

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

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2008 JUL 10 10:15 AM

Form #2

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Department of Administration, Purchasing Division TITLE NUMBER: 148

RULE TYPE: Legislative CITE AUTHORITY: 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 Division

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 14, 2008 AT 9:30 am ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Donna Lipscomb, Executive Coordinator

WV Department of Administration

1900 Kanawha Boulevard, East
Building 1, Room E-119

Charleston, WV 25305

304-558-3392

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Agency: Department of Administration
Purchasing Division

Rule Type: Legislative

Title Number: 148

Cite Authority: 5A-3-4

STATEMENT OF CIRCUMSTANCE AND BRIEF SUMMARY

The passage of House Bill 4664 during the 2008 legislative session makes changes to the purchasing statute. As a result of the passage of this bill, the Department of Administration must make changes to the existing legislative rules so there is no conflict between the Statute and the Legislative Rules. The proposed changes eliminates language which states that the Director must determine that there are no additional funds available from any other source prior to negotiation.

TITLE 148
DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION

SERIES 1
PURCHASING

2007 JUL 13 11:00 AM
OFFICE OF THE ATTORNEY GENERAL

§148-1-1. General.

1.1. Scope. -- This Legislative Rule is an explanation and clarification of operative procedures for the purchase of commodities, services or printing by the Purchasing Division of the Department of Administration.

1.2. Authority. -- W. Va. Code, §5A-3-4.

1.3. Filing Date. -- April 13, 2007.

1.4. Effective Date. -- July 1, 2007.

§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:

2.1. "Director" means the Director of the Purchasing Division of the Department of Administration.

2.2. "F.O.B. destination" and "free on board destination" mean the seller or vendor must transport or pay for the transportation of commodities, services or printing to the point of destination specified in the contract

2.3. "Secretary" means the head of a department, as appointed by the Governor, as defined in W. Va. Code §5F-1-2.

2.4. "Best Value Procurement" means a purchasing method used in awarding a contract based on evaluating and comparing all established quality criteria where cost is not the sole determining factor in the award.

§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. The person(s) named should take available purchasing training and have responsibility for the function of purchasing. Each spending unit shall process all purchases through this person(s), who shall be responsible for correspondence and communication with the Purchasing Division.

3.3. All automated systems prescribed by the Director as statewide systems shall be mandatory for spending units.

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

The Director shall:

4.1. Ensure that purchases and contracts for commodities, services or printing are based on competitive bid whenever possible. The Director may establish a list of commodities or services that are not possible to submit for competitive bid. The Director shall approve the list before the beginning of each fiscal year and shall make the list available for public review. Spending units may purchase the commodities and services on the list directly from the vendor and are not required to have contracts for purchase of those items approved by the Purchasing division. A spending unit's request to add commodities and services to the list must be accompanied by written justification and an explanation of why competitive bids are not possible. Nothing in this section supercedes or replaces the Attorney

General's authority to approve contracts as to form.

4.2. Purchase or contract for, in the name of the State, the commodities, services or printing required by the spending units of State government;

4.3. Prescribe the manner in which commodities, services or printing shall be purchased, delivered, stored, and distributed;

4.4. Review specifications and descriptions before soliciting bids to ensure that specifications and descriptions do not favor a particular brand or vendor;

4.5. Accept or reject any and all bids in whole or in part;

4.6. Waive minor irregularities in bids or specifications;

4.7. Apply and enforce standard specifications;

4.8. Transfer to or between spending units, or sell surplus, obsolete, or unused commodities, services or printing;

4.9. Direct the central storerooms of supplies for spending units;

4.10. Prescribe the amount of deposit or bond to be submitted with any bid or contract;

4.11. Prescribe contract provisions for liquidated damages, remedies or other damages provisions in the event of vendor default;

4.12. Exempt purchases of commodities, services or printing 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.

4.13. Employ a person whose responsibilities, in addition to other duties, are to identify

commodities, services or printing available for purchase from nonprofit sheltered workshops; evaluate the needs for the commodities, services or printing; coordinate workshops in their production efforts; and provide information to workshops about available opportunities within State government for the purchase of commodities, services or printing.

