

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #4

FILED
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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Department of Administration TITLE NUMBER: 148

CITE AUTHORITY West Virginia Code Section 5A-3-4

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

Curt Polun

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148 CSR 1

TITLE 148
LEGISLATIVE RULES
WEST VIRGINIA DEPARTMENT OF ADMINISTRATION

PURCHASING DIVISION

SERIES 1
PURCHASING

§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.-- See West Virginia Code §5A-3-4.

1.3. Filing Date.--

1.4. Effective Date.--

1.5. Repeal of Former Rules.--148 CSR 1

These rules repeal and replace the former Legislative Rules, West Virginia Department of Finance and Administration, Series 1, Purchasing Division, effective July 1, 1989.

§148-1-2. Definitions.

As used in this rule, all terms have the same meaning as provided in West Virginia 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 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 West Virginia Code §5F-1-2.

§148-1-3. Applicability.

This legislative rule applies to all spending units of State government except those statutorily exempted. Exempted spending units may elect to follow this rule.

All purchases must be approved by the secretary or head of the spending unit, or his designee, and the name of such designee shall be filed with the Director.

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

The director shall have the power and duty to:

(a) Ensure 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 the 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 from within State government or from 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, shall be to identify commodities and printing available for purchase from nonprofit sheltered workshops, evaluate the needs for such commodities and printing, coordinate the workshops in their production efforts and provide information to the workshops about available opportunities within State government for the purchase of commodities or printing;

(n) Resolve conflicts between State or other institutions with preference for State purchases in accordance with the West Virginia Code, or between a spending unit and such an institution, basing such decision on quality, price and the efficient and economical operation of State government;

(o) Prescribe the manner of inspecting all deliveries of commodities, and make chemical and physical tests of samples submitted with bids and samples of deliveries to determine compliance with specifications;

(p) Collect an annual fee in the amount of \$45.00 to be paid by all vendors registering or already registered. The Director may waive the annual fee at any time when, in the discretion of the Director, waiver of the fee would be in the best interest of the State of West Virginia;

(q) Director's Remedies--Implement the following remedies when appropriate circumstances arise:

(1) In the event that a vendor fails to honor any contractual term or condition, reserve the right to cancel the contract and re-award the purchase order to the next lowest bidder. The vendor failing to honor contractual obligations may be held responsible for all differences in cost.

(2) Declare a vendor non-responsible or non-responsive and refuse to award a purchase order. All such instances shall be substantiated in writing. Such documentation shall be considered a public document and shall be available for inspection at all reasonable times.

(3) 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 that such vendor has violated any of the provisions of the terms and 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 shall be considered adequate grounds for suspension:

(i) A vendor has exhibited a pattern of poor performance in fulfilling his 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, or repeated instances of poor performance;

(ii) The vendor has breached any contract entered into pursuant to the provisions of West Virginia Code §5A-3-1 et seq. or this rule; or

(iii) The vendor has been convicted of any federal, state or local law punishable as a felony, directly related to the performance of a contract entered into pursuant to West Virginia Code §5A-3-1 et seq. or this rule.

§148-1-5. Registration, Bidding and Award.

5.1. Registration of Vendors.

(a) All vendors shall be registered with the Purchasing Division.

(b) Vendors shall register by filing the form provided by the Purchasing Division which shall be completed according to its instructions.

(c) 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.

(d) An annual fee of \$45.00 will be assessed all vendors who have received orders for goods and/or services exceeding \$1,000. A vendor with multiple locations shall be required to pay only one fee when operating under one Federal Employer Identification Number (FEIN).

(e) The Director may waive the registration requirements in the case of any vendor that is a sole source provider.

(f) Bids will not be accepted from any vendor not properly registered with the Purchasing Division prior to issuance of a purchase order.

5.2. Bidding.

(a) All bids shall be F.O.B. destination unless otherwise clearly indicated by the vendor in the bid.

(b) Bids shall be submitted prior to the date and time of the bid opening on the Request for Quotation forms provided to the bidder. Substitutions may be made for the Request for Quotation form only if the substituted terms, conditions and/or provisions are approved by the Director.

(c) Bidders are required to submit their bid and/or proposal to the Purchasing Division and to submit an exact copy to the State Auditor prior to the specified date and time of the bid opening. Bids received after the required time and date will be rejected.

The bid received by the Purchasing Division shall be signed by an authorized representative of the bidder. A corporate signature without an individual name shall not be construed as an acceptable signature.

(d) Bids by facsimile machine may be accepted, at the discretion of the Director. 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 of the bid sent by facsimile transmission and a copy must be received within two (2) working days of the bid opening date by the Purchasing Division and the State Auditor, respectively.

(e) 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 shall be open for public inspection after the award has been made.

(f) A written change of a sealed bid is permitted before the bid opening. Written changes must be submitted to the Purchasing Division and State Auditor prior to the date and time of the bid opening. Changes by facsimile machine shall be made in the manner provided in Section 5.2(d) of this rule.

