

Form #3

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2015 SEP -1 P 2:45

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

TITLE OF RULE BEING PROPOSED:_____

Authorized Signature

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 31, 2015

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No) Purchasing Division, Department of Administration

2019 Washington St., East P.O. Box 50130

Charleston, WV 25305 (304) 558-2306

LEGISLATIVE RULE TITLE: Purchasing

1. Authorizing statute(s) citation 5A-3-4(a)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
July 27, 2015

b. What other notice, including advertising, did you give of the hearing?

c. Date of Public Hearing(s) *or* Public Comment Period ended:
August 27, 2015

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached 1 No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Jennelle H. Jones jennelle.h.jones@wv.gov

Deputy General Counsel/Legislative Liaison

Building 1, Room E-119
1900 Kanawha Blvd.East

Charleston, WV 25305 ph. (304) 558-4331 fax (304)558-2999

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

b. Date of hearing or comment period:

July 27, 2015 to August 27, 2015

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

July 23, 2015

d. Attach findings and determinations and reasons:

Attached Please see attached

APPENDIX B
FISCAL NOTE FOR PROPOSED RULES

Rule Title: Purchasing

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: Purchasing Division, Department of Administration

Address: 2019 Washington Street, East
P.O. Box 50130
Charleston, WV 25305

Phone Number: 304-558-2306 Email: _____

Fiscal Note Summary

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

The proposed amendments to the rule will have no effect of the existing budget of the Purchasing Division. However, the proposed amendments will have the effect of cost savings on the existing budgets for state spending units that contract for government construction contracts, however the amount of cost savings is impossible to quantify.

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	0.00	0.00	0.00

Rule Title: Purchasing

Rule Title: _____

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

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

The proposed changes to the emergency rule will have no effect on the costs or revenues of the Purchasing Division.

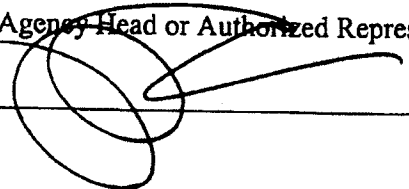
MEMORANDUM

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.

The proposed rule does not affect the costs or revenues of the Purchasing Division. The amendments will, however, have the effect of costs savings for state spending units that enter into government construction contracts, as those contracts will not experience delays for review and approval of the Purchasing Division and Attorney General (as to form only) of the change order prior to any work subject to the change order.

Date: July 22, 2015

Signature of Agency Head or Authorized Representative



Brief Summary

During the 2015 Regular Session, amendments were adopted to Section 6 of Series 1 in Title 148, a Purchasing Division rule, which governs, generally, the review and approval of all contracts by the Purchasing Division. The amendments provide, among other things, that all change orders must be approved by the Purchasing Division and the Attorney General (as to form) prior to the commencement of work. The rule, including the amendments requiring prior approval of change orders, relates to all contracts that the Purchasing Division reviews, such as contracts for the purchase of commodities and services.

On July 1, 2015, the amendments became effective. Prior to that date, change orders were required to be filed with the Purchasing Division in a timely fashion, but prior approval was not required. Since the effective date of the amendments, it has become apparent that a number of government construction contracts duly entered into pursuant to W.Va. Code 5-22-1, *et seq.*, are experiencing or will soon be experiencing lengthy stoppages of work so that the Purchasing Division and Attorney General may review and approve the change orders necessary to complete the contracts.

Statement of Circumstances

Amendments adopted to W.Va. C.S.R. 148-1-6 during the 2015 Regular Session governing, among other things, change orders for contracts approved by the Purchasing Division became effective July 1, 2015. The amendments provide that all change orders must be approved by both the Purchasing Division and the Attorney General prior to the commencement of any work.

The required prior approval of change orders naturally results in stoppage of work on the contract. Government construction contracts are unique from contracts for the purchase of commodities or services, in that the stoppage of work, which can sometimes be lengthy depending on the circumstances, can potentially compromise public safety. Additionally, stoppage of work on construction contracts drives up the cost of completing the contract for taxpayers, government agencies, contractors and many others. In the private sector, owner of the contract and the approval authority are one in the same, thereby making approval of change orders seamless. The lengthy stoppage of work on government construction contracts and their attributable costs as a result of the prior approval of all change orders could have a chilling effect on the willingness of contractors to bid on government construction projects.

148CSR1

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Title 148
Department of Administration
Purchasing Division

2015 SEP -1 P 2:45

Series 1
Purchasing

OFFICE WEST VIRGINIA
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 commodities, services or printing by the Purchasing Division of the Department of Administration.

1.2. Authority. -- W. Va. Code, §§ 5A-3-4, 5A-3-10d, 5A-3-10e

1.3. Filing Date. ~~April 13, 2015.~~

1.4. Effective Date. ~~July 1, 2015.~~

~~1.5. Repeal and Replace -- This rule repeals and replaces the prior version of this rule.~~

§ 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. "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.

2.2. "Bid" or "Bids" means anything that a vendor submits in response to a solicitation that constitutes an offer to the State and includes, but is not limited to, documents submitted in response to a request for quotation, proposals submitted in response to a request for proposal, or proposals submitted in response to an expression of interest.

2.3. "Director" means the Director of the Purchasing Division of the Department of Administration or anyone that the Director has designated to perform a specific task or function.

2.4. "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.

2.5. "Non-Responsible" means not having the capability to fully perform the contract requirements, and lacking the integrity and reliability which will assure good-faith performance.

2.6. "Prequalification" means the process by which the Purchasing Division advertises the opportunity to participate in a reverse auction, a vendor submits documentation for evaluation in response to the advertisement, and the Purchasing Division evaluates that documentation to determine if the vendor is qualified to participate in the reverse auction. This process will be conducted in the same manner as a request for quotation, except that no cost information related to the commodity will be included in the evaluation.

2.7. "Requisition" means a written or electronic request sent by an agency to the Purchasing Division for the purchase of commodities and services.

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

2.9. "Working Days" means Monday through Friday, but excludes Saturday, Sunday, state holidays and days that government offices are closed due to declaration of an emergency.

§ 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 must be filed with the Director. The person(s) named must take at least 10 hours annually of available purchasing training and have responsibility for the function of purchasing. Each spending unit must 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 are mandatory for spending units.

§ 148-1-4. Authority of Director; Buyer Qualifications.

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 or services to the list must be accompanied by written justification and an explanation of why competitive bids are not possible. Nothing in this section supersedes 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 when the Director determines such action to be appropriate;

4.7. Apply and enforce standard specifications;

4.8. Sell surplus, obsolete, or unused commodities, services or printing or transfer the same to or between spending units;

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

4.10. Prescribe the amount of deposit or bond to be submitted;

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

4.12. 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.

