

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

Form #7

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2006 JUN 16 P 3: 56

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

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

CITE AUTHORITY: 5A-3-4

EMERGENCY 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: _____

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

1. The passage of HB 4031 during the 2006 session made major changes to the purchasing process and the rules must be modified to address those changes so they are consistent with the current law.
2. Without having the emergency rules in place, it will cause substantial harm to the public interest as the current rules are inconsistent with the new statute and vendors who do business with the state may inadvertently follow the wrong process in submitting their bids which could result in their bid being thrown out and a resulting lawsuit against the state for failure to have appropriate rules in place with the correct data for vendors to rely upon. If a bid is thrown out then the state could be required to award a contract to a higher priced vendor resulting in public funds being used unwisely.
3. HB 4031 gave authority for emergency rules as it relates to selling of surplus property by means of internet auction site. Surplus property is included in the current purchasing legislative rules and language for internet auction is being included in the proposed modifications.

Use additional sheets if necessary


Authorized Signature

Agency: Department of Administration
Purchasing Division

Title Number: 148
Cite Authority: 5A-3-4

Rule Type: Legislative

STATEMENT OF CIRCUMSTANCE AND BRIEF SUMMARY

The passage of HB 4031 during the 2006 session made major statutory changes in the purchasing process and the rules must be modified to address those changes so they are consistent with the current law. Without having the emergency rules in place, it will cause substantial harm to the public interest as the current rules are inconsistent with the new statute and vendors who do business with the state may inadvertently follow the wrong process in submitting their bids which could result in their bid being thrown out and a resulting lawsuit against the state for failure to have appropriate rules in place with the correct data for vendors to rely upon. If a bid is thrown out then the state could be required to award a contract to a higher priced vendor. Additionally, HB 4031 gave authority for emergency rules as it relates selling of surplus property by means of internet auction site. Surplus property is included in the current purchasing legislative rules and language for internet auction is being included in the proposed modifications.

The proposed modifications make the following changes to the current rules:

Defines "best value procurement".

Requires training for all agency personnel responsible for procurement.

Makes automated systems mandatory for spending units with failure to comply resulting in a fee for manual costs.

Allows the Purchasing Director to establish a list of commodities and/or services that are not possible to bid which would be considered pre-approved by the Purchasing Director and enable the agency to purchase items on the list directly without a purchase order. This would not supercede or replace approval as to form by the Attorney General's office.

Allows the Director to appoint inspectors to review and audit spending unit requests, purchases, and other transactions. Also allows inspectors to provide training and have access to needed records and documents.

Changes the vendor registration fee from \$45.00 to \$125.00 to be consistent with the statute.

Allows bids by electronic transmission and advises vendors that electronic bids may not be sealed until receipt by the Purchasing Division so no guarantee of confidentiality.

Removes the dual bid with the Auditor to be consistent with statute.

Clarifies that an award shall be made to lowest responsible bidder meeting specifications.

Adds a new section regarding specifications.

Adds a new section regarding bid evaluation.

Prohibits agencies from using brand names to restrict competition.

Gives the Purchasing Director the sole authority to determine the method of purchase in best interest of the State.

Changes the limit on sealed bid purchases from \$10,000 to \$25,000 to be consistent with the statute.

Makes the use of open end contracts mandatory.

Give Purchasing Director the sole authority to reject sole source requests whenever competition is believed to be available.

Requires all sole source requests be publicly advertised and available for review by potential bidders.

Deletes the section regarding agreements.

Requires RFP's be used for contracts for services exceeding \$500,000. Clarifies that RFP's shall not be used to acquire equipment or any combination of equipment and services.

Allows Director to use best value procurement to be consistent with the statute.

Adds a new section for purchases from contracts issued by other agencies and entities which allows cooperative purchasing.

Adds a new section regarding negotiation when all bids exceed the available funds to be consistent with statute.

Adds a new section on discussion and final offers to be consistent with the statute.

Adds a new section on contract management to be consistent with the statute.

Deletes the section on late payments.

Adds a new section regarding internet auction sales.

148 CSR 1
TITLE 148
DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION
SERIES 1
PURCHASING

FILED
2006 JUN 16 P 3:56
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 ~~printing, commodities and services~~ commodities, services or printing by the Purchasing Division of the Department of Administration.
- 1.2. Authority. - West Virginia Code, §5A-3-4.
- 1.3. Filing Date. - June 10, 2006
- 1.4. Effective Date. -

§148-1-2. Definitions.

