

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #6

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NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION
AGENCY: PURCHASING DIVISION TITLE NUMBER: 148

AMENDMENT TO AN EXISTING RULE: YES XX, NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: PURCHASING

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

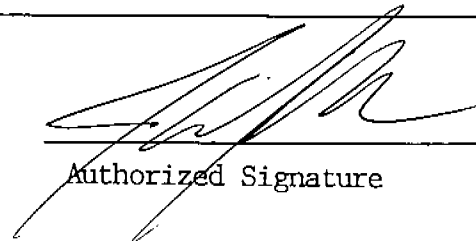
TITLE OF RULE BEING PROPOSED:

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) SB272

SECTION §64-2-1(b), PASSED ON March 11, 1999

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE: April 7, 1999


Authorized Signature

\$4.60

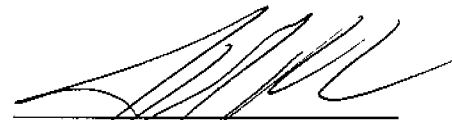
LEGISLATIVE RULE

148CSR1

**TITLE 148
DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION**

**SERIES 1
PURCHASING**

APPROVAL OF FILING BY CABINET SECRETARY



**Joseph F. Markus
Cabinet Secretary
Department of Administration**

TITLE 148
DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION

SERIES 1
PURCHASING

APR 6 1 42 PM '99
OFFICE OF THE SECRETARY OF STATE

§148-1-1. General.

- 1.1. Scope. - This Legislative Rule is an explanation and clarification of operative procedures for the purchase of printing, commodities and services by the Purchasing Division of the Department of Administration.
- 1.2. Authority. - W. Va. Code, §5A-3-4.
- 1.3. Filing Date. -
- 1.4. Effective Date. -

§148-1-2. Definitions.

As used in this rule, all terms have the same meaning as provided in W.Va. Code §5A-1-1 and 5A-3-1 et seq., and as follows:

- (a) "Director" means the Director of the Purchasing Division of the Department of Administration.
- (b) "F.O.B. destination" and "free on board destination" mean the seller or vendor must transport or pay for the transportation of the printing, commodities or services to the point of destination specified in the contract.
- (c) "Secretary" means the head of a department, as appointed by the Governor, as defined in W.Va. Code §5F-1-2.

§148-1-3. Applicability.

- 3.1. This legislative rule applies to all spending units of State government except those statutorily exempted. Exempted spending units may elect to follow this rule.
- 3.2. All purchases must be approved by the secretary or head of the spending unit, or a designee, whose name shall be filed with the Director.

§148-1-4. Authority and Remedies of Director.

The Director shall:

- (a.) Ensure that purchases and contracts for commodities and printing are based on competitive bid whenever possible;
- (b.) Purchase or contract for, in the name of the State, the commodities and printing required by the spending units of State government;
- (c.) Prescribe the manner in which commodities and printing shall be purchased, delivered, stored, and distributed;
- (d.) Review specifications and descriptions before soliciting bids to ensure that specifications and descriptions do not favor a particular brand or vendor;
- (e.) Accept or reject any and all bids in whole or in part;
- (f.) Waive minor irregularities in bids or specifications;
- (g.) Apply and enforce standard specifications;
- (h.) Transfer to or between spending units, or sell surplus, obsolete, or unused commodities;
- (i.) Direct the central storerooms of supplies for spending units;
- (j.) Prescribe the amount of deposit or bond to be submitted with any bid or contract;
- (k.) Prescribe contract provisions for liquidated damages, remedies and/or other damages provisions in the event of vendor default;
- (l.) Exempt purchases of commodities, printing, and services within State government, or West Virginia sheltered workshops from competitive bidding requirements when price, availability, and quality are comparable to those in the open market;
- (m.) Employ a person whose responsibilities, in addition to other duties, are to identify commodities and printing available for purchase from nonprofit sheltered workshops; evaluate the needs for the commodities and printing; coordinate workshops in their production efforts; and provide information to workshops about available opportunities within State government for the purchase of commodities or printing;
- (n.) Resolve conflicts between the State and other institutions with preference for State purchases in accordance with the West Virginia Code, or between a spending unit and the institution, basing the decision on quality, price and the efficient and economical operation of State government; and

- (o.) Prescribe the manner of inspection for all deliveries or commodities, and make chemical and physical tests of samples submitted, with bids and samples (determined to be in) compliance with specifications;
- (p.) Collect an annual fee in the amount of \$45.00 to be paid by all vendors. The Director may waive the annual fee at any time if doing so would be in the best interest of the State of West Virginia.