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

4.14. 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 Purchasing 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.

4.15. Buyer Qualifications. Anyone employed as a buyer or in a higher level buying position such as senior buyer or buyer supervisor shall at a minimum:

4.15.a. Be a graduate of an accredited college or university, or

4.15.b. Have at least four years of experience in purchasing for any unit of government or for any business, commercial or industrial enterprise.

4.16. Additional Qualifications. The Purchasing Division may require additional qualifications for any of the buying positions listed herein provided that those requirements are implemented uniformly to each job title.

§ 148-1-5. Remedies.

5.1. The Director may require that the spending unit attempt to resolve any issues that it may have with the vendor prior to pursuing a remedy contained herein. The spending unit must document any resolution efforts and provide copies of those documents to the Purchasing Division.

5.2. Contract Cancellation.

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

5.2.a.1. The vendor agrees to the cancellation;

5.2.a.2. The vendor has obtained the contract by fraud, collusion, conspiracy, or is in conflict with any statutory or constitutional provision of the State of West Virginia;

5.2.a.3. Failure to honor any contractual term or condition or to honor standard commercial practices;

5.2.a.4. The existence of an organizational conflict of interest is identified;

5.2.a.5. Funds are not appropriated or an appropriation is discontinued by the legislature for the acquisition.

5.2.a.6. Violation of any federal, state, or local law, regulation, or ordinance.

5.2.b. The Director may cancel a purchase or contract for any reason or no reason, upon providing the vendor with 30 days' notice of the cancellation.

5.2.c. Opportunity to Cure. In the event that a vendor fails to honor any contractual term or condition, or violates any provision of federal, state, or local law, regulation, or ordinance, the Director may request that the vendor remedy the contract breach or legal violation within a time frame the Director determines to be appropriate. If the vendor fails to remedy the contract breach or legal violation or the Director determines, at his or her sole discretion, that such a request is unlikely to yield a satisfactory result, then he or she may cancel immediately without providing the vendor an opportunity to perform a remedy.

5.2.d. Re-Award. The Director may award the cancelled contract to the next lowest responsible bidder (or next highest scoring bidder if best value procurement) without a subsequent solicitation if the following conditions are met:

5.2.d.1. The next lowest responsible bidder (or next highest scoring bidder if best value procurement) is able to perform at the price contained in its original bid submission, and

5.2.d.2. The contract is an open-end contract, a one-time purchase contract, or a contract for work which has not yet commenced.

Award to the next lowest responsible bidder (or next highest scoring bidder if best value procurement) will not be an option if the vendor's failure has in any way increased or significantly changed the scope of the original contract. The vendor failing to honor contractual and legal obligations is responsible for any increase in cost the state incurs as a result of the re-award.

5.3. Non-Responsible. If the Director believes that a vendor may be non-responsible, the Director may request that a vendor or spending unit provide evidence that the vendor either does or does not have the capability to fully perform the contract requirements, and the integrity and reliability necessary to assure good faith performance. If the Director determines that the vendor is non-responsible, the Director shall reject that vendor's bid and shall not award the contract to that vendor. A determination of non-responsibility must be evaluated on a case-by-case basis and can only be made after the vendor in question has submitted a bid. A determination of non-responsibility will only extend to the contract for which the vendor has submitted a bid and does not operate as a bar against submitting future bids.

5.4. Suspension.

5.4.a. The Director may suspend, for a period not to exceed one (1) year, the right of a vendor to bid on procurements issued by the Purchasing Division or any state spending unit under its authority if:

5.4.a.1. The vendor has exhibited a pattern of submitting bids and then requesting that its bid be withdrawn after bids have been publicly opened. For purposes of this provision, a pattern is two or more instances in any 12 month period.

5.4.a.2. The 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, two or more instances of any of the following: violations of law, regulation, or ordinance; failure to deliver timely; failure to deliver quantities ordered; poor performance reports; and failure to deliver commodities, services, or printing at the quality level required by the contract.

5.4.a.3. The vendor has breached a contract issued by the Purchasing Division or any state spending unit under its authority and refuses to remedy that breach.

5.4.a.4. The vendor's actions have given rise to one or more of the grounds for debarment listed in section 5A-3-33d.

5.4.b. Vendor suspension for the reasons listed in section 5.4 above shall occur as follows:

5.4.b.1. Upon a determination by the Director that a suspension is warranted, the Director will serve a notice of suspension to the vendor.

5.4.b.2. A notice of suspension must inform the vendor:

5.4.b.2.A. Of the grounds for the suspension;

5.4.b.2.B. Of the duration of the suspension;

5.4.b.2.C. Of the right to request a hearing contesting the suspension;

5.4.b.2.D. That a request for a hearing must be served on the Director no later than five (5) working days of the vendor's receipt of the notice of suspension;

5.4.b.2.E. That the vendor's failure to request a hearing no later than five (5) working days of the receipt of the notice of suspension will be deemed a waiver of the right to a hearing and result in the automatic enforcement of the suspension without further notice or an opportunity to respond; and

5.4.b.2.F. That a request for a hearing must include an explanation of why the vendor believes the Director's asserted grounds for suspension do not apply and why the vendor should not be suspended.

5.4.b.3. A vendor's failure to serve a request for hearing on the Director no later than five (5) working days of the vendor's receipt of the notice of suspension will be deemed a waiver of the right to a hearing and may result in the automatic enforcement of the suspension without further notice or an opportunity to respond.

5.4.b.4. A vendor who files a timely request for hearing but nevertheless fails to provide an explanation of why the asserted grounds for suspension are inapplicable or should not result in a suspension, may result in a denial of the vendor's hearing request.

5.4.b.5. Within five (5) working days of receiving the vendor's request for a hearing, the Director will serve on the vendor a notice of hearing that includes the date, time and place of the hearing.

5.4.b.6. The hearing will be recorded and an official record prepared. Within ten (10) working days of the conclusion of the hearing, the Director will issue and serve on the vendor, a written decision either confirming or reversing the suspension.

5.4.c. A vendor may appeal a decision of the Director to the Secretary of Administration. The appeal must be in writing and served on the Secretary no later than five (5) working days of receipt of the Director's decision.

5.4.d. The Secretary, or his or her designee, will schedule an appeal hearing and serve on the vendor, a notice of hearing that includes the date, time and place of the hearing. The appeal hearing will be recorded and an official record prepared. Within ten (10) working days of the conclusion of the appeal hearing, the Secretary will issue and serve on the vendor a written decision either confirming or reversing the suspension.

5.4.e. Any notice or service related to suspension actions or proceedings must be provided by certified mail, return receipt requested.