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

- (a.) "Director" means the Director of the Purchasing Division of the Department of Administration.
- (b.) "F.O.B. destination" and "free on board destination" mean the seller or vendor must transport or pay for the transportation of the ~~printing, commodities or services~~ commodities, services or printing to the point of destination specified in the contract.
- (c.) "Secretary" means the head of a department, as appointed by the Governor, as defined in West Virginia Code §5F-1-2.
- (d) "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 shall take all purchasing training and be approved or disapproved by the Director 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. This person(s) shall not have additional responsibilities as a spending unit program manager, spending unit director or supervisor

of other spending unit programs.

3.3 All automated systems prescribed by the Director as statewide systems shall be mandatory for spending units. Failure to comply may require agencies to remit to the Purchasing Division actual costs of manual processing by the division or by a fee established by the Director. Such actual manual costs or fee shall not exceed \$100 per purchase request; or \$10 per transaction for non-purchase requests.

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

The Director shall:

- (a) Ensure that purchases and contracts for ~~commodities and printing~~ 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 bid. Purchases of the commodities and services on this list have been preapproved by the Purchasing Division shall be made directly by the spending unit. A contract or purchase order for these commodities or services is not required to be approved by the Purchasing Division. This preapproval by the Purchasing Division does not supercede or replace approval as to form by the West Virginia Attorney General's Office. Commodities and services to be included on this list shall be approved by the director prior to each fiscal year. Spending units may request commodities and services to be added to the list with justification and explanation of why competitive bids are not possible.
- (b) Purchase or contract for, in the name of the State, the ~~commodities and printing~~ commodities, services or printing required by the spending units of State government;
- (c) Prescribe the manner in which ~~commodities and printing~~ commodities, services or printing shall be purchased, delivered, stored, and distributed;
- (d) Review specifications and descriptions before soliciting bids to ensure that specifications and descriptions do not favor a particular brand or vendor;
- (e) Accept or reject any and all bids in whole or in part;
- (f) Waive minor irregularities in bids or specifications;
- (g) Apply and enforce standard specifications;
- (h) Transfer to or between spending units, or sell surplus, obsolete, or unused ~~commodities;~~ commodities, services or printing;
- (i) Direct the central storerooms of supplies for spending units;
- (j) Prescribe the amount of deposit or bond to be submitted with any bid or contract;
- (k) Prescribe contract provisions for liquidated damages, remedies or other damages provisions in the event of vendor default;
- (l) Exempt purchases of ~~commodities, printing, and services~~ 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 as determined by the director by competitive bid or other methods.
- (m) Employ a person whose responsibilities, in addition to other duties, are to identify ~~commodities and printing~~ commodities, services or printing available for purchase from nonprofit sheltered workshops; evaluate the needs for the ~~commodities and printing;~~ 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 or printing;~~ commodities, services or printing. This person shall report only to the Purchasing Division and have no reporting or other responsibilities to the workshops, committees or other public or private bodies.

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

(o) Prescribe the manner of inspection for all deliveries ~~or of commodities, commodities,~~ services or printing with bids and samples to assure compliance with specifications;

(p) 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. Inspectors shall have access at any and all times to personnel, records, reports, and other documents as needed. Purchasing Division Inspectors may visit any spending unit unannounced to perform their mission.

(q) Collect an annual fee in the amount of ~~\$45.00~~ \$125.00 to be paid by all vendors. The Director may waive the annual fee at any time if doing so would be in the best interest of the State of West Virginia.

(r) 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 twenty five thousand dollar (\$25,000) threshold within a twelve (12) month period or for other violations of Purchasing rules, processes, procedures including but not limited to failure to use state contracts, failure to follow bid limits, etc. In the event of suspension or reduction of purchasing authority, the director shall prescribe revised procedures and limits which may include 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 Section 5.3(j) of this rule. The following are adequate grounds for suspension:

(i.) A vendor has exhibited a pattern of poor performance in fulfilling his or her contractual obligations to the State. Poor performance includes, but is not limited to, a vendor providing or furnishing ~~commodities, 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 West Virginia 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 West Virginia Code §5A-3-1 *et seq.* or this rule.