4.14. 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

4.15. Prescribe the manner of inspection for all deliveries of commodities, services or printing with bids and samples to assure compliance with specifications;

4.16. The Director shall appoint inspectors to review and audit spending unit requests and purchases and other transactions and performance that fall under the authority of the division. Inspectors may also provide relevant training for agency personnel. Inspectors shall have access at any and all times to personnel, records, reports, and other documents as needed.

4.17. Collect an annual fee in the amount of \$125.00 to be paid by all vendors except for purchasing card vendors providing travel related services or receiving an aggregate total yearly payment less than \$25,000.00 from a spending unit. 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.

4.18. Suspend or reduce purchasing authority for any spending unit that fails to report multiple contract awards that are deemed by the Director to circumvent the \$25,000 threshold within a twelve (12) month period. In the event of suspension or reduction of purchasing authority, the Director shall prescribe revised procedures and limits which may require all spending unit purchases, regardless of amount, be made by the Purchasing

Division.

§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, or State law. A suspended vendor may appeal the decision of the Director to the Secretary of Administration as provided in subsection 5.2. 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, services or printing, 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, 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.

5.2. 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. Except for purchasing card vendors providing travel related services or receiving an aggregate total yearly payment less than \$25,000.00 from a spending unit, all vendors shall register with the Purchasing Division.

6.1.2. Vendors shall register by completing the vendor registration and disclosure statement 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. Except for purchasing card vendors providing travel related services or receiving an aggregate total yearly payment less than \$25,000.00 from a spending unit, vendors receiving orders for goods or services exceeding \$1,000, regardless of payment method, shall pay an annual fee of \$125.00. 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 award any contract to any vendor not properly registered with the Purchasing Division.

6.1.7. The vendor must be licensed and in good standing in accordance with any and all state and local laws and requirements by any state or local agency of West Virginia, including, but not limited to, the West Virginia Secretary of State's Office, the West Virginia Tax Department, West Virginia Insurance Commission, or other state agencies or political subdivisions. The vendor must provide all necessary releases to obtain information necessary to verify that the vendor is licensed and in good standing with the above entities.

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 or proposals prior to the date and time of the bid opening on the Request for Quotation ("RFQ") forms provided by the Director to the bidders. Substitutions for the RFQ form are acceptable only if the substituted terms, conditions, or provisions are approved by the Director. Bidders shall submit their bids or proposal to the Purchasing Division. The Director shall reject bids received after the designated time and date. The Director may not accept any bid or part of any bid submitted to any other state spending unit or any other recipient.

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 electronic transmission as defined in West

Virginia Code §5A-1-1(6). Bids by electronic transmission must be received by the Purchasing Division 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 electronic transmission 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 electronic transmission. Bids submitted via facsimile may not be sealed until receipt by the Purchasing Division. The Purchasing Division makes no guarantee of confidentiality and accepts no responsibility for completeness of bids or transmission.

6.2.5. Copies of bids may be open for public inspection in the office of the Purchasing Division at any time after the completion of the public bid opening. No original bid shall be removed from the presence of a purchasing division representative. The Director may prescribe policies to include scanning, copying or other methods of assuring public access. The files of the Purchasing Division are open for public inspection after the award has been made.

6.2.6. A bidder may make a change to a sealed bid before the bid opening. A bidder shall submit changes in writing or by electronic transmission to the Purchasing Division and be received by the Purchasing Division prior to the date and time of the bid opening. A bidder shall make changes by facsimile machine or other electronic transmission in the manner provided in Subdivision 6.2.4 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, services 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 RFQ 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. The Director shall consult with spending units on contracts issued exclusively for the spending unit.

6.3. Vendors' Rights and Duties.

6.3.1. Each vendor is solely responsible for delivering a bid to the Purchasing Division. Bids must be received at the Purchasing Division 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. If there is a conflict between the extension price and the unit price, the unit price prevails.