5.5. Vendor Debarment. The Director may debar a vendor on the basis of one or more of the grounds for debarment contained in West Virginia Code § 5A-3-33d or if the vendor has been declared ineligible to participate in procurement related activities under federal laws and regulation.

5.5.a. Debarment proceedings shall be conducted in accordance with West Virginia Code § 5A-3-33e and these rules. A vendor that has received notice of the proposed debarment by certified mail, return receipt requested, must respond to the proposed debarment within 30 working days after receipt of notice or the debarment will be instituted without further notice. A vendor is deemed to have received notice, notwithstanding the vendor's failure to accept the certified mail, if the letter is addressed to the vendor at its last known address. After considering the matter and reaching a decision, the Director shall notify the vendor of his or her decision by certified mail, return receipt requested.

5.5.b. Any vendor, other than a vendor prohibited from participating in federal procurement, undergoing debarment proceedings is permitted to continue participating in the state's procurement process until a final debarment decision has been reached. Any contract that a debarred vendor obtains prior to a final debarment decision shall remain in effect for the current term, but may not be extended or renewed. Notwithstanding the foregoing, the Director may cancel a contract held by a debarred vendor if the Director determines, in his or her sole discretion, that doing so is in the best interest of the State. A vendor prohibited from participating in federal procurement will not be permitted to participate in the state's procurement process during debarment proceedings.

5.5.c. If the Director's final debarment decision is that debarment is warranted and notice of the final debarment decision is mailed, the Purchasing Division shall reject any bid submitted by the debarred vendor, including any bid submitted prior to the final debarment decision if that bid has not yet been accepted and a contract consummated.

5.5.d. Pursuant to West Virginia Code section 5A-3-33e(e), the length of the debarment period will be specified in the debarment decision and will be for a period of time that the Director finds necessary and proper to protect the public from an irresponsible vendor.

5.5.e. List of Debarred Vendors. The Director shall maintain and publicly post a list of debarred vendors on the Purchasing Division's website.

5.6. Damages.

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

5.6.b. If any commodities delivered under a contract have been used or consumed by a spending unit and on testing the commodities are found not to comply with specifications, no payment may be approved by the Spending Unit for the merchandise until the amount of actual damages incurred has been determined.

5.6.c. The Spending Unit shall seek to collect damages by following the procedures established by the Office of the Attorney General for the collection of delinquent obligations.

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

6.1. Registration of Vendors.

6.1.a. Purchasing Division Registration. All vendors must register with the Purchasing Division prior to being awarded a contract, except that the following categories of vendors are exempt from this registration requirement.

6.1.a.1. Purchasing card vendors providing travel related services are not required to register with the Purchasing Division.

6.1.a.2. Purchasing card vendors receiving an aggregate total yearly payment less than \$25,000.00 from a spending unit are not required to register with the Purchasing Division.

6.1.a.3. Any company or corporation, or subsidiary of the company or corporation, listed on any nationally recognized stock exchange is not required to register with the Purchasing Division.

6.1.b. Vendors shall register by submitting the vendor registration and disclosure statement provided by the Purchasing Division.

6.1.c. Purchasing Division Fee Payment. All vendors shall pay to the Purchasing Division, an annual registration fee of \$125 prior to being awarded a contract, except that the following categories of vendors are exempt from this requirement.

6.1.c.1. Purchasing card vendors providing travel related services are not required to pay the registration fee.

6.1.c.2. Purchasing card vendors receiving an aggregate total yearly payment less than \$25,000.00 from a spending unit are not required to pay the registration fee.

6.1.c.3. Vendors receiving orders for goods or services of \$2,500 or less, regardless of payment method, are not required to pay the registration fee.

6.1.c.4. Vendors providing a good or service under a sole source solicitation are not required to pay the registration fee. The fee is considered waived by the Director for all sole source providers.

6.1.c.5. Any vendor can be exempted from paying the registration fee if the Director determines that waiving the registration fee would be in the best interest of the State of West Virginia.

6.1.d. A vendor with multiple locations shall pay only one fee when operating under one Federal Employer Identification Number (FEIN).

6.1.e. Other Registrations, Licenses, etc. 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 prior to being awarded a contract. 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.

6.1.f. Failure to Register. The Director is prohibited from awarding any contract to any vendor not properly registered with the Purchasing Division. If a vendor is eligible to be awarded or has been awarded a contract and it is determined that the vendor has failed to comply with the requirements of 6.1.e. of these Rules, the vendor will be given a period of time that the Director deems sufficient to cure the failure. If after that period vendor has not cured the failure, the Director may cancel the contract.

6.2. Advertising. Solicitations that exceed \$25,000 must be advertised using advertising media such as the Purchasing Bulletin, newspapers, trade journals, or any other media the Director considers advisable. The type and duration of advertising completed is at the Director's discretion. This provision shall not apply to expressions of interest procured by the spending unit under West Virginia Code § 5G-1-4, or other solicitations governed by a law that mandates certain advertising requirements be met. Any vendor that pays the registration fee will receive notice of solicitations that the Purchasing Division has released to the public for bidding, response, comment, or other purposes.

6.3. Bidding.

6.3.a. The Purchasing Division must receive bids from vendor prior to the date and time of the bid opening listed on the solicitation forms provided by the Purchasing Division. The Director must reject bids received after the designated time and date. Each vendor is solely responsible for delivering its bid to the Purchasing Division.

6.3.b. An authorized representative of the vendor must sign all bids submitted to the Purchasing Division. A corporate or other business entity signature without an individual name is not an acceptable signature.

6.3.c. The Director may allow bids by electronic transmission as defined in W. Va. Code § 5A-1-1(6). Bids by electronic transmission must be received by the Purchasing Division prior to the bid opening date and time. A bid will not be considered received until after transmission is 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 or changes to bids by electronic transmission. Bids submitted via electronic transmission may not be sealed until received by the Purchasing Division. The Purchasing Division makes no guarantee of confidentiality when vendors utilize electronic transmission.

6.3.d. 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 may 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.

6.3.e. A bidder may make a change to a sealed bid before the bid opening. A bidder must submit changes in writing or by electronic transmission to the Purchasing Division. To be effective, any change must be received by the Purchasing Division prior to the date and time of the bid opening. Changes by electronic transmission must be made in the manner provided in Subdivision 6.2.4 of this rule.

6.3.f. The Director may reject a bid that a vendor declares to be erroneous after the bid opening, but otherwise appears to be responsive, 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 under this subsection, the public file must contain documented evidence that all of the conditions set forth in this subdivision exist.

6.3.g. The Director must reject a bid that is found to be non-responsive. A non-responsive bid is one that fails to conform to the solicitation in all material respects.

