

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

Do Not Mark in this Box

RECEIVED

1992 SEP -1 AM 9:44

OFFICE OF RES: VANDER
SECRETARY OF STATE

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

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

AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 12C

TITLE OF RULE BEING AMENDED: PREFERENCE FOR DETERMINING SUCCESSFUL BIDS

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED:

TITLE OF RULE BEING ADOPTED:

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS OCT 21 1992

James H. Paige III
State Tax Commissioner



State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

TAX DIVISION
P. O. Box 2389
Charleston, WV 25328-2389

JAMES H. PAIGE III
SECRETARY

CONSENT TO FILE RULE

September 1, 1992

RECEIVED
1992 SEP - 1 AM 9:44
OFFICE OF THE SECRETARY
DEPARTMENT OF TAX AND REVENUE

To Whom It May Concern:

Title of Rule: Preference for Determining Successful Bids
Title Number: 110
Series Number: 12C

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

Signed this 1st day of September, 1992.

James H. Paige, III
Secretary, Tax and Revenue

AGENCY APPROVED
WEST VIRGINIA INTERPRETIVE REGULATIONS
DEPARTMENT OF TAX AND REVENUE
TITLE 110
SERIES 12C
1992

RECEIVED

1992 SEP -1 AM 9:44

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

PREFERENCE FOR DETERMINING SUCCESSFUL BIDS

§ 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, and for purchases of commodities and printing competitively bid.

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

1.3 Filing Date. -

1.4 Effective Date. -

§ 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 or to supply commodities or printing 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 "Commodities" means supplies, material, equipment, contractual services, and any other articles or things used by or furnished to a department, agency or institution of the state government.

~~2.4~~ 2.5 "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~~ 2.6 "Construction services" means contracting services.

~~2.6~~ 2.7 "Contractual services" shall include telephone, telegraph, electric light and power, water and similar services.

~~2.7~~ 2.8 "Director" means the Director of the Purchasing Division of the State of West Virginia, Department of Administration, or his delegate.

~~2.8~~ 2.9 "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.

2.10 "Printing" means printing, binding, ruling, lithographing, engraving and other similar services.

2.11 "Project" means the objective of the bid, irrespective of any secondary or subcontracting considerations.

~~2.9~~ 2.12 "Qualified bid" means a bid or proposal which meets specifications, as determined by the Director.

~~2.10~~ 2.13 "Removable property" means any personal property not permanently affixed to or forming a part of real estate.

~~2.11~~ 2.14 "Resident vendor" means a vendor who:

~~2.11.1~~ 2.14.1 Is registered in accordance with article 12, chapter 11 of the Code to transact business within the State of West Virginia;

~~2.11.2~~ 2.14.2 Maintains its headquarters or principal place of business in the State;

~~2.11.3~~ 2.14.3 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~~ 2.14.4 Has actually paid, and not just applied to pay, all required business taxes imposed by Chapter 11 of the Code; and

~~2.12~~ 2.15 "Secretary" means the Secretary of Tax and Revenue, or his delegate.

~~2.13~~ 2.16 "Spending officer" means the executive head of a spending unit, or a person designated by him.

~~2.14~~ 2.17 "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~~ 2.18 "Vendor" means any person, whether selling at retail or otherwise, who is engaged in furnishing or rendering services, or selling tangible personal property, commodities or furnishing printing.

§ 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 and application 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. Preference-Commodities and Printing. - Effective July 1, 1992, qualified bids for the purchase of commodities or printing required to be obtained through competitive bids, whether issued as one contract or as a series of contracts, may receive a maximum preference of five percent (5%). In order to be eligible for such preference, appropriate certification and application in writing must be made at the time the qualified bid is submitted.

4.1 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.

4.1.1 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.

4.1.2 If a bidder has changed the name under which it does business and such former entity meets the requirements of this Section 4.1, then the bidder shall be deemed to meet the requirements of this Section 4.1 if the residence of the bidder has not changed in a material manner subsequent to the effective date of the name change.

4.2 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 of the bidder will be persons who have been residents of West Virginia continuously for the two (2) years immediately preceding submission of the bid.

4.3 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 4.1 and 4.2

~~§ 110-12C-4.~~ § 110-126-5. **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 or Section 4 of these regulations.

~~4.1~~ 5.1 To meet the four (4) year continuous residency requirement, the required certification shall state:

~~4.1.1~~ 5.1.1 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~~ 5.1.2 If a partnership, association or corporation, that:

~~4.1.2.1~~ 5.1.2.1 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~~ 5.1.2.2 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~~ 5.2 To meet the sixty percent (60%) requirement, the certification shall state:

~~4.2.1~~ 5.2.1 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~~ 5.2.2 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.~~ § 110-12C-6. **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~~ 6.1 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~~ 6.2 Disqualify the bidder.

~~§ 110-12C-6.~~ § 110-12C-7. **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~~ West Virginia 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.~~ § 110-12C-8. **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~~ 8.1 Rescind the contract or purchase order issued to the vendor without penalty to the State; or

~~7-2~~ 8.2 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.~~ § 110-12C-9. **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.