(g) 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 to reject a bid, the public file must contain documented evidence that all of the above conditions exist.

(h) Price adjustment shall be allowed on any purchase order if specific provisions for price adjustment have been incorporated

in the Request for Quotation and the purchase order. All such requests for price adjustment shall be made 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 shall rest with the Director.

5.3. Vendor's Rights and Duties.

(a) Each vendor shall be solely responsible for the delivery of a bid to the Purchasing Division and 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.

(b) The official time clock of the Purchasing Division, for the purpose of receipt of bids, will be displayed in the offices of the Purchasing Division.

(c) Vendors failing to return quotation forms may be removed from the bidding list.

(d) If there is a conflict between the extension price and the unit price, the unit price shall prevail.

(e) 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, delivery may be required within ten (10) days after receipt or order.

(f) Any changes made by the vendor in the specifications listed in the bid request must be clearly stated. If changes are not stated, it will be assumed that items offered meet the specifications.

(g) Vendors are responsible for the accuracy of the information on the bid envelopes.

(h) Vendors may write, visit, or telephone the Purchasing Division to obtain official bid forms.

(i) All sales to the State of West Virginia are exempt from Consumer's Sales Tax or Excise Tax by blanket state exemption and blanket federal exemption.

(j) If a vendor has been 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.

The hearing shall be documented and an official record shall be 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. Such appeal must be made within five (5) working days of issuance of the decision of the Director. The Secretary of Administration, or his 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.

5.4. Awards.

(a) Award will be made to the lowest responsible bidder. Consideration will be given to 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 multiple and/or split awards may be made when determined to be in the best interest of the State by the Director. Occasionally, purchase orders may be issued which impose no obligation on the State to take delivery of a product and/or service and as such, these purchase orders shall be issued as blanket purchase orders or price agreements.

(b) 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, a written explanation must be placed in the purchase order file.

(c) When tie bids are received, the award will be 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 deemed prudent by the Director.

(d) Vendor Preference--All commodities and printing made upon competitive bids, with the exception of construction, shall be subject to a resident vendor reciprocity preference equal to the amount of preference/reciprocity applied or granted by another State. The amount of the preference shall be equal to the amount of the preference applied by the other state. A resident vendor is one who:

(i) Is authorized to transact business within the State by appropriate authorities;

(ii) Maintains an office in the State;

(iii) 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;

(iv) Has actually paid, and not just applied to pay, business taxes; and

(v) When selling tangible personal property, has available for delivery a stock of materials of the type being offered and of a reasonable quantity.

If any of these requirements or provisions jeopardize the receipt of federal funds, then such requirements or provisions shall be null and void and of no force and effect.

For construction services, the rules and regulations promulgated by the Secretary of the Department of Tax and Revenue as to preference shall be followed.

(e) Requirements for bonds and deposits--The Director shall determine the applicability and amount of bonds and/or deposit required of vendor at any time, if, in his judgement, such 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 such requirements will usually be incorporated into the Request for Quotation and purchase order.

When any contract has been 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. The Purchasing Division, upon receipt of the notification, shall then return the check or deposit to the vendor.

§148-1-6. Purchasing Methods.

6.1. General.

(a) Specifications shall be written to maximize and encourage competition. In certain cases, a "brand name or equal" may be used as a specification.

(b) Contracts requiring more than six (6) months to fulfill must be filed with the State Auditor.

6.2. Purchases of \$10,000 or Less.

Spending units may make purchases in the amount of \$10,000 or less of certain commodities, printing and services under guidelines established by the Director. Records of such purchases must be maintained on file with the spending unit and made available for public inspection during the normal office hours of the spending

unit.

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

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

(b) Requests for offers or bids estimated to cost in excess of \$10,000 shall be advertised at least two times, whenever possible, using advertising media such as the Purchasing Bulletin, newspapers, trade journals, Purchasing bulletin board and journals in the Purchasing offices, or any other media the Director considers advisable. The requirement to advertise may be waived by the Director when he determines it to be in the best interest of the State.

6.4. 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 determined to be in the best interest of the State.

6.5. 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 of a unique nature and not available from any other source; or (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.

6.6. Emergency Procurement.

Emergency purchases exceeding \$10,000 must receive the prior written approval of the Director or his designee. 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 shall not be used for hardship resulting from neglect, poor planning or lack of organization by the spending unit. Competitive bids must be obtained if possible.

6.7. Used Equipment.

Used equipment may be purchased directly without competitive bids upon prior approval of the Director.

6.8. 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.

6.9. Request 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 shall be awarded on the basis of the criteria specified in the instructions to the bidders, including price.

6.10. Deliveries.

Spending units are responsible for inspection of goods, ensuring purchases meet contractual requirements, and maintaining records of receipt for goods and services. Routine visits to spending units will 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.

§148-1-7. Protests, Reconsideration and Appeals.