6.3.h. 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.i. If there is a conflict between the extension price and the unit price in the bid, the unit price prevails.

6.3.j. Vendor must disclose any instance where the vendor's bid fails to comply with the requirements of the solicitation, which includes but is not limited to, failure to comply with a mandatory

requirement or goods or services not meeting the required specifications. If changes are not stated, the Director may assume that items offered meet the specifications.

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

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

6.3.m. 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.

6.4. Awards.

6.4.a. Any award made by the Director will be made in accordance with the law governing the type of procurement being awarded. The Director may make multiple or split awards when it is in the best interest of the State.

6.4.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, the Director shall place a written explanation in the purchase order file.

6.4.c. When tie bids are received, the Director shall break the tie by: allowing the tied vendors to make a final offer, flip of a coin, draw of the cards, or any other impartial method considered prudent by the Director.

6.4.d. Vendor Preference. All purchases of commodities, services or printing made upon competitive bids, with the exception of construction services, are subject to a vendor preference in accordance with the rules promulgated by the Secretary of the Department of Revenue. For purposes of application of the vendor preference, the term "West Virginia vendor" used in W. Va. CSR section 110-12C-7 shall have the same meaning as "resident vendor."

6.4.e. 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 nor company checks are acceptable. Vendors can request that bonds or other security be returned after the purpose for which the bond was provided has been fulfilled. Upon confirmation from the spending unit or other relevant party that the bond or security in question has fully served its purpose, the Director may return the bond or security.

6.5. Specifications.

6.5.a. Specifications must be written to encourage competition to the fullest extent possible. No person may write specifications, or attempt to influence the drafter of specifications, to limit competition or favor or disfavor a particular brand or vendor. Spending units may not use brand or vendor names to

restrict competition. If, however, brand names are used to adequately describe a needed commodity or service, the brand or vendor name must be followed by the phrase "or equal" to promote and encourage competition.

6.5.a.1. Examples of limiting competition or favoring a brand or vendor include, but are not limited to: drafting specifications to match a vendor's description of its commodity or service to the exclusion of others, listing a brand name in specifications without noting that equivalent products will be considered, and drafting specifications that are so restrictive that only one desired vendor can meet the requirements without adequate justification for the restrictions.

6.5.a.2. Nothing contained in the subsection will be construed to prevent a spending unit from drafting specifications with restrictions and mandatory requirements that are necessary to perform the objectives for which the commodity or service is purchased. Reduced need for training, maintaining consistency in inventory, staff familiarity, and other similar objectives will not be sufficient to justify restrictions in specifications.

6.5.a.3. A spending unit that uses a brand or vendor name to describe a needed commodity or service must also list in the specifications the mandatory components of that commodity or service that the reference to a brand or vendor name is intended to capture. A vendor's equality with the brand or vendor name will be evaluated on the basis of the mandatory components only. If a vendor bids a commodity or service that is equal to the brand or vendor name with regard to all identified mandatory components, the Director shall not disqualify the vendor's bid due to inequality of non-mandatory components. Any spending unit request to disqualify a vendor on the grounds that the vendor has bid an unequal product must be accompanied by written justification listing the mandatory component that is unequal and explaining how the product bid is unequal.

6.5.b. The Director has authority to develop standard specifications that will form the basis of statewide 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.

6.5.c. The Purchasing Division has final authority over specifications and may require that a spending unit modify specifications. In the event that a spending unit refuses to make the required changes, the Director is prohibited from issuing a solicitation until the spending unit provides the Director with a written explanation for the refusal, that the Director deems satisfactory.

6.6. Bid Evaluation.

6.6.a. Evaluators of bids must certify that no financial, personal, or other conflict of interest exists relating to any vendor or vendor representative that has submitted a bid. The Purchasing Division may develop a form that evaluators can sign for certification purposes under this subsection.

6.6.b. From the time a requisition is submitted to the Purchasing Division for public advertisement until an award is made, evaluators and spending unit personnel are not permitted to

communicate with vendors about the solicitation or any component thereof without prior approval from the Purchasing Division. All communication regarding the solicitation must be directed to the Purchasing Division until an award has been made. Nothing in this subsection, however, shall prevent the evaluators and spending unit personnel from communicating with a vendor about existing contracts or other matters unrelated to the solicitation in question.

6.7. Deliveries. Spending units are responsible for: (1) the inspection of commodities, services, or printing upon delivery to ensure that purchases meet contractual requirements, and (2) maintaining records of receipt.

6.8. Change Orders.

6.8.a. Review and Approval. The Director has the authority and responsibility to review change orders just as he or she has authority and responsibility for review and approval of the original contract.

6.8.b. Change Order Submission. A spending unit desiring to make a change to a contract must submit a request for the contract change to the Purchasing Division. Any change order request submitted to the Purchasing Division that requires vendor agreement must include the vendor's agreement in writing.

6.8.c. Documentation. The Director may ask for, and the spending unit must provide, any documentation or further explanation that the Director deems necessary to aid in reviewing a change order request.

6.8.d. Rejection. If the Director reviews the change order and determines that it has not been properly justified; fails to include necessary documentation; is or could be construed as an attempt to circumvent the bidding process; or is otherwise unfit to be approved; the Director shall reject the change order.

6.8.e. Attorney General. Change orders must be approved by the Attorney General's office, as to form, just as the original contract is approved as to form by that office under West Virginia Code section 5A-3-13.

6.8.f. Timing of Work. Spending units must not permit vendors to perform work that the spending unit anticipates will be added to a contract through a change order until such time as the change order has been formally approved by the Purchasing Division and the Attorney General's office, encumbered by the Purchasing Division, and mailed to the vendor. This subsection related to timing of work does not apply to government construction contracts executed pursuant to W.Va. Code §5-22-1, et seq.

§ 148-1-7. Purchasing Methods.

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

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

7.2.a. Spending units may make purchases of \$25,000 or less per transaction for certain commodities, services or printing without processing the purchase as a formal solicitation through the Purchasing Division, provided that the spending unit adheres to the most current Purchasing Division procedures and requirements established by the Director. The spending unit must keep records of these purchases on file and make them available for public inspection during the normal office hours of the spending unit.

7.2.b. If an agency fails to comply with the procedures and requirements established for purchases of \$25,000 or less, the Director has the ability to:

7.2.b.1. Suspend or reduce purchasing authority for that spending unit,

7.2.b.2. Require the spending to provide additional reports and documentation relating to purchases of \$25,000 or less for Purchasing Division review,

7.2.b.3. Require the agency to submit to additional oversight that the Director deems appropriate, or

7.2.b.4. Require that the agency personnel responsible for purchases of \$25,000 or less participate in remedial training provided by the Purchasing Division.

