments or concurrence.

5.1.5. The CNA submits the Fair Market Price change request with supporting data to the Committee. The request is to be accompanied by the following:

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

5.1.5.b. The objections and/or comments of the purchasing agency and/or purchasing division concerning the proposed Fair Market Price change.

5.1.5.c. The prevailing wage determination upon which the proposed recommended Fair Market Price is based.

5.1.5.d. A statement from the purchasing agency or purchasing division indicating the change of scope of work, if any, upon which the proposed Fair Market Price change is based.

5.1.6. The Committee reviews the information submitted and establishes the Fair Market Price.

5.1.7. The Committee transmits the notice of the approved Fair Market Price to the CNA which in turn notifies the purchasing agency and/or purchasing division and the workshop or rehabilitation facility of the Committee's action.

5.1.8. Prior to a request for a new Fair Market Price by a workshop or a rehabilitation facility, the CNA must receive a prevailing wage determination and new Scope of Work from the purchasing agency or purchasing division.

§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 W. Va. Code, § 5A-3A-1 et seq.

6.2. Requests from Committee or CNA.

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



WEST VIRGINIA LEGISLATURE
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
Room M-152, State Capitol
Charleston, West Virginia 25305
(304) 340-3286

FILED

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Senator William R. Wooten, Co-Chair
Delegate David Grubb, Co-Chair

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE
Debra A. Graham, Counsel
~~Michael McThomas, Associate Counsel~~
Marie Nickerson, Admr. Assistant

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

January 12, 1993

TO: Ken Hechler, Secretary of State, State Register

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

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Fair Market Price Determination

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule
(a) as originally filed
(b) as modified by the agency X
2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. _____
3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____
4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____
5. Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached. _____

Pursuant to Code 29A-3-11(c), this notice has been filed in the State Register and with the agency proposing the rule.

cc:

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CONFIDENTIAL

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