6.3.4. 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.

6.3.5. 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.

6.3.6. Vendors are responsible for the accuracy of the information on and in the bid envelopes.

6.3.7. Vendors may contact the Purchasing Division to obtain official bid forms.

6.3.8. 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.

6.3.9. 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 meeting minimum specifications. 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 or split awards when they are in the best interest of the State.

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, services or 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 Revenue. In addition, all purchases of commodities, services or 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.

Finally, the Director shall apply all vendor preferences set forth in W. Va. Code §5A-3-37.

6.4.5. Requirements for bonds and deposits- The Director shall determine the applicability and amount of bonds 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, litigation bond or any other security acceptable to the Director, payable to the State of West Virginia. Neither personal checks or company checks are acceptable. Provision for these requirements is usually incorporated into the RFQ 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.

6.5. Specifications

6.5.1. Specifications are written to encourage competition and meet the needs of the spending units. No person may write or attempt to influence the drafter of specifications to limit

competition or favor or disfavor a particular vendor.

6.5.2. Where appropriate, the Director shall develop standard specifications that govern statewide and other contracts used by multiple agencies. Standard specifications shall include information relating to the cost of maintenance and expected life of the commodities, services or printing when the Director determines there are applicable nationally accepted standards. Use of standard specifications is mandatory unless an exemption is granted by the Director.

6.6. Bid Evaluation

Evaluators of bids, proposals or solicitations must certify that no conflict of interest exists, including financial or personal, with any vendor or vendor representative in the evaluation of the specific solicitation. During the evaluation of bids, proposals or solicitations in excess of \$25,000, evaluators may not contact vendors, except through the Purchasing Division buyer or with his/her consent. No spending unit personnel may have any communication concerning the particular solicitation, bid, evaluation or award with any vendor during the solicitation, bid, evaluation or award periods except through the Purchasing Division buyer or with his/her consent.

§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. Spending units may not use brand names to restrict competition. If, however, brand names are used, the brand name shall be followed by the phrase "or equal" to promote and encourage competition.

7.1.3. Contracts requiring more than six (6) months to fulfill are filed with the State

Auditor.

7.2. Purchases of \$25,000 or less.

Spending units may make purchases of \$25,000 or less per transaction for certain commodities, services or printing pursuant to the most current Purchasing Division procedures and requirements established by the Director. The spending unit shall keep on file records of these purchases and make them available for public inspection during the normal office hours of the spending unit.

7.3. Purchases In Excess of \$25,000

7.3.1. Purchases of commodities, services or printing estimated to be in excess of \$25,000 shall be made by the Purchasing Division.

7.3.2. Request for offers or bids estimated to cost in excess of \$25,000 shall be advertised using advertising media such as the Purchasing Bulletin, newspapers, trade journals, 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, services or printing to supply the repetitive needs of the State spending units in the form of statewide contracts, blanket orders, or spending unit contracts. Use of these contracts by the agencies is mandatory. The Director may solicit requirements for similar commodities, services or printing to determine the best methods for acquisition. The Director may grant exceptions to spending units from utilizing existing statewide contracts, or agency contracts, etc., on a case-by-case basis if the Director determines these exceptions are in the best interest of the State.

7.5. Sole Source Procurement.

7.5.1. The Director of Purchasing may approve the purchase of commodities, services 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; 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.

7.5.2. Agencies are encouraged to solicit competition rather than process a sole source request. The Director has authority to reject sole source requests whenever competition is believed to be available.

7.5.3. The spending unit must provide written documentation to the Director setting forth the basis for the sole source procurement and the specific efforts made to determine the availability of other sources.

7.5.4. All sole source requests made to the Director shall be publicly advertised and made available for review by registered bidders. Should this advertisement cause inquiry and concern or requests to bid by prospective bidders or other interested parties, the Director may: (a) reject the sole source request and require the spending unit to submit a requisition for public advertisement and formal bidding; (b) accept the request and approve the sole source; or (c) take other action as necessary.