7.3. Purchases In Excess of \$25,000. Purchases of commodities, services or printing that exceed \$25,000 shall be made by the Purchasing Division.

7.4. Open End Contracts and Statewide Contracts.

7.4.a. The State may secure open end contracts to obtain commodities, services, or printing to supply the repetitive needs of the spending units in the form of statewide contracts, blanket orders, or spending unit contracts.

7.4.b. If the Director establishes an agency open end contract, any spending unit covered by the contract is required to use it. The Director may grant a spending unit a waiver that permits the spending unit to purchase from a source other than the open-end contract.

7.4.c. If the Director establishes a statewide contract, all spending units are required to use it. The Director may grant a spending unit a waiver that permits the spending unit to purchase from a source other than the statewide contract.

7.4.d. Granting of a waiver from an open end or statewide contract will be considered on a case-by-case basis and will only be granted if the Director determines that granting the waiver is in the best interest of the state. A waiver will only be granted if the spending unit can show that any one of the following conditions exists:

7.4.d.1. The vendor is unable to deliver the commodity or service by the required delivery date, assuming that the spending unit is not imposing an unreasonable delivery deadline;

7.4.d.2. The vendor is unresponsive to ordering requests;

7.4.d.3. The vendor has refused to perform.

7.5. Sole Source Procurement.

7.5.a. The Director of Purchasing may approve the purchase of commodities, services or printing directly from a vendor as a sole source procurement without competitive bidding, if:

7.5.a.1. The spending unit can acquire the required good or services from only one source, and

7.5.a.2. The spending unit provides 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.b. 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.c. All sole source requests made to the Director shall be publicly advertised and made available for review by vendors registered with the Purchasing Division. 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.d. 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 these rules.

7.5.e. The Director must issue prior approval or disapproval for the purchase of used equipment directly from the vendor without competitive bids. If disapproved, the Director must return the request to the spending unit and direct another method of purchasing. Notwithstanding the foregoing, approval to purchase used equipment under this subsection is contingent upon meeting all of the requirements applicable to a sole source procurement.

7.6. Emergency Procurement.

7.6.a. Any request to procure specific commodities for immediate delivery exceeding \$25,000 on an emergency basis must be submitted in writing to the Purchasing Division. The Director shall review a spending unit's written request and issue written approval or disapproval.

7.6.b. Approval to procure goods or services on an emergency basis will permit the spending unit to purchase the required goods or services directly from a vendor. Provided, however, that the spending unit must obtain three bids, if possible. Any required documentation must be submitted to the Purchasing Division as soon as possible for processing.

7.6.c. What qualifies as an emergency under this subsection shall be evaluated by the Director on a case by case basis, but will at least include unforeseen events or circumstances, including delays by contractors, delays in transportation, or an unanticipated volume of work, as well as procurement of specific commodities for immediate delivery related to an official declaration of emergency by the Governor or federal officials. 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. Best Value Procurement.

7.7.a. The term best value procurement means a request for proposal as described in West Virginia Code § 5A-3-10b or an Expression of Interest as described in West Virginia Code § 5G-1-1.

7.7.b. Requests for Quotation are the preferred method and gold standard of procurement, but a spending unit may utilize a best value procurement method to procure goods, services, or printing, excluding construction. In order to utilize a request for proposal, the spending unit must provide adequate justification explaining why an evaluation based on price and compliance with specification alone would not be adequate. The Director shall review each request to utilize a request for proposal and may permit the use of a request for proposal if he or she determines in writing that it is in the best interest of the state.

7.7.c. A request for proposal must contain provisions for a two-part evaluation, the first part being technical aspects of the proposal and the second part being cost to the State. The two components must then be evaluated based upon the criteria contained in the request for proposal, scored, and combined to form a total score. The highest scoring vendor will be awarded a contract. No proposal may be evaluated using any criteria other than the criteria specified in the request for proposal.

7.7.d. Expressions of interest may only be used to procure architectural, engineering, or other services contained within Chapter 5G, article 1 of the West Virginia Code.

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

7.8.a. The Director may approve a request by a spending unit to purchase from, join as a party, or otherwise utilize contracts issued by agencies of the federal government, agencies of other states, other public bodies, or other state agencies. The Director may also sign an agreement with a vendor that has the effect of adding state spending units to a contract issued by agencies of the federal government, agencies of other states, other public bodies, or other state agencies. The Director may, but is not required to, designate such a contract as a statewide contract and require that spending units utilize it. The Director may also lead, participate in, or join after issuance cooperative purchasing arrangements with other public agencies and entities created by public agencies.

Before undertaking any activity authorized by this section, the Director shall determine that the contracts being utilized and/or created are valid, properly awarded, financially advantageous, and comparable to what can be obtained through competitive bidding. The last requirement will be satisfied if the contract was created or is to be created from a competitive procurement method.

The Director shall require spending units, or the Purchasing Division if acting without a spending unit request, to prove that their requests to use such contracts:

7.8.a.1. 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.;

7.8.a.2. 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

7.8.a.3. Does not cause extensive hardship to any spending unit offered preference under the West Virginia Code.

7.8.b. All spending unit requests to take an action authorized under this subsection must 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.

7.9. Multiple Awards.

7.9.a. 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:

7.9.a.1. The quality, availability, and reliability of the supplies, materials, equipment, or service and their adaptability to the particular use required;

7.9.a.2. The ability, capacity, and skill of the bidder;

7.9.a.3. The sufficiency of the bidder's financial resources;

7.9.a.4. The bidder's ability to provide maintenance, repair parts, and service;

7.9.a.5. The compatibility with existing equipment;

7.9.a.6. The need for flexibility in evaluating new products on a large scale before becoming contractually committed for all use; and

7.9.a.7. Any other relevant factors.

7.9.b. 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 must provide written justification to the Director. The Director's decision shall be final in all cases.

7.10. Negotiation When All Bids Exceed Available Funds.

7.10.a. Spending units must submit a valid maximum budgeted amount for each requisition 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.

7.10.b. If all bids meeting requirements exceed the funds available for the purchase, 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.

7.10.c. 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. Nothing contained herein is intended to supersede the requirements contained in Chapter 5G, article 1 or the West Virginia Code.

7.10.d. If agencies fail to provide a valid maximum budgeted amount, the Director shall not permit negotiation.

7.10.e. The Director shall determine the method of negotiation.

7.11. Discussion and Final Offers.

7.11.a. 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.

