

WEST VIRGINIA  
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

FILED

1992 JAN 10 PM 4:08

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: STATE TAX DIVISION TITLE NUMBER: 110

CITE AUTHORITY: W. VA. CODE § 5A-3-37

RULE TYPE: PROCEDURAL \_\_\_\_\_ INTERPRETIVE X

EXEMPT LEGISLATIVE RULE \_\_\_\_\_  
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES \_\_\_\_\_, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

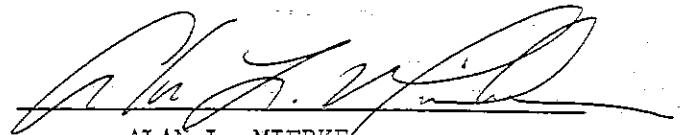
TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 120

TITLE OF RULE BEING ADOPTED: \_\_\_\_\_

CONTRACTOR PREFERENCE FOR DETERMINING SUCCESSFUL BIDS

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS FEB. 15, 1992



ALAN L. MIERKE  
ACTING TAX COMMISSIONER

WEST VIRGINIA INTERPRETIVE REGULATIONS  
DEPARTMENT OF TAX AND REVENUE  
TITLE 110  
SERIES 12C  
1991

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OFFICE OF THE COMPTROLLER  
TREASURER OF THE STATE

CONTRACTOR PREFERENCE FOR DETERMINING SUCCESSFUL BIDS

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§ 110-12C-1. General.

1.1 **Scope.** - These interpretive rules are an explanation and clarification of operative procedures for the "Jobs For West Virginians Act of 1990," being vendor preference for construction services in the amount of fifty thousand dollars (\$50,000.00) or more and competitively bid.

1.2 **Authority.** - See W. Va. Code § 5A-3-37.

§ 110-12C-2. **Definitions.** - As used in these regulations, and unless the context clearly requires otherwise, the following terms shall have the meaning ascribed herein, and shall apply in the singular and in the plural.

2.1 "Bid" means an offer to perform contracting services at a specified price.

2.2 "Bidder" means the person who submits a bid to the Director.

2.3 "Code" means the Code of West Virginia of 1931, as amended.

2.4 "Contracting services" means the furnishing of work, or both materials and work, in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property. For purposes of this definition, the term "structure" shall include, but not be limited to, everything built up or composed of parts joined together in some definite manner and attached to real property, or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time.

2.5 "Construction services" means contracting services.

2.6 "Contractual services" shall include telephone, telegraph, electric light and power, water and similar services.

2.7 "Director" means the Director of the Purchasing Division of the State of West Virginia, Department of Administration, or his delegate.

2.8 "Headquarters" or "principal place of business" means the place where the majority of the governing power and business activity of a bidder resides and is executed.

2.9 "Qualified bid" means a bid or proposal which meets specifications, as determined by the Director.

2.10 "Removable property" means any personal property not permanently affixed to or forming a part of real estate.

2.11 "Resident vendor" means a vendor who:

2.11.1 Is registered in accordance with article 12, chapter 11 of the Code to transact business within the State of West Virginia;

2.11.2 Maintains its headquarters or principal place of business in the State;

2.11.3 Has actually paid, and not just applied to pay, personal property taxes imposed by Chapter 11 of the Code on equipment used in the regular course of supplying services or commodities of the general type offered;

2.11.4 Has actually paid, and not just applied to pay, all required business taxes imposed by Chapter 11 of the Code; and

2.12 "Secretary" means the Secretary of Tax and Revenue, or his delegate.

2.13 "Spending officer" means the executive head of a spending unit, or a person designated by him.

2.14 "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, but does not include any department, agency or institution which is not subject to the provisions of W. Va. Code § 5A-3-37.

2.15 "Vendor" means any person, whether selling at retail or otherwise, who is engaged in furnishing or rendering services or selling tangible personal property.

**§ 110-12C-3. Preference-Construction Services.** - For the period of July 1, 1990 through June 30, 1994, qualified bids for the purchase of construction services or for the construction, repair or improvement of any building or portion thereof, estimated to cost in excess of fifty thousand dollars (\$50,000.00), whether issued as one contract or as a series of contracts, and competitively bid, may receive a maximum preference of five percent (5%). In order to be eligible for such preference, appropriate certification in writing must be made at the time the qualified bid is submitted.