§148-1-5. REMEDIES.

- 5.1. In the event that a vendor fails to honor any contractual term or condition, the Director may:
 - (a.) Cancel the contract and re-award the purchase order to the next lowest bidder. The vendor failing to honor contractual obligations is responsible for all differences in cost:
 - (b.) Declare a vendor non-responsible or non-responsive and refuse to award a purchase order. All such instances shall be substantiated in writing. The documentation shall be considered a public document and shall be available for inspection at all reasonable times; or
 - (c.) Suspend, for a period not to exceed one (1) year, the right of a vendor to bid on State purchases when there is reason to believe the vendor has violated any of the provisions, terms, or conditions of a contract, this rule, and/or State law. A suspended vendor may appeal the decision of the Director to the Secretary of Administration as provided in Section 5.3(j) of this rule. The following are adequate grounds for suspension:
 - (i.) A vendor has exhibited a pattern of poor performance in fulfilling his or her contractual obligations to the State. Poor performance includes, but is not limited to, a vendor providing or furnishing commodities, materials, or services late, or at a quantity or quality level below that which is specified in the contract.
 - (ii.) The vendor has breached any contract entered into pursuant to the provisions of W.Va. Code §5A-3-1 et seq. or this rule; or
 - (iii.) The vendor has been convicted of any federal, state, or local crime punishable as a felony, directly related to the performance of a contract entered into pursuant to W.Va. Code §5A-3-1 et seq. or this rule.
- 5.1.2 The Director shall schedule a hearing for a suspended vendor upon the vendor's request. The vendor shall be notified, in writing, of the date, time and place of the hearing. The hearing shall be documented and an official record prepared. Following the hearing, the

Director shall issue a written decision of the hearing. Vendors may appeal the decision of the Director to the Secretary of Administration. The appeal shall be made within five (5) working days of issuance of the decision of the Director. The Secretary of Administration, or a stated designee, shall schedule a hearing and notify the vendor, in writing, of the date, time and place of the hearing. The hearing shall be documented and an official record prepared. The decision of the Secretary shall be stated in writing.

§148-1-6. Registration, Bidding, and Award.

6.1. Registration of Vendors.

- 6.1.1. All vendors shall register with the Purchasing Division.
- 6.1.2. Vendors shall register by completing and filing the form provided by the Purchasing Division.
- 6.1.3. Any company or corporation, or subsidiary of the company or corporation, listed on any nationally recognized stock exchange may be considered an eligible vendor properly registered to do business with the State of West Virginia.
- 6.1.4. Vendors receiving orders for goods and/or services exceeding \$1,000 shall pay an annual fee of \$45.00. A vendor with multiple locations shall pay only one fee when operating under one Federal Employer Identification Number (FEIN).
- 6.1.5. The Director may waive the registration requirements in the case of any vendor who is a sole-source provider.
- 6.1.6. The Director shall not accept bids from any vendor not properly registered with the Purchasing Division prior to issuance of a purchase order.

6.2. Bidding

- 6.2.1. All bids are F.O.B. destination unless otherwise clearly indicated by the vendor in the bid.
- 6.2.2. Bidders shall submit their bids and/or proposals prior to the date and time of the bid opening on the Request for Quotation forms provided by the Director of the Purchasing Division to the bidders. Substitutions for the Request for Quotation form are acceptable only if the substituted terms, conditions, and/or provisions are approved by the Director. Bidders shall submit their bids and/or proposal to the Purchasing Division and a duplicate of the bid or proposal to the State Auditor. The Director shall reject the bids after the required time and date.
- 6.2.3. An authorized representative of the bidder shall sign all bids received by the Purchasing Division. A corporate signature without an individual name is not an acceptable signature.