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

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

7.12. Contract Management.

7.12.a. 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:

7.12.a.1. Establishing payment benchmarks to assure the State receives value prior to remitting payment;

7.12.a.2. Conducting regular meetings between spending unit and vendor to assess contract performance;

7.12.a.3. Training spending unit personnel to manage contracts; or

7.12.a.4. Using the Office of Technology Project Manager for its projects.

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

7.12.b.1. Post Award Conferences. The agency administrator responsible for administering the contract must 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 must include, at a minimum, the introduction of all participants and identification of agency and contractor key personnel, and discussion of the following items:

7.12.b.1.A. The scope of the contract, including specifications of what the agency is buying;

7.12.b.1.B. The contract terms and conditions, particularly any special contract provisions;

7.12.b.1.C. The technical and reporting requirements of the contract;

7.12.b.1.D. The contract administration procedures, including contract monitoring and progress measurement;

7.12.b.1.E. The rights and obligations of both parties and the contractor performance evaluation procedures;

7.12.b.1.F. 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;

7.12.b.1.G. Potential contract problem areas and possible solutions;

7.12.b.1.H. Invoicing requirements and payment procedures, with particular attention to whether payment will be made according to milestones achieved by the contractor;

7.12.b.1.I. An explanation of the limits of authority of the personnel of both the agency and the contractor.

7.12.b.2. Monitoring -- The agency must develop a comprehensive and objective monitoring checklist which:

7.12.b.2.A. Measures outcomes;

7.12.b.2.B. Monitors compliance with contract requirements; and

7.12.b.2.C. Assesses contractor performance.

7.12.c. Reports -- The agency must make the following reports to the Director, on a schedule established by the Director, but not less frequently than once a year:

7.12.c.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.

7.12.c.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.

7.13. Inspection.

7.13.a. The agency must inspect all materials, supplies, and equipment upon delivery and again prior to final acceptance to insure compliance with the contract requirements and specifications.

7.13.b. The agency must report any discrepancies to the Director immediately.

148CSR1

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

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

7.14. 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.

§ 148-1-8. Protests.

8.1. Submission of Protest.

8.1.a. 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.b. All protests must be submitted in writing to the Purchasing Division and contain the following information:

8.1.b.1. The name and address of the protestor;

8.1.b.2. The requisition, solicitation, purchase order or contract numbers;

8.1.b.3. A statement of the grounds of protest;

8.1.b.4. Supporting documentation, if necessary; and

8.1.b.5. The resolution or relief sought.

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

8.2. Protest Review.

8.2.a. 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.b. 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.

8.3. Reverse Auction Protests: A vendor desiring to submit a protest of specifications related to a reverse auction must submit the protest 5 working days prior to the prequalification bid submission deadline. A protest of a prequalification decision must be submitted within 5 working days of the prequalification approval or denial. A protest of award must be submitted within 5 working days of award.

8.4. Master Contract and Direct Order Protests: Any vendor desiring to protest the specifications of a master contract or the direct ordering process may do so prior to 5 working days before the master contract opening date and 5 working days before the direct ordering process opening date. Any vendor desiring to protest the award of a master contract or direct order may do so within 5 working days of the master contract award and within 5 working days of the direct order award.

8.5. All protests, regardless of dollar amount should be directed to the Purchasing Division and any protests incorrectly submitted to the spending unit must be forwarded by the spending unit to the Purchasing Division for further review. A protest incorrectly delivered to the spending unit will not be considered received until it reaches the Purchasing Division. Responsibility for delivery of the protest to the Purchasing Division shall remain with the protesting vendor. A spending unit's failure to deliver the protest to the Purchasing Division shall not be grounds for extending the time for receipt of protests.

§ 148-1-9. Violations.

9.1. 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. Provided, that the state establishes by a preponderance of the evidence that the individual acted knowingly and willfully.

9.2. 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.

9.3. 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.

§ 148-1-10. Internet Auction Sales.

10.1. 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.

10.2. 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.

10.3. 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.

§ 148-1-11. Reverse Auctions.

11.1. Authority. Authority to promulgate rules relating to reverse auctions derives from West Virginia Code § 5A-3-10d.

11.2. Justification for Use. The spending unit requesting that a reverse auction be utilized to procure commodities must provide the Director with an explanation of how the reverse auction process would be fair, economical, and in the best interest of the state. Additionally, the spending unit must provide written documentation verifying that the commodities to be procured:

11.2.a. Are subject to low price volatility;

11.2.b. Have specifications that are common and not complex;

11.2.c. Vary little between suppliers;

11.2.d. Are sourced primarily based on price, with limited ancillary considerations;

11.2.e. Require little collaboration from suppliers; and

11.2.f. Are sold by a large, competitive supply base.

When soliciting bids for commodities through a reverse auction, the Purchasing Division may be considered the spending unit and the Purchasing Division may rely on information provided by one or more of the spending units that will utilize the contract in satisfying the requirements necessary to utilize a reverse auction.

11.3. Prequalification. All reverse auctions conducted under these rules must be preceded by prequalification of vendors. Only vendors that have completed prequalification for the auction will be permitted to participate in the auction. Prequalification will be completed as follows:

11.3.a. Notice of Reverse Auction. If the Director approves the spending unit's request to utilize a reverse auction, the spending unit will then prepare specifications to describe the commodity being procured by reverse auction and list any mandatory requirements the vendor must meet. The spending unit must then provide that information to the Director, along with any additional documentation the Director deems necessary, in a manner suitable to the Director. The Purchasing Division will then ensure that an adequate description of the contemplated reverse auction is included and will advertise the reverse auction in the same manner that a request for quotation is advertised under Chapter 5A, Article 3 of the West Virginia Code.

11.3.b. Prequalification Bid. Any vendor desiring to participate in the reverse auction must submit a prequalification bid to the Purchasing Division before the deadline contained in the advertisement or specifications. Failure to submit a prequalification bid prior to the deadline will result in automatic disqualification from participation in the reverse auction. The Director may request additional information from a vendor to assist in evaluating a vendor's prequalification bid.

11.3.c. Prequalification Request Review; Approval; Denial. Each prequalification bid submitted prior to the applicable submission deadline will be evaluated to ensure compliance with all specifications and mandatory requirements. All vendors that are in compliance with the specifications and mandatory requirements will be notified that they have been approved to participate in the reverse auction. Vendors that are not in compliance with the specifications and mandatory requirements will be notified that their request to participate in the reverse auction has been denied.

11.3.c.1. Approval. A vendor that has been approved will be provided with the necessary information to participate in the reverse auction. This information may include website addresses, log-in information, etc.

11.3.c.2. Denial. A vendor that has been denied will be provided with notice thereof and, upon request, the vendor must be provided with a reason for the denial.