3.1 A two and one-half percent (2.5%) preference will be provided for a qualified bid which is submitted by an individual resident vendor who has resided in West Virginia continuously for the four (4) years immediately preceding the date the qualified bid is submitted, or for a qualified bid which is submitted by a partnership, association or corporation resident vendor which

has maintained its headquarters or principal place of business within West Virginia continuously for the four (4) years immediately preceding the date the qualified bid is submitted.

3.1.1 A partnership, association or corporation shall be deemed to meet the four (4) year continuous residency requirement if at least eighty percent (80%) of the ownership interest of such resident vendor is held by another individual, partnership, association or corporation resident vendor who otherwise meets the four (4) year continuous residency requirement.

3.1.2 The entity submitting a bid and requesting preference under Section 3.1 of these regulations must meet the requirements of such Section 3.1 and must actually be performing the services required as a regular commercial activity of the bidder or usually be supervising the performance of such services as a general contractor. If a bidder has changed the name under which it does business and such former entity meets the requirements of this Section 3.1, then the bidder shall be deemed to meet the requirements of this Section 3.1 if the activity and residence of the bidder have not changed in a material manner subsequent to the effective date of the name change.

3.2 A two and one-half percent (2.5%) preference will be provided for a qualified bid which is submitted by a resident or nonresident vendor which certifies that on an average at least sixty percent (60%) of the employees working on the project being bid will be persons who have been residents of West Virginia continuously for the two (2) years immediately preceding submission of the bid. Bidders shall be responsible for ensuring subcontractor compliance with the sixty percent (60%) requirement.

3.3 A qualified bid may receive a five percent (5%) preference if the vendor submitting that bid meets both requirements as specified in the foregoing subsections 3.1 and 3.2.

**§ 110-12C-4. Certification.** - To receive preference within the meaning of these regulations, a bidder must give written consent to the Department of Tax and Revenue authorizing disclosure to the Director of appropriate information which will verify that the bidder has paid the required business taxes; Provided, That such information shall not contain the amounts of taxes paid nor any other information deemed by the Tax Commissioner to be confidential. At the time the qualified bid is submitted, the bidder must certify, on the form provided, compliance with the requirements specified in Section 3 of these regulations.

4.1 To meet the four (4) year continuous residency requirement, the required certification shall state:

4.1.1 If an individual vendor, that the vendor is a resident vendor and has resided continuously in West Virginia for the four (4) years immediately preceding the date of certification.

4.1.2 If a partnership, association or corporation, that:

4.1.2.1 The vendor is a resident vendor and has maintained its headquarters or principal place of business continuously in West Virginia for the four (4) years immediately preceding the date of certification; or

4.1.2.2 That eighty percent (80%) of the ownership interest of vendor is held by another individual, partnership, association or corporation resident vendor which has maintained its headquarters or principal place of business continuously in West Virginia for the four (4) years immediately preceding the date of certification. For the purpose of determining the eighty percent (80%) ownership interest, only actual ownership by one entity, not joint ventures, shall be acceptable. For the purpose of meeting the four (4) year residency requirement or the eighty percent (80%) ownership interest requirement as either pertains to a joint venture, each party to a joint venture must meet the appropriate requirement.

4.2 To meet the sixty percent (60%) requirement, the certification shall state:

4.2.1 On an average, sixty percent (60%) of the employees working on the project being bid will be persons who have been residents of West Virginia continuously for the two (2) years immediately preceding submission of the bid; and

4.2.2 Sufficient records will be maintained by the bidder to verify that the average percentage of employees continuously residing in West Virginia, including the employees of any subcontractors, is sixty percent (60%) or more.

**§ 110-12C-5. Investigating Certifications.** - The Director shall investigate requests for preference exclusive of tax matters when any portion of a certification is questioned. If it is determined that the qualified bid fails to meet a requirement for the requested preference, the Secretary, or the Director at the direction of the Secretary may:

5.1 Deny that portion of the requested preference that fails to meet the requirement, leaving the remaining requested preference in tact, if any; or

5.2 Disqualify the bidder.

**§ 110-12C-6. Preference to be Considered in Making Award.** - The preference received by a bid qualified in accordance with these regulations shall be included in the determination of the award of the contract. Preference shall not be applied as between or among resident vendors, but shall be applied as between or among resident vendors(s) and non-resident vendor(s), and between or among non-resident vendors.