7.5.5. The Director may require potential sole source requests at any dollar level above \$2,500 to be subject to review, approval and processing in the same manner described in 7.5.4.

7.5.6. The Director shall issue prior approval or disapproval for the purchase of used equipment directly from the vendor without competitive bids. If disapproved, the Director

shall return the request to the spending unit and direct another method of purchasing.

7.6. Emergency Procurement.

The Director or an appointed designee shall review a spending unit's written request and issue written approval or disapproval for emergency purchases exceeding \$25,000. An "Emergency Situation" requiring a purchase of commodities, services or printing 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 shall be obtained if possible.

7.7. Requests for Proposals and Expressions of Interest.

7.7.1. 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 or printing. An RFP or EOI are awarded based on criteria specified in instructions to bidders, including price in RFP's.

7.7.2. Where practical, Requests for Quotations (RFQs) shall be the primary method of competitive procurement. Any spending unit desiring to use an RFP shall provide written justification to the Director.

7.7.3. The Director may use best value procurement, except for government construction contracts, when he or she determines, in writing, such contract to be in the best interest of the state. All best value procurements shall be made after formal advertisement and inclusion of award criteria in the RFP. No proposal may be evaluated using any criteria other than the criteria specified in the RFP. All RFP awards shall be made to the highest scoring vendor.

7.8. Deliveries

7.8.1. Spending units are responsible for the inspection of commodities, services or printing, ensuring that purchases meet contractual requirements, and maintaining records receipt for commodities, services or printing 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, services or printing delivered conform to contractual requirements.

7.9. Purchases from contracts issued by other public agencies and entities

7.9.1. The Director may approve a request by a spending unit to make a purchase from contracts issued by agencies of the federal government, agencies of other states, other public bodies or other state agencies. The Director may require the use of a contract issued by another public organization or a spending unit to make a purchase from contracts issued by other public agencies and entities. The Director may participate in cooperative purchases with other public agencies and entities. In all cases, these contracts or cooperative arrangements shall be from valid properly awarded contracts and considered by the Director to be available and financially advantageous and comparable to what can be obtained by competitive bid. The Director shall require spending units to prove that their requests to use such contracts:

(a) Do not conflict with existing State of West Virginia contracts unless the prices on the contracts issued by other public agencies and entities is substantially lower than the state contract based on an equal comparison. No price comparison may be based on differing specifications as determined by the Director;

(b) Will not cause a West Virginia vendor that offers like products and services to lose substantial business, unless the Director determines based on submitted documentation from the spending unit that the difference in price is so great that the State's best interest is served by using the contracts issued by other public

agencies and entities; and

(c) Does not cause extensive hardship to any spending unit offered preference under the West Virginia Code.

7.9.2. All requests to use such contracts shall be submitted in advance to the Director with necessary evidence and documentation. The Director shall approve only those requests submitted with evidence that justifies use of such contracts. Any request that is not supportable shall be returned to the spending unit.

7.10. Multiple Awards

7.10.1. The Director may elect to award a contract to more than one vendor when the Director determines in writing such action would be in the best interest of the State. In arriving at a determination, the Director will consider the following factors, insofar as they are applicable:

- (1) The quality, availability, and reliability of the supplies, materials, equipment, or service and their adaptability to the particular use required;
- (2) The ability, capacity, and skill of the bidder;
- (3) The sufficiency of the bidder's financial resources;
- (4) The bidder's ability to provide maintenance, repair parts, and service;
- (5) The compatibility with existing equipment;
- (6) The need for flexibility in evaluating new products on a large scale before becoming contractually committed for all use; and
- (7) Any other relevant factors.

7.10.2. In situations where a multiple award is necessary, the Director shall place a written explanation into the public file. If a

multiple award is requested by a spending unit, that spending unit shall provide written justification to the Director. The Director's decision shall be final in all cases.

7.11. Negotiation When All Bids Exceed Available Funds

7.11.1. Spending units shall submit a valid maximum budgeted amount for each requisition or RFP to the Purchasing Division. The maximum budgeted amount may not be disclosed to any vendor prior to the bid opening and may not be changed after the bid opening.