11.4. Reverse Auction Bidding. The prequalified vendors will be granted access to participate in the reverse auction either physically or electronically depending on the format of the auction. Each prequalified vendor may submit bids until the time for bidding has expired. Any bid that a vendor submits during the reverse auction process will supersede all prior bids submitted by that vendor.

11.5. Award. The lowest responsible bidder within the time period allowed for the reverse auction will be awarded a contract. If the Director determines that a vendor identified as the lowest responsible bidder has failed to meet a mandatory requirement contained in the specifications or if the vendor fails to consummate the contract after bidding, the Director may reject the bid of that vendor or cancel an award that has been made and move to award to the next lowest responsible bidder.

11.6. Reverse Auction Options. The Director may conduct reverse auctions through software systems owned and/or operated by the State of West Virginia, through industry-recognized third-party providers, through mailing and electronic submissions, or through a live auctioneer. Third-party providers or auctioneers must be selected through a procurement method authorized by article 3, Chapter 5A for the procurement of services.

§ 148-1-12. Master Contract and Direct Ordering Process

12.1. Authority. Authority to promulgate rules relating to master contracts and the direct ordering process derives from West Virginia Code § 5A-3-10e.

12.2. Definitions. The words and phrases used herein have the same meanings assigned to them in West Virginia Code §§ 5A-3-10e and 5A-1-1.

12.3. Master Contract Procedures. An agency that desires to establish a master contract with a subsequent direct ordering process as defined in W. Va. Code 5A-3-10e(b)(4) must first provide written justification and obtain the written approval from the Director to do so.

12.3.a. Justification for Use. Any request by a spending unit to establish a master contract must include the following items:

12.3.a.1. Identification and a detailed description of the commodity to be covered by the master contract;

12.3.a.2. One or more requirements that each vendor must meet in order to be approved for the master contract, which may include, but are not limited to, experience, quality assurance, licensing, delivery terms, and quantity terms;

12.3.a.3. An estimation of the quantity and price of the commodity to be purchased over the term of the contract; and

12.3.a.4. Forms (if any) that will be utilized in the direct ordering procedure bidding process.

12.3.b. Advertisement. Once the Director approves a request to solicit master contracts, the documentation contained in the request, along with any additional documentation the Director deems necessary, will be compiled into a form suitable to the Director. The vendor community will be notified of the opportunity to obtain a master contract through an advertisement that the Director deems appropriate. The advertisement will be completed in the same manner that a request for quotation is advertised under Chapter 5A, Article 3 of the West Virginia Code.

12.3.c. The justification referenced in this section 12.3 must also contain:

12.3.c.1. A clause stating that the state is seeking a master contract that will permit all awarded vendors an opportunity to participate in the direct ordering process;

12.3.c.2. An explanation of how bids will be submitted and evaluated through the direct ordering process,

12.3.c.3. A clause limiting the master contract to a term of one year, and

12.3.c.4. Language setting dollar thresholds for direct ordering process purchases.

12.3.d. Evaluation and Award. At the date and time provided in the advertisement required by this section, the Purchasing Division will publicly open the vendors' responses in accordance with current laws, rules, and procedures applicable to bid opening, including but not limited to, late bids, public availability of bids, etc. Vendors' responses will be evaluated and each vendor that meets all of the qualifications will be awarded a master contract that allows the vendor to participate in the direct ordering process.

12.4. Direct Ordering Process.

12.4.a. Limitations. No single order under the master contract and direct ordering process is permitted to exceed \$1,000,000 for information technology commodity purchases or \$50,000 for other commodities unless a written request to exceed these limits is approved by the Director in writing. If all bids returned under the direct order process are over the applicable dollar threshold, the spending unit must cancel the direct order process and solicit competitive bids in accordance with the requirements contained in West Virginia Code Chapter 5A, Article 3 and West Virginia Code of State Rules section 148-1-6. If the spending unit solicits bids and one or more vendors submit bids over the applicable dollar threshold, then the spending unit may only award to the vendors that submit bids under the threshold. Nothing contained herein will prohibit the Director from setting lower limits for the direct order process if he or she determines lower limits are more appropriate.

12.4.b. Request for Bids – A spending unit, or the Purchasing Division when acting as a spending unit, that desires to purchase a commodity identified in the master contract must notify each vendor that has been awarded a master contract of the request. The notice must contain any commodity specific requirements, the total quantity of the commodity being sought, the deadline by which the vendors must submit bids, and the location to which bids must be submitted.

12.4.c. Direct Order Bid Opening – At the appointed date, time, and place, the spending unit, or the Purchasing Division when acting as a spending unit, will open all bids in a public bid opening and announce the vendors' bid prices for all bids.

12.4.d. Evaluation and Award – After bids have been opened, the spending unit, or the Purchasing Division when acting as a spending unit, shall evaluate the bids received to ensure that the bid submissions comply with the requirements contained in the master contract and the request for bids. The spending unit, or the Purchasing Division when acting as a spending unit, shall award the direct order to the lowest responsible bidder that has complied with all requirements. The spending unit must reject any bid that fails to comply with the requirements contained in the master contract and the request for bids. The spending unit shall provide the following notices related the evaluation and award:

12.4.d.1. The lowest responsible bidder must be notified that it has won the direct ordering process and may begin the process of filling the order,

12.4.d.2. The vendors that do not submit the lowest bid must be notified that their bids were not the lowest and they will not be selected to provide the commodity, and

12.4.d.3. Any vendor that submits a bid that is rejected must be notified of the rejection and upon request, the vendor must be provided with a reason for that rejection.

All notices relating to evaluation and award must be provided as close to simultaneously as practical.

12.5. Records. Any spending unit utilizing the direct ordering process described herein must maintain records of all requests for bids, bids received, bids awarded, bids rejected, and other correspondence related to the direct ordering process.

12.6. Purchasing Division Oversight. Notwithstanding anything contained herein to the contrary, the Purchasing Division may institute oversight procedures that require spending units to provide notices to the Purchasing Division and obtain approvals from the Purchasing Division prior to utilizing the direct order process. The Purchasing Division may also choose to conduct the direct order process on behalf of a spending unit if the Director determines additional oversight is warranted.

§ 148-1-13. Encumbrance.

13.1. Authority. Authority to promulgate rules relating to encumbrance derives from West Virginia Code § 5A-3-4(a).

13.2. Definitions. The words and phrases used herein have the same meanings assigned to them in West Virginia Code 5A-1-1.

13.3. Account Designation. Spending units must designate the appropriate account from which funds to pay for a contract will be taken prior to a contract being awarded, unless the contemplated contract is a type that cannot be encumbered as determined by the Director.