**§ 110-12C-7. Violations.** - If the Secretary determines that a vendor which received preference under these regulations has failed to continue to meet the requirements for such preference, the Secretary shall advise the Director to proceed with one of the following:

7.1 Rescind the contract or purchase order issued to the vendor; or

7.2. Assess a penalty against such vendor in an amount not to exceed five percent (5%) of the vendor's bid. Such penalty shall be paid to the contracting agency or deducted from any unpaid balance on the contract or purchase order.

**§ 110-12C-8. Jeopardizing Federal Funds.** - If any portion of these regulations jeopardize the receipt of federal funds, then such portion shall be waived as being void and of no force and effect as such regulation pertains to the project.



# Contractors Association of West Virginia

2114 Kanawha Boulevard, East • Charleston, West Virginia 25311 • (304) 342-1166

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- \*Senior Vice President  
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- Director of Construction Information Services  
Betty R. Walls
- Staff Assistant  
Mary Lou Atkins
- \*Executive Committee

August 5, 1991

Legal Division  
Department of Tax & Revenue  
P. O. Box 1005  
Charleston, WV 25324-1005


Gentlemen:

The Contractors Association of West Virginia has reviewed the proposed regulations for Title 110, Series 12c, "Contractor Preference For Determining Successful Bids."

Enclosed are our comments and questions relating to specific items in the regulations. We will be glad to provide you further information, if necessary, to support our recommendations.

We appreciate the opportunity to provide our comments, and please do not hesitate to contact me should you have any questions.

Sincerely,



Michael L. Clowser  
Executive Director

RECEIVED  
 1991 AUG -6 AM 10:00  
 STATE TAX DEPARTMENT  
 LEGAL DIVISION



CONTRACTORS ASSOCIATION OF WEST VIRGINIA

RECOMMENDED CHANGES TO TITLE 110,  
SERIES 12 C, "CONTRACTOR PREFERENCE FOR  
DETERMINING SUCCESSFUL BIDS"

1. Section 3.1.2

This section states that "the entity submitting a bid and requesting preference . . . must actually be performing the services required as a regular commercial activity of the bidder."

In the construction industry, a general contractor will bid a project, then usually subcontract portions of the work to specialty contractors, e.g. electrical, dry wall, plumbing, etc. By using the words "regular commercial activity of the bidder," could it be construed that the general contractor does not usually perform the work of specialty contractors, and, therefore, would not be allowed to apply for the bidder's preference? We don't believe this is the intent but we want to be sure this is not what the language provides.

2. 110-12c-4. Certification

This section requires the bidder to give written consent to the Department of Tax and Revenue authorizing disclosure to the Director of Administration of appropriate information which will verify that the bidder has paid the required business taxes.

The CAWV opposes language that would allow confidential tax information on a contractor to be released to any agency official. The Tax Department should be able to certify that a contractor has paid taxes, but the regulations should be specific as to what information can be released.

3. 110-12c-6 - Check correct spelling of "vendors."

4. The CAWV recommends adding to the regulation language that specifies when and where the vendors preference bill applies. We believe the regulations should state that the preference shall be included in all state-funded contracts, and also in all contracts administered by political subdivisions when the projects are 100 percent state-funded.

The regulations should also spell out the method used by political subdivisions of the state, including county boards of education, when granting vendors preference. A form should be developed that political subdivisions can include in their bidding documents.

5. We recommend language be developed and inserted in the regulations that state that political subdivisions may grant the preferences to any vendor who had made a written claim for such preference at the time a bid is submitted. However, the language should be expanded to state that if the political subdivision decides to include the preference in the bid package, the preference can't be rescinded after the bids are opened.

This would prevent a political subdivision from providing for the preference and then arbitrarily deciding not to grant the preference after the bids are opened. This is not fair to those bidding on the contract. Political subdivisions don't have to offer the preference, but if they do, they should honor the preference once the bids have been opened.

End of Comments

COMMENTS AND RESPONSES FOR THE  
CONTRACTOR PREFERENCE FOR DETERMINING SUCCESSFUL BIDS

Following are the responses to comments received relative to the regulations governing Contractor Preference For Determining Successful Bids. The comment or concern expressed will be stated first followed by the agency's response. Where appropriate, comments relative to similar concerns will be combined.

COMMENT NO. 1: Section 3.1.2 appears to be unduly narrow in construction because it would require a general contractor to have actually performed and continue to perform on a regular basis the work of specialty contractors that he would supervise in the completion of a bid.

RESPONSE TO COMMENT NO. 1: The Tax Division agrees with the comment and has amended Section 3.1.2 to require the general contractor either to be actually performing such services or to usually be supervising the performance of such services as a general contractor.