- 6.2.4. The Director may allow bids by facsimile machine. Bids by facsimile transmission must be received by the Purchasing Division and the State Auditor prior to the bid opening date and time (transmission completed). A vendor choosing to submit a bid or a written change to a bid by facsimile machine accepts full responsibility for transmission and receipt of the bid or written change to a bid. The State accepts no responsibility for the unsuccessful and/or incomplete transmission of bids by facsimile machine. An original document and a copy of a bid that is initially sent by facsimile transmission shall be sent to the Purchasing Division and State Auditor, respectively, within two (2) working days of the bid opening date.
- 6.2.5. Copies of bids may be open for public inspection in the office of the State Auditor immediately after bid opening. The files of the Purchasing Division and State Auditor are open for public inspection after the award has been made.
- 6.2.6. A bidder may make a written change of a sealed bid before the bid opening. A bidder shall submit written changes to the Purchasing Division and State Auditor prior to the date and time of the bid opening. A bidder shall make changes by facsimile machine in the manner provided in Subdivision 6.2(d) of this rule.
- 6.2.7. The Director may reject an erroneous bid after the bid opening if all of the following conditions exist: (1) An error was made; (2) The error materially affected the bid; (3) Rejection of the bid would not cause a hardship on the State spending unit involved, other than losing an opportunity to receive commodities and/or printing at a reduced cost; and (4) Enforcement of the part of the bid in error would be unconscionable. In order for the Director to reject a bid, the public file shall contain documented evidence that all of the conditions set forth in this subdivision exist.
- 6.2.8. A bidder may make a price adjustment on any purchase order if specific provisions for price adjustments have been incorporated in the Request for Quotation and purchase order. A bidder shall make a request for price adjustment in accordance with the specific terms and conditions of the individual purchase order. In the event no provision for price adjustment has been made, discretion to grant a price adjustment rests with the Director.

6.3. Vendors' Rights and Duties.

- 6.3.1. Each vendor is solely responsible for the delivering of a bid to the Purchasing Division, with an exact or duplicate copy to the office of the State Auditor. Any deviation between the bids received by the State Auditor and the Purchasing Division (relating to quantity, quality, specifications, price, date of delivery, or performance) shall cause the bid to be rejected. Both bids must be received at the respective offices prior to the specified date and time of the bid opening.
- 6.3.2. The official time clock of the Purchasing Division, for the purpose of receipt of bids, shall be displayed in the offices of the Purchasing Division.

- 6.3.3. The Director may remove vendors who fail to return quotation forms from the bidding list.
- 6.3.4. If there is a conflict between the extension price and the unit price, the unit price prevails.
- 6.3.5. A definite shipping date, after receipt of order, should be indicated by the vendor on all bids. If not indicated on the vendor's response, the Director shall require delivery within ten (10) days after receipt of order.
- 6.3.6. Any changes made by the vendor in the specifications listed in the bid request shall be clearly stated by the vendor. If changes are not stated, the Director shall assume that items offered meet the specifications.
- 6.3.7. Vendors are responsible for the accuracy of the information on and in the bid envelopes.
- 6.3.8. Vendors may write, visit, or telephone the Purchasing Division to obtain official bid forms.
- 6.3.9. All sales to the State of West Virginia are exempt from Consumer Sales Tax or Excise Tax by blanket state exemption and blanket federal exemption.
- 6.3.10. If a vendor is suspended and requests a hearing, one will be scheduled with the Director. The vendor shall be notified, in writing, of the date, time and place of the hearing.

6.4. Awards

- 6.4.1. The Director shall make an award to the lowest responsible bidder. The Director shall consider such factors as quality (meeting specifications), price, time of delivery, cost of delivery, and other terms and conditions considered prudent. Unit prices shall prevail in all cases. In some cases the Director shall make multiple and/or split awards when they are in the best interest of the State. Occasionally, purchase orders are issued which impose no obligation on the State for taking delivery of a product and/or service. These purchase orders shall be issued as blanket purchase orders or price agreements.
- 6.4.2. The Director may accept or reject, in whole or in part, any bid when the Director feels it to be in the best interest of the State. If any bid is rejected, the Director shall place a written explanation in the purchase order file.
- 6.4.3. When tie bids are received, the award is made by allowing the tied vendors to make a "last and final offer," by flip of a coin, draw of the cards, or any other impartial method considered prudent by the Director.