13.4. Purchasing Division Review. Prior to issuing a contract, the Purchasing Division will verify that the amount of funds encumbered is appropriate and that the account being encumbered matches what the spending unit has requested.

13.5. Encumbrance Amounts. Contracts must be encumbered prior to issuance in the following amounts:

13.5.a. One-time purchase in current fiscal year. A spending unit seeking a contract for a one-time purchase to be completed in the current fiscal year must encumber the full contract amount.

13.5.b. Contract Spanning Multiple Years. A spending unit seeking a contract that will span multiple fiscal years must encumber at least the amount of funds that will be spent under the contract in the current fiscal year.

13.5.c. Contract to Begin in a Future Year. A spending unit seeking a contract that will be awarded prior to the end of a current fiscal year but will become effective after that same fiscal year has ended is not required to encumber funds prior to issuance of the contract.

13.5.d. Open-End and Statewide Contracts. A spending unit seeking an open-end contract or a statewide contract issued by the Purchasing Division is not required have funds encumbered prior to the issuance of the contract.



STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION

EARL RAY TOMBLIN
GOVERNOR

JASON PIZATELLA
ACTING CABINET SECRETARY

RESPONSE TO COMMENTS RECEIVED
TITLE 148 SERIES 1
DIVISION OF PURCHASING

The Department of Administration received one comment to the emergency rule from the American Subcontractors Association which expressed support of the changes to the Division of Purchasing rule regarding change orders. The letter from the American Subcontractors Association is attached.



August 26, 2015

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Subject: Proposed Rule 148-01
Purchasing Division

The American Subcontractors Association, Inc. (ASA) is pleased to express its strong support of the proposed rule which would exempt construction from the requirement that prior approval must be obtained from the Director of the Purchasing Division and from the Office of the Attorney General (as to form) prior to any work being done by a contractor. As the Summary of the Proposed Rule correctly observes, a prior-approval requirement of all Change Orders on construction contracts would have the detrimental consequences cited. In addition, it would be extraordinarily harmful to the various subcontractors and suppliers that generally provide the vast majority of labor and materials on a typical modern construction project, whether public or private. A substantial majority of these subcontractors and suppliers in West Virginia, as in other states, are small business concerns.

Following adoption of the proposed rule, ASA strongly recommends that an effort be undertaken to draft comprehensive rules relating to Change Orders on construction contracts awarded by the State, pursuant to W.Va. Code §5-22-1, *et seq.*, and offers specific recommendations relating to the appropriate parameters of such a proposed rule.

ASA is a national trade association representing subcontractors, specialty trade contractors, and suppliers in the construction industry. ASA members work in virtually all of the construction trades and on virtually every type of horizontal and vertical construction. ASA members frequently contract directly with public entities. More often, they serve as subcontractors dealing with such public entities through a prime contractor. More than 60 percent of ASA members are small businesses.

ASA recommends the following fundamental "Guiding Principles" for the drafting of comprehensive and modern rules for the timely and equitable administration of Change Orders relating to public construction.

Fiscal Accountability

Direction to the construction contractor to make a change by the contracting officer (CO) or a CO's representative carries with it the obligation for the buying agency to determine that funding is available to compensate the contractor for any additional costs incurred by the contractor. Such funding may come from costs savings attributable to other modifications to the overall project budget or from unobligated funds currently allotted to the project. In the current budgetary situation, it is totally unreasonable to direct changes that the buying agency knows will require supplementation of the project's overall budget from other appropriated funds or through a supplemental appropriation. To do so invites distrust of the buying agency by prospective future contractors, who will modify their bids to provide a cushion for the risk of winning the contract in order to "buy" the contract awardee disputes with the buying agency.

Prompt Issuance by the Contracting Office of a written Change Order

In practice, changes to a construction project begin as verbal instructions to the contractor's representative by a representative of the buying agency. To increase the certainty that the directed changes were made by an authorized representative of the CO and accurately reflect the intent of the buying agency, the contracting officer must issue a written Change Order to the contractor as promptly as possible. Any proposed rule to provide for timely and effective administration of Change Orders must specify times certain by which the CO must furnish the contractor with a written change order. Different times can be established based upon the anticipated dollar value of the Change Order. The specified times can be extended upon a CO's determination, supported by findings, that additional time is required. The extended deadline must, however, also be to a time certain.

The written Change Order must be as specific as possible. The contractor needs to know what the buying activity wants. To the extent that the written Change Order reflects the buying agency's understanding of the potential impact on cost and schedule, it will foster a feeling of mutual investment in the completion of the project as quickly as possible at the least cost.

Both requirements will encourage discussions between the contractor and the CO, sooner rather than later. Such discussions will facilitate the avoidance of disputes, which is in the public's interest, as represented by the buying agency, as well as that of the contractor.

Prompt Issuance by the Contractor of its estimate of the impact of the Change Order on price and schedule

Upon receipt of the CO's written Change Order, the constructor must be similarly obligated to provide its estimate of costs and schedule adjustment associated with the directed change. Again, specified deadlines can be set at different dollar thresholds. An extension of the specified deadline should be granted by the CO, to a later time certain upon "good cause shown" in the contractor's request for an extension.

Similarly, the process can only be advanced with specificity provided by the contractor regarding the contractor's estimate of the cost and schedule impact of the directed change. This will enable the CO to make a more informed decision with regard to the contractor's request for an equitable adjustment to the amount due the contractor and the revision to the schedule of performance.

Prompt Issuance of a decision by the Contracting Officer

Finally, any proposed rule to comprehensively improve the administration of Change Orders must impose upon the CO a time certain by which a Contracting Officer's final decision must be issued. Again, varying deadlines can be established for decisions based upon dollar thresholds. An extension of the specified deadline may be granted based-upon a CO's request, supported by specific information, by the head of the buying activity.

Such timely decisional action by the CO will inform the contractor as to whether performance of work directed by the Change Order will be undertaken in an environment of general mutual agreement or one that is likely to lead to formal dispute resolution.

ASA recommends that those charged with drafting a proposed rule to improve the management of Change Orders on the State's public works should consider ConsensusDocs Form 210 (Standard Form and General Conditions Between Owner and Constructor for a Public Work Project) and Form 202 (Change Order). Both represent the best practices of the construction industry. ConsensusDocs forms are endorsed by ASA and 40 other nationwide associations that represent providers of all elements of the overall construction industry.

In summary, ASA strongly endorses the adoption of the proposed rule and strongly recommends that the Secretary initiate an effort with the Board of Public Works to draft rules for the timely and equitable administration of Change Orders on public construction that are modern and comprehensive.

Respectfully submitted,

/s/ E. Colette Nelson

E. Colette Nelson
Chief Advocacy Officer