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TITLE 186
LEGISLATIVE RULE
COMMITTEE FOR THE PURCHASE OF COMMODITIES
AND SERVICES FROM THE HANDICAPPED

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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. -- ~~June 17, 1993~~

1.4. Effective Date. -- ~~June 17, 1993~~

§186-1-2. Definitions.

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

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

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

2.4. "Costing" -- means the determination made by the CNA and qualified vendors ~~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 costs, ~~(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.

2.5. "Director" -- means the director of the purchasing division of the department of administration.

2.6. "~~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.~~

2.6. "Fair Market Price" -- means a reasonable price, set by the Committee and approved by the director, which permits the qualified vendor to recover the cost of raw materials, labor, capital, overhead, CNA service

charges and delivery costs.

2.7. "Functional capability" means an individual's ability to perform certain activities taking into consideration factors such as mobility, communication, self-care, self-direction, work tolerance or work skills. Functional capability can be determined on the basis of an evaluation of rehabilitation potential.

2.8. "Labor Costs" -- means the wages, fringe benefits (such as holiday, sick leave, insurance, etc.), and employment taxes paid by or on behalf of an employee.

~~2.10.~~ 2.9. "Non Profit Workshop", "workshop", and "rehabilitation facility"—mean 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." state division of rehabilitation services.

2.10. "Qualified Vendor," -- means a non profit workshop, workshop or rehabilitation facility as described in 2.9 of these rules.

~~2.7. "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.~~

2.11. "Reserved or Set Aside" -- means commodities and services that are placed on the statewide contract.

~~2.8. 2.12. "Scope of Work" -- means the specifications, time tables, worker qualifications, materials and shipping regulations is the requirement for a particular commodity or service. as defined by the purchasing entity i.e., purchasing agencies or purchasing division spending unit. It includes specifications, time tables, worker qualifications, materials and shipping regulations.~~

~~2.9.~~ 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. "Severely disabled" -- means and individual who has a severe physical, visual or mental disability resulting from injury, disease, or congenital defect, which creates a limiting condition to the person's functional capability to engage in competitive employment over an extended period of time.

2.15. "Spending unit" -- means a department, agency or institution of the state government for which an appropriation is requested, or to which an appropriation is made by the Legislature.

2.16. "Statewide Contract" -- means for purposes of these rules a contract between the division of purchasing and the CNA which that lists all the commodities and services the committee has approved for the program and has set a fair market price.

§186-1-3. General Rules-Responsibilities of the Committee, the CNA, and state spending units.

3.1. Committee responsibility.

3.1.1. The Committee, subject to ~~acceptance approval~~ by the Director of Purchasing, ~~is to shall~~ determine the fair market price of all commodities ~~manufactured~~ and services provided by ~~approved workshops or rehabilitation facilities~~ qualified vendors and offered for sale to State spending units, ~~agencies, political subdivision, or instrumentalities of the state~~. As outlined in §186CSR3, the Committee shall determine must have made a prior determination, that the commodities and services provided by the workshop or rehabilitation facility qualified vendor are suitable for use: sale to the state.

3.1.2. The Committee has a duty to exercise stewardship of the State's resources as well as to the interests of people with disabilities.

3.1.3. To determine the fair market price of commodities or services the Committee must give due consideration to the following factors:

- a. The cost of the commodities or services in similar quantities if purchased by the state from a qualified in-state vendor engaged in the business of selling or providing similar commodities or services as determined by the director;
- b. 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 as determined by the director;
- c. The actual cost to the qualified vendor of manufacturing or providing the commodity or service; and
- d. The usual, customary, and reasonable costs of manufacturing, marketing, and distribution.

3.1.4. The Committee has a duty to ensure that employee wages be at least federal minimum wage. If a qualified vendor wishes to compensate an employee more than the federal minimum wage a detailed explanation of why and how they determined the wage must be submitted to the CNA on the appropriate Committee approved form(s).

3.1.5. The fair market price may include a reasonable charge for overhead and profit, however it may not, however, be excessive or unreasonable.

3.2. Responsibilities of the CNA.

3.2.1. The CNA is the designated agent to represent qualified vendors to the Committee and to spending units. As such, the CNA is authorized to negotiate with spending units the prices and terms of contracts procured in accordance with provisions of the W. Va. Code. Qualified vendors may make joint presentations with the CNA to the Committee or spending unit when a matter affecting the qualified vendor is under deliberation.

3.3. Responsibilities of state spending units.

3.3.1. 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 spending unit shall provide to the CNA a copy of the most recent solicitation and contract for the service or commodity within ten (10) working days of receipt of request.

3.3.2 The spending unit must 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.

3.2. 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:~~

~~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(e);~~

~~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;~~

~~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;~~

~~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;~~

~~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.~~

3.4. Revision 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.~~

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(e), 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.

§186-1-4. Pricing guidelines established by the Committee.