6.4.4. Vendor Preference—All purchases of commodities and printing made upon competitive bids, with the exception of construction services, are subject to a resident vendor preference in accordance with the rules promulgated by the Secretary of the Department of Tax and Revenue. In addition, all purchases of commodities and printing made upon competitive bid are subject to reciprocity preference equal to the amount of preference applied or granted by another State. A resident vendor is one who:

- (a.) Is authorized to transact business within the State by appropriate authorities;
- (b.) Maintains an office in the State;
- (c.) Has actually paid, and not just applied to pay, personal property taxes on equipment used in the regular course of supplying services of the general type offered;
- (d.) Has actually paid, and not just applied to pay, business taxes; and
- (e.) When selling tangible personal property, has available for delivery a stock of materials of the type being offered and of a reasonable quantity.

6.4.5. Requirements for bonds and deposits— The Director shall determine the applicability and amount of bonds and/or deposit required of a vendor at any time, if, it is judged that security is necessary to safeguard the State from undue risk. The Director may require the vendor to submit a certified check, certificate of deposit, performance bond, or any other security acceptable to the Director, payable to the State of West Virginia. Personal checks and/or company checks are not acceptable. Provision for these requirements is usually incorporated into the Request for Quotation and purchase order.

When any contract is satisfactorily completed on which a surety bond or other deposit has been previously submitted, the spending unit shall certify the completion in writing to the Purchasing Division. Upon receipt of the notification, the Purchasing Division shall return the check or deposit to the vendor.

§148-1-7. Purchasing Methods.

7.1. General

- 7.1.1. Specifications are written to maximize and encourage competition. In certain cases, a "brand name or equal" is used as a specification.
- 7.1.2. Contracts requiring more than six (6) months to fulfill are filed with the State Auditor.

7.2. Purchases of \$10,000 or less.

Spending units may make purchases (of no more than) \$10,000 for certain commodities, printing and services under guidelines established by the Director. Records of the purchases are kept on file with the spending unit and made available for public inspection during the normal office hours of the spending unit.

7.3. Purchases In Excess of \$10,000.

7.3.1. Purchases of commodities and printing estimated to be in excess of \$10,000 are made by the Purchasing Division in the form of sealed bids.

7.3.2. Request for offers or bids estimated to cost in excess of \$10,000 are advertised at least two times, whenever possible, using advertising media such as the Purchasing Bulletin, newspapers, trade journals, the Purchasing bulletin board and journals in the Purchasing offices, or any other media the Director considers advisable. The Director may waive the requirement to advertise when it is determined to be in the best interest of the State.

7.4. Open End Contracts.

The State may secure open end contracts to obtain commodities and/or printing to supply the repetitive needs of the State spending units in the form of statewide contracts, blanket orders, or price agreements. The Director may solicit requirements for similar commodities, printing, and services to determine the best methods for acquisition. The Director may grant exceptions to spending units from utilizing existing statewide contracts, blanket orders, price agreements, etc., on a case-by-case basis if the Director determines these exceptions are in the best interest of the State.

7.5. Non-Competitive Procurement.

The Director of Purchasing may approve the purchase of commodities and/or printing directly from a vendor without competitive bidding, if any of the following conditions exist:

- (a.) The item cannot be obtained through ordinary purchasing procedures.
- (b.) The item is unique and not available from any other source.
- (c.) The item is available from a State spending unit or other institution with preference under the West Virginia Code, provided the price, availability, and quality are comparable to those in the open market.

7.6. Emergency Procurement.

The Director or an appointed designee shall issue prior written approval for emergency purchases exceeding \$10,000. An "Emergency Situation" requiring a purchase of

commodities, printing, or services must be the result of unforeseen events or circumstances, including delays by contractors, delays in transportation, or an unanticipated volume of work. Emergency purchases are not used for hardship resulting from neglect, poor planning, or lack of organization by the spending unit. Competitive bids are obtained if possible.

7.7. Used Equipment.

The Director shall issue prior approval for used equipment to be purchased directly without competitive bids.