7.11.2. If all bids meeting requirements exceed the funds available for the purchase, ~~and the Director determines in writing that there are no additional funds available from any other source to permit an award and the best interest of the State will not permit the delay attendant to a resolicitation under revised specifications or for revised quantities;~~ the Purchasing Division may negotiate a lower price within budget with the lowest bidder meeting specifications. If the negotiation does not lead to the budget amount being met, the Director may negotiate a lower price with the next lowest bidder and continue negotiations with participating bidders after negotiations close with the preceding bidder. In conducting discussions, there may be no disclosure of any information derived from proposals submitted by competing bidders.

7.11.3. If the Purchasing Division solicits bids utilizing a best value procurement, and there is more than one bidder, the Director may negotiate a lower price with the highest ranked bidder. If the Director does not award the contract to the highest scoring bidder, he or she may close negotiations with that bidder and enter into negotiations with the next highest scoring bidder, and may continue to do so in like manner with the remaining responsive and responsible bidders. The Director may not extend an offer to any bidder that is not first extended to the prior bidders in order of rank.

7.11.4. If agencies fail to provide a valid

maximum budgeted amount, the Director shall not permit negotiation.

7.11.5. The Director shall determine the method of negotiation.

7.12. Discussion and Final Offers

7.12.1. The Director may conduct discussions to obtain best and final offers from bidders to assure full understanding of solicitation requirements. If the Director determines that a best and final offer is necessary from one vendor, all vendors shall be afforded the opportunity to provide best and final offers.

7.12.2. All best and final offers shall be treated like a formal bid, except that advertising is not required. All bidders shall provide their best and final offers to the Purchasing Division prior to the date and time specified by the Director.

7.12.3. Government construction contracts and supplies and material are exempt from this section pursuant to 5A-3-11(b)(1) and (2).

7.13. Contract Management

7.13.1. For contracts for commodities and services in the amount of \$1 million or less, the Director may prescribe contract management procedures for all state contracts, except government construction contracts. These procedures may include, but are not limited to:

(a) establishing payment benchmarks to assure the State receives value prior to remitting payment;

(b) conducting regular meetings between spending unit and vendor to assess contract performance;

(c) training spending unit personnel to manage contracts; or

(d) using the Office of Technology Project Manager for its projects.

7.13.2. For contracts for commodities and services in an amount exceeding \$1 million, the following contract management procedures apply:

a. Post Award Conferences.

The agency administrator responsible for administering the contract shall hold a post award conference with the contractor to ensure a clear and mutual understanding of all contract terms and conditions, and the respective responsibilities of all parties. The agenda for the conference shall include, at a minimum, the introduction of all participants and identification of agency and contractor key personnel, and discussion of the following items:

(1) The scope of the contract, including specifications of what the agency is buying;

(2) The contract terms and conditions, particularly any special contract provisions;

(3) The technical and reporting requirements of the contract;

(4) The contract administration procedures, including contract monitoring and progress measurement;

(5) The rights and obligations of both parties and the contractor performance evaluation procedures;

(6) An explanation that the contractor will be evaluated on its performance both during and at the conclusion of the contract and that such information may be considered in the selection of future contracts;

(7) Potential contract problem areas and possible solutions;

(8) Invoicing requirements and payment procedures, with particular attention to whether payment will be made according to milestones achieved by the contractor;

(9) An explanation of the limits of authority of the personnel of both the agency and the contractor.

b. Monitoring

The agency shall develop a comprehensive and objective monitoring checklist which:

- (1) Measures outcomes;
- (2) Monitors compliance with contract requirements; and
- (3) Assesses contractor performance.

c. Reports

The agency shall make the following reports to the Director, on a schedule established by the Director, but not less frequently than once a year:

(1) **Status Reports.** Status reports describe the progress of the work; track the organizational structure of the statement of work in terms of phases, segments, deliverables and products; and describe what work is complete and what work is pending and contrast that status against the contract schedule. If there are any unresolved issues that the agency is contractually obligated to resolve, those issues should be included in the status report and a resolution should be requested.