~~3.8.1. 4.1. Pricing guidelines are established by the Committee. The guidelines are as follows:~~

a. The prices included in the statewide contract procurement list are the fair market prices established by the Committee.

b. Unless otherwise provided, fair market prices for commodities include delivery cost (FOB destination). Delivery costs may include packaging, packing and parking, shipping and handling costs charged by private couriers.

c. The fair market price established by the Committee for a service or commodity on the ~~Procurement List statewide contract~~ remains in effect until the Committee approves a new fair market price is established. In addition to the criteria established in §3.1.3 of these rules, 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 in labor costs, and/or 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, an increase of other costs related to the contract.

d. The fair market price established by the Committee shall usually apply for the a period of one year (or other "service period" determined by the contract) service period determined by the contract. Until a new fair market price has been approved, by the Committee, the workshop or rehabilitation facility the qualified vendor is to must continue to proving provide 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.

e. During the service period, the purchasing agencies or purchasing division the spending unit and CNA may, by mutual written 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) whichever is less. 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 dollars (\$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 Procuring 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.

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.

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.

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. §186-1-5. Initial Fair Market Price Determination Procedures.

5.1. The CNA shall use the following procedure to develop the initial fair market price to be recommended to the Committee.

~~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.~~

5.1.1. The CNA shall request a copy of the most recent solicitation or contract (as required under 3.3.1(a) of this rule) of the service or commodity from the spending unit.

5.1.2. The CNA shall request a scope of work from the spending unit.

~~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 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.~~

5.1.3. The qualified vendor must submit to the CNA all costs associated with fulfilling the contract on Committee approved forms and assist the CNA in establishment of the fair market price.

~~4.1.5. 5.1.4. The CNA shall is required to review and verify all costing information submitted by the qualified vendor. 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.~~

5.1.5. Prior to submission to the Committee, the CNA shall submit a copy of the suggested fair market price to the spending unit. The spending unit is to notify the CNA of any objection in writing within ten (10) working days of receipt of the proposed price, otherwise concurrence with the proposed price shall be assumed.

5.1.6. The CNA shall submit all costing information to the committee and comments from the spending unit using the appropriate forms(s) for approval.

5.1.6.1. Base Price – Each time the committee determines the fair market price, a new base

price is established.

5.1.6.2. The qualified vendor shall project costs for at least three (3) years in order to assist state spending units in future years.

5.1.7. The Committee shall review the proposal package submitted by the CNA to determine the fair market price. If additional information or clarification is needed by the committee the appropriate party(s) will be contacted.

5.1.8. The committee shall notify the CNA of the approved fair market price. The CNA shall notify the spending unit and qualified vendor of the committee's action.

~~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:~~

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

~~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.~~

~~c. The federal prevailing wage determination on which the proposed price is based.~~

~~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. §186-1-6. Fair Market Price Changes Or Followup Determination Procedure Modifications.~~

~~5.1. 6.1. The following procedure is used when either a spending unit requests a change in the scope of work/specifications or costing, in developing subsequent or followup Fair Market Prices recommended by the CNA to the Committee for services and commodities:~~

~~5.1.1. 6.1.1. 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. The qualified vendor or the spending unit shall submit to the CNA a request for a price change showing a breakdown of the change in the workshop or rehabilitation facility costs using forms provided by the Committee and other appropriate documentation as requested by the CNA or Committee; or~~

~~6.1.2. The qualified vendor or the spending unit shall submit to the CNA a request to change the scope of work for a current contract and the reason(s) for the change using forms approved 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. 6.1.3. The CNA shall review and verify validates and verifies the breakdown of the changes in the qualified vendors workshop's or rehabilitation facility's costs.~~

~~5.1.4. 6.1.4. Prior to submission of the fair market price change request to the Committee, the CNA shall submit a copy or summary of the suggested fair market price change request to the purchasing agency and/or purchasing division spending unit for comments or concurrence. The spending unit is to notify the CNA of any objection in writing within ten (10) working days of receipt of the proposed price, otherwise concurrence with the proposed price shall be assumed.~~

~~5.1.5. 6.1.5. The CNA shall submit the fair market price change request with supporting data to the Committee. The request is to be accompanied by the following:~~

~~a. A breakdown of changes in the qualified vendors workshop or rehabilitation facility cost using the committee approved form(s). form attachments as requested by the CNA and/or Committee.~~

~~b. The objections and/or comments of the spending unit purchasing agency and/or purchasing division concerning the proposed fair market price change.~~

~~e. The prevailing wage determination upon which the proposed recommended Fair Market Price is based.~~

~~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. 6.1.6. The Committee shall reviews the information submitted and establishes the modified fair market price.

5.1.7. 6.1.7. The Committee shall transmits the notice of the approved modified fair market price to the CNA. ~~which in turn~~ The CNA shall notify ~~notifies~~ the spending unit purchasing agency and/or purchasing division and the qualified vendor 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 rehabilitation facility, the CNA must receive a prevailing wage determination and new Scope of Work from the purchasing agency or purchasing division.~~

§186-1-7. Miscellaneous provisions.

7.1 Qualified vendors who fail to avail themselves of the protection of W. Va. Code §5A-3-10, which exempts certain workshops and rehabilitation facilities from competitive bidding, may bid competitively on commodities or services without the involvement of the CNA or Committee, provided the commodities or services have not been "reserved" on the statewide contract..

7.2 A qualified vendor may elect to discontinue consideration of a project or to discontinue services if they cannot recover their production costs. The qualified vendor must give the CNA and the committee at least sixty (60) days written notice of their intent to discontinue service.

§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.~~