7.8. Agreements.

The Director may negotiate for technical, professional, or other services not routinely available within State government by a procurement method known as an agreement. The Director may delegate the authority to negotiate for technical, professional, or other services to spending units. The agreement must be approved by the Director before issuance.

7.9. Requests for Proposals and Expressions of Interest.

The Director may approve use of Requests for Proposals (RFP), Expressions of Interest (EOI) and other similar types of requests to allow for procurement of certain commodities, services and/or printing. An RFP and/or EOI are awarded based on criteria specified in instructions to bidders, including price.

7.10. Deliveries

Spending units are responsible for the inspecting of goods, ensuring that purchases meet contractual requirements, and maintaining records receipt for goods and services. Routine visits to spending units shall be made by personnel of the Purchasing Division to review and report on purchasing practices and procedures, and to verify that commodities and services delivered conform to contractual requirements.

§148-1-8. Protests.

8.1. Submission of Protest.

8.1.1. Protests based on bid specifications must be submitted no later than five (5) working days prior to bid opening. Protest of purchase order/contract awards must be submitted no later than five working days after the award. The vendor is responsible for knowing the bid opening and award dates. Protests received after these dates may be rejected at the option of the Purchasing Director.

8.1.2. All protests shall be submitted in writing to the Purchasing Division and contain the following information:

- (a.) the name and address of the protestor;
- (b.) the requisition, purchase order/contract numbers;
- (c.) A statement of the grounds of protest;
- (d.) supporting documentation (if necessary); and
- (e.) the resolution or relief sought.

Failure to submit this information shall be grounds for rejection of the protest by the Director of the Purchasing Division.

8.2. Protest Review.

8.2.1. The Purchasing Director or his/her designee shall review the matter of protest and issue a written decision. A hearing may be conducted at the option of the Purchasing Director or assigned designee. Continuation or delay of purchase order/contract award is at the discretion of the Purchasing Director.

8.2.2. The Purchasing Division may refuse to review any protests when the matter involved is the subject of litigation before a court of competent jurisdiction; if the merits have previously been decided by a court of competent jurisdiction; or if it has been decided in a previous protest by the Purchasing Division. The provisions of this Subsection do not apply where the court requests, expects, or otherwise expresses interest in the decision of the State.

§148-1-9. Late Payments.

9.1. Before July 1, 1991.

Payments on completed public contracts entered into after July 1, 1990 and before July 1, 1991, in accordance with W. Va. Code §5A-3-1 et seq., except public construction contracts relating to roads or bridges let by the Commissioner of the Division of Highways, shall bear interest at the current rate determined by the State Tax Commissioner beginning on the ninety-first day, unless the contracting spending unit reasonably determines that delay in completing the contract or accepting payment is the fault of the vendor.

9.2. On or After July 1, 1991.

9.2.1. On or after July 1, 1991, if a properly registered and qualified vendor who supplies services of commodities to any State spending unit, except the Division of Highways, the Public Employees Insurance Agency, and the Department of Health and Human Services, does not receive payment within sixty (60) days following receipt by that spending unit of a legitimate, uncontested invoice, the vendor shall receive interest at the current rate determined by the State Tax Commissioner from the sixty-first day until the date the State check is mailed to the vendor.

9.2.2. On or after July 1, 1992, if a properly registered and qualified vendor who supplies services or commodities to the Division of Highways, the Public Employees Insurance Agency or the Department of Health and Human Resources does not

receive payment within sixty (60) days following receipt by the spending unit of a legitimate uncontested invoice, the vendor shall receive interest at the current rate determined by the State Tax Commissioner from the sixtieth day until the date the State check is mailed to the vendor.

- 9.2.3. An invoice is considered received on the date marked as received by the spending unit, or three (3) days after the date of postmark which ever is earlier.

The initial receiving spending units shall indicate the date of receipt on the invoice, and attach the accompanying envelope or any other explanatory documentation evidencing the date of receipt and tolling of the time limits for payments.