(2) **Activity Reports.** Activity reports describe all activity on the project, regardless of whether substantial progress has been made toward completion of the project. If payment is based on the number of completed transactions, these activities must be specifically set out in the report.

7.14. Inspection

7.14.1. The agency shall inspect all materials, supplies, and equipment upon delivery

to insure compliance with the contract requirements and specifications.

7.14.2. The agency shall report any discrepancies to the Director immediately.

7.14.3. If unlisted shortages are discovered, the vendor and the Director must be notified immediately.

7.14.4. A contractor may be required to pick up any merchandise not conforming to specifications and replace the merchandise immediately.

7.15. Substitutions.

Substitution of items called for in a contract is not permitted without the Director's prior approval. The Director will not approve substitution of items unless the substituted items are of equal quality and are offered at the same or lower price.

7.16. Cancellations.

7.16.1. The Director may cancel a purchase or contract under any one of the following conditions including, but not limited to:

(a) The vendor agrees to the cancellation;

(b) The vendor has obtained the contract by fraud, collusion, conspiracy, or in conflict with any statutory or constitutional provision of the State of West Virginia;

(c) Failure to conform to contract requirements or standard commercial practices;

(d) The existence of an organizational conflict of interest is identified; or

(e) Funds are not appropriated or an appropriation is discontinued by the legislature for the acquisition.

7.16.2. Notwithstanding other provisions

of this subsection, the Director may cancel a purchase or contract for any reason or for no reason, upon 30 days' notice to the vendor.

7.17. Damages.

7.17.1. A vendor who fails to perform as required under a contract shall be liable for actual damages and costs incurred by the state.

7.17.2. If any merchandise delivered under a contract has been used or consumed by an agency and on testing is found not to comply with specifications, no payment may be approved by the Director for the merchandise until the amount of actual damages incurred has been determined.

7.17.3. The Director shall seek to collect damages by following the procedures established by the Office of the Attorney General for the collection of delinquent obligations.

§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 a purchase order or contract awards must be submitted no later than five (5) 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 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 or 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.

8.2. Protest Review.

8.2.1. The 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 Director or assigned designee. Continuation or delay of a purchase order or contract award is at the discretion of the 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.

§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 or this rule are void and of no effect.

10.2. The 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.

§148-1-11. Internet Auction Sales.

11.1. The state spending unit for surplus property has the exclusive power and authority to sell commodities to the highest bidder by means of an Internet auction site approved by the Director, pursuant to provisions of W. Va. Code §5A-3-45.

11.2. The state spending unit for surplus property may contract with one or more nationally recognized commercial Internet auction sites to coordinate sales of surplus property, pursuant to the provisions of §5A-3-45 of the West Virginia Code and this rule.

11.3. To ensure that organizations eligible under Federal Property Management Regulations (41CFR Chapter 101) have priority in obtaining surplus property, all surplus property will be listed on the West Virginia State Agency for Surplus Property website for a least five (5) working days prior to being made available on an Internet auction site.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Purchasing Division

Type of Rule: Legislative Interpretive Procedural

Agency: Department of Administration, Purchasing Division

Address: 1900 Kanawha Boulevard, East
Building 1, Room E-119
Charleston, WV 25305

Phone Number: 304-558-3392 Email: donna.m.lipscomb@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The adoption of the proposed modifications to the Purchasing Division legislative rules will not have any negative impact to the State of West Virginia. The adoption of the proposed modifications may actually reduce costs for the State by allowing the Purchasing Division to negotiate a lower price.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues			

Rule Title: _____

Rule Title: Purchasing Division

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

The adoption of the proposed modifications may actually reduce costs for the State by allowing the Purchasing Division to negotiate a lower price. The amount of savings long term is unknown as the Department of Administration does not know how effective having the ability to negotiate will have on the State.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: _____

Signature of Agency Head or Authorized Representative