COMMENT NO. 2: Section 4 appears to authorize the Tax Division to provide any information the Director of Administration may require to assure that the bidder does meet the requirements for a contractor preference.

RESPONSE TO COMMENT NO. 2: The Tax Division agrees with the concern expressed in the comment and has amended Section 4 to provide that information provided to the Director of Administration shall not contain the amounts of any taxes paid or any other information deemed by the Tax Commissioner to be confidential.

COMMENT NO. 3: The spelling of "vendors" in Section 6 is incorrect.

RESPONSE TO COMMENT NO. 3: The Tax Division is in agreement and has corrected this spelling.

COMMENT NO. 4: The regulation should be amended to provide that the preference should be included in all State-funded contracts.

RESPONSE TO COMMENT NO. 4: West Virginia Code § 5A-3-37(a) requires the vendor preference to be applied to a contract which the Director of Purchasing estimates the cost will exceed \$50,000, or for which the Director of Purchasing or any other State department is required to receive competitive bids. In other words, the determination of vendor preference is based upon who awards the contract, not upon who funds the contract. As a result, the regulation is not amended in this regard.

COMMENT NO. 5: The regulations should be amended to provide that vendor preference is applicable in all contracts administered by political subdivisions when the projects are 100% State funded.

RESPONSE TO COMMENT NO. 5: West Virginia Code § 5A-3-37(c) indicates that the application of vendor preferences by political

subdivisions is optional, not required. Therefore, the regulations should not be amended in this regard. Additionally, as indicated previously, this is a question of who awards the contracts, not a question of who funds the contract. Furthermore, the methods used by political subdivisions when granting vendor preferences should be developed by the respective political subdivisions, not by the State.

COMMENT NO. 6: The regulations should be amended to provide that political subdivisions may grant preferences to any vendor who has made a written claim at the time a bid is submitted; however, the preference cannot be rescinded after bids are opened when the political subdivision decides to include the preference in the bid package.

RESPONSE TO COMMENT NO. 6: While the Tax Division is in agreement with the concept, it does not feel that such language should be included in the regulations. This is an issue which should be addressed in the purchasing regulations developed in each political subdivision.



State of West Virginia  
Department of Tax and Revenue

Charleston 25305

GASTON CAPERTON  
GOVERNOR

FILED  
1992 JAN 10 PM 4:08

OFFICE OF THE SECRETARY  
SECRETARY OF STATE  
L. FREDERICK WILLIAMS, JR.  
SECRETARY

CONSENT TO FILE RULE

January 10, 1992.

To Whom It May Concern:

Title of Rule: Contractor Preference For Determining  
Successful Bids

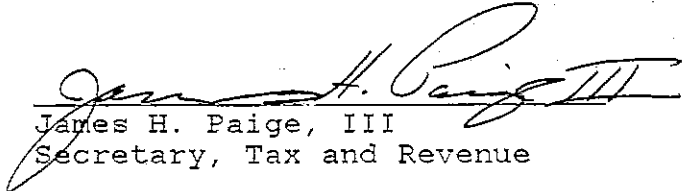
Title Number: 110

Series Number: 12C

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Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 10th day of January, 1992.

  
James H. Paige, III  
Secretary, Tax and Revenue

KEN HECHLER  
Secretary of State  
  
MARY P. RATLIFF  
Deputy Secretary of State  
  
ROBERT E. WILKINSON  
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STATE OF WEST VIRGINIA  
SECRETARY OF STATE  
Charleston 25305

WILLIAM H. HARRINGTON  
Chief of Staff  
  
JUDY COOPER  
Director, Administrative Law  
  
DONALD R. WILKES  
Director, Corporations  
  
SHEREE COHEN  
Special Assistant

(Plus all the volunteer help we can get)

RECEIVED  
92 MAR 23 AM 10:23  
STATE LAW DEPARTMENT  
LEGAL DIVISION

TO: John Montgomery  
AGENCY: Tax and Revenue  
FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION  
DATE: March 19, 1992

THE ATTACHED RULE RECENTLY FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 12C TITLE: Contractor Preference for Determining Successful Bids

\* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: \_\_\_\_\_  
TITLE OF PERSON SIGNING: \_\_\_\_\_  
DATE: \_\_\_\_\_

\*\*\*\*\*

\* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: John Montgomery  
TITLE OF PERSON SIGNING: Attorney  
DATE: 7-9-92