- 9.2.4. An invoice is considered legitimate and uncontested if the commodities or services covered by the invoice have been delivered and accepted or fully performed and accepted; if the appropriate authorization for delivery of the commodities or services has been received by the vendor; and if the invoice is correct in all respects, as determined by the spending unit reviewing the invoice. If an invoice is contested for any reason at any level of processing, after the contest has been resolved the time for accruing interest begins.

If the Purchasing Director receives an invoice prior to acceptance of the commodities or services, the invoice becomes legitimate and uncontested, and considered received upon acceptance of the commodities or services.

- 9.2.5. The State spending unit initially receiving the legitimate uncontested invoice shall process the invoice for payment within ten (10) days of receipt, with exceptions for the Department of Health and Human Resources, the Division of Highways, and the Public Employees Insurance Agency, who have fifteen (15) days from receipt to process the invoice for payment. Although all invoices should be processed promptly, invoices subject to a cash discount should be processed expeditiously to benefit the spending unit.
- 9.2.6. Any other State spending unit charged by law with processing requisitions for payment of legitimate uncontested invoices shall either process the requisition or reject it for good cause within ten (10) days after the State spending unit receives the requisition. If the State spending unit fails to process or reject the requisition for good cause within ten (10) days, then it is liable for payment of that portion of interest attributable to its actions.

§148-1-10. Violations.

- 10.1. Any person who authorizes or approves a purchase or contract in violation of West Virginia Code, this rule or any policy or procedure adopted by the Purchasing Division is personally liable for the cost of the purchase or contract. Purchases and contracts violating the West Virginia Code and/or this rule are void and of no effect.

- 10.2. The Purchasing Director shall suspend from bidding on State purchases up to one year, any vendor violating the West Virginia Code, this rule, or any policy or procedure adopted by the Purchasing Division. Appeal of the suspension may be made to the Secretary of Administration.
- 10.3. Any person receiving anything of value from a known interested party in awarding a purchase order is subject to the provisions of W. Va. Code §5A-3-28, 29, 30 and 31, unless otherwise determined by the Ethics Commission.

148-1

9050

1 Bill-Admin

H. B. 2506

2

(By Delegates Hunt, Linch, Compton, Faircloth,
Jenkins and Riggs)

3

4

[Introduced February 1, 1999; referred to the
Committee on Finance then the Judiciary.]

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9

10 A BILL to amend and reenact section one, article two,
11 chapter sixty-four of the code of West Virginia, one
12 thousand nine hundred thirty-one, as amended, relating
13 to authorizing the department of administration and
14 the auditor to promulgate a legislative rule relating
15 to purchasing.

16 *Be it enacted by the Legislature of West Virginia:*

17 That section one, article two, chapter sixty-four of
18 the code of West Virginia, one thousand nine hundred
19 thirty-one, as amended, be amended and reenacted, to read
20 as follows:

21 **ARTICLE 2. AUTHORIZATION FOR DEPARTMENT OF ADMINISTRATION**
22 **TO PROMULGATE LEGISLATIVE RULES.**

23 **§64-2-1. Department of administration and the auditor.**

1 (a) The legislative rule filed in the state register
2 on the first day of August, one thousand nine hundred
3 ninety-seven, under the authority of section ten-a, article
4 three, chapter twelve of this code, modified by the
5 department of administration and the auditor to meet the
6 objections of the legislative rule-making review committee
7 and refiled in the state register on the eighteenth day of
8 September, one thousand nine hundred ninety-seven, relating
9 to the department of administration and the auditor (state
10 purchasing card program, 148 CSR 7), is authorized.

11 (b) The legislative rule filed in the state register
12 on the third day of August, one thousand nine hundred
13 ninety-eight, authorized under the authority of section
14 four, article three, chapter five-a, of this code, modified
15 by the department of administration and the auditor to meet
16 the objections of the legislative rule-making review
17 committee and refiled in the state register on the first
18 day of October, one thousand nine hundred ninety-eight, ✓
19 relating to the department of administration and the
20 auditor (purchasing, 148 CSR 1), is authorized.

21

22 NOTE: The purpose of this bill is to authorize the
23 Department of Administration and the Auditor to promulgate
24 a legislative rule relating to Purchasing.

1 Strike-throughs indicate language that would be
2 stricken from the present law, and underscoring indicates
3 new language that would be added.