7.1. Protests.

(a) Protests based on a violation of State law or regulation must be filed within five (5) working days after the bid opening. Protests based on specifications or improprieties in any type of solicitation which are apparent prior to the bid opening or closing date for receipt of bids or proposals must be filed not later than

five (5) days prior to the bid opening or closing date. Any other protest must be filed no later than five (5) days following award of the contract.

(b) The protest must be filed in writing with the Director and contain the name and address of the protestor, the requisition number of the bid or purchase order number, a statement of the grounds for protest and supporting documentation, and the relief sought.

(c) The Director will review the protest and issue a decision in writing. In the event a conference on the merits of the protest is requested by the protestor, the Director will set a time and place for the conference. Following the conference, the Director will issue a decision in writing to the protestor.

7.2. Reconsideration and Appeals.

(a) Reconsideration of a decision on a protest or an appeal of a suspension by the Director may be requested by an aggrieved party to the Secretary of Administration. A request for reconsideration or appeal shall be in writing and contain the name and address of the aggrieved party, the requisition number of the bid or purchase order number, a statement of the grounds for reconsideration or appeal and supporting documentation, and the relief sought.

(b) The Secretary of the Department of Administration, or his designee, will review the request for reconsideration or appeal and issue a decision in writing. In the event a conference on the merits is requested by the aggrieved party, the Secretary of the Department of Administration, or his designee, will set a time and place for the conference. Following the conference, the Secretary, or his designee, will issue a decision in writing to the aggrieved party.

7.3. General.

The State may refuse to decide any protest, reconsideration or appeal where the matter involved is the subject of litigation before a court of competent jurisdiction, or has been decided on the merits by such court. The foregoing shall not apply where the court requests, expects or otherwise expresses interest in the decision of the State.

§148-1-8. Late Payments.

8.1. Before July 1, 1991.

Payments on completed public contracts entered into after July 1, 1990 and before July 1, 1991, in accordance with West Virginia 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.

8.2. On or After July 1, 1991.

(a) On or after July 1, 1991, if a properly registered and qualified vendor who supplies services or 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 from the sixty-first day until the date the State check is mailed to the vendor at the current rate determined by the State Tax Commissioner.

(b) 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 such spending unit of a legitimate uncontested invoice, the vendor shall receive interest from the sixtieth day until the date the State check is mailed to the vendor at the current rate determined by the State Tax Commissioner.

(c) An invoice shall be considered received at the earlier of the date marked as received by the spending unit or three (3) days after the date of the postmark made by the United States postal service as evidenced on the envelope in which the invoice was mailed.

The initial receiving spending unit shall indicate the date of receipt on the invoice, attaching the envelope in which the invoice was mailed or other explanatory documentation evidencing the date of receipt and tolling of the time limits for payment.

(d) An invoice shall be 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, only when such contest has been

resolved does the time for accruing interest begin.

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

(e) The State spending unit initially receiving the legitimate uncontested invoice shall process the invoice for payment within ten (10) days from receipt, except that the Department of Health and Human Resources, the Division of Highways and the Public Employees Insurance Agency shall have fifteen (15) days from receipt to process the invoice for payment. Although all invoices should be processed in a prompt manner, invoices subject to a cash discount should be processed in such a manner as to avail the spending unit of the discount, if possible.

(f) 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 such State spending unit receives the requisition. If such State spending unit fails to process or reject the requisition for good cause within ten (10) days, then it shall be liable for payment of that portion of interest attributable to its actions.

§148-1-9. Violations.

(a) Any person who authorizes or approves a purchase or contract in a manner in violation of the West Virginia Code, this rule or any policy or procedure adopted by the Purchasing Division shall be personally liable for the cost of such purchase or contract. Purchases or contracts violating the West Virginia Code and/or this rule shall be void and of no effect.

(b) Any vendor violating the West Virginia Code, this rule, or any policy or procedure adopted by the Purchasing Division may be suspended from the right to bid on State purchases for a period of up to one year. Appeal of the suspension may be made to the Secretary of Administration.

(c) Any person receiving anything of value from a known interested party in the awarding of a purchase order shall be subject to the provisions of West Virginia Code §§5A-3-28, 29, 30 and 31, unless otherwise determined by the Ethics Commission.



WEST VIRGINIA LEGISLATURE
 LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
 Room M-438, State Capitol
 Charleston, West Virginia 25305
 (304) 340-3286

Senator Lloyd Jackson, Co-Chairman
 Delegate Patrick H. Murphy, Co-Chairman

Debra A. Graham, Counsel
 Michael McThomas, Associate Counsel
 Marie Nickerson, Admr. Assistant

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

January 10, 1991

FILED
 1991 JAN 23 PM 3:24
 OFFICE OF WEST VIRGINIA
 SECRETARY OF STATE

TO: Ken Hechler, Secretary of State, State Register

TO: The Honorable Chuck Polan, Secretary
 Department of Administration
 State Capitol
 Charleston, WV 25305

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Purchasing

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

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

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

cc: Ron Riley
 Dept. of Administration
 Capitol Complex E-108
 Charleston, WV 25305