5.1.2 The Director shall schedule a hearing for a suspended vendor upon the vendor's

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

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

6.1. Registration of Vendors.

6.1.1. All vendors shall register with the Purchasing Division.

6.1.2. Vendors shall register by completing ~~and filing the form~~ 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. Such vendors shall pay the fee in 6.1.4.

6.1.4. Vendors receiving orders for goods or services exceeding \$1,000, regardless of payment method, shall pay an annual fee of ~~\$45.00~~ \$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 accept bids from award any contract to any vendor not properly registered with the Purchasing Division.

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 forms provided by the Director of the Purchasing Division to the bidders. Substitutions for the Request for Quotation form are acceptable only if the substituted terms, conditions, or provisions are approved by the Director. Bidders shall submit their bids ~~and/or proposal~~ to the Purchasing Division ~~and a duplicate of the bid or proposal to the State Auditor~~. The Director shall reject the bids received after the required designated time and date. The Director shall not accept any bid or part of any bid received by 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 ~~facsimile machine~~ electronic transmission as defined in West Virginia Code §5A-1-1(6). Bids by electronic transmission ~~facsimile transmission~~ must be received by the Purchasing Division ~~and the State Auditor~~ prior to the bid opening date and time (transmission completed). A vendor choosing to submit a bid or a written change to a bid by electronic transmission ~~facsimile machine~~ accepts full responsibility for transmission and receipt of the bid or written change to a bid. The State accepts no responsibility for the unsuccessful and/or incomplete transmission of bids by electronic transmission ~~facsimile machine~~. ~~An original document and a copy of a bid that is initially sent by facsimile transmission shall be sent to the Purchasing Division and State Auditor, respectively, within two (2) working days of the bid opening date. Any vendor submitting bids via facsimile, shall be aware that bids sent in such manner 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 bid or transmission.~~

6.2.5. Copies of bids may be open for public inspection in the office of the ~~State Auditor~~ Purchasing Division immediately after the completion of the public bid opening. No original bid shall leave 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 ~~and State Auditor~~ are open for public inspection after the award has been made.

6.2.6. A bidder may make a ~~written change of~~ to a sealed bid before the bid opening. A bidder shall submit ~~written changes in writing or by electronic transmission~~ to the Purchasing Division and be received by the Purchasing Division and State Auditor 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 (d) of this rule.

6.2.7. The Director may reject an erroneous bid after the bid opening if all of the following conditions exist: (1) An error was made; (2) The error materially affected the bid; (3) Rejection of the bid would not cause a hardship on the State spending unit involved, other than losing an opportunity to receive commodities and/or printing 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 Request for Quotation and purchase order. A bidder shall make a request for price adjustment in accordance with the specific terms and conditions of the individual purchase order. In the event no provision for price adjustment has been made, discretion to grant a price adjustment rests with the Director.

6.3. Vendors' Rights and Duties.

6.3.1. Each vendor is solely responsible for the delivering of a bid to the Purchasing Division, ~~with an exact or duplicate copy to the office of the State Auditor. Any deviation between the bids received by the State Auditor and the Purchasing Division (relating to quantity, quality, specifications, price, date of delivery, or performance) shall cause the bid to be rejected.~~ Both The bids must be received at the respective 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. The Director may remove vendors who fail to return quotation forms from the bidding list.~~

6.3.4. 3. If there is a conflict between the extension price and the unit price, the unit price prevails.

6.3.5. 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.

6.3.6. 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.

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

6.3.8. 7. Vendors may ~~write, visit, or telephone~~ contact the Purchasing Division to obtain official bid forms.

6.3.9. 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.

~~6.3.10. If a vendor is suspended and requests a hearing, one will be scheduled with the Director. The vendor shall be notified, in writing, of the date, time and place of the hearing.~~

6.4. Awards

6.4.1. The Director shall make an award to the lowest responsible bidder 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. ~~Occasionally, purchase orders are issued which impose no obligation on the State for taking delivery of a product and/or service. These purchase orders shall be issued as blanket purchase orders~~

~~or price agreements.~~

6.4.2. The Director may accept or reject, in whole or in part, any bid when the Director feels it to be in the best interest of the State. If any bid is rejected, the Director shall place a written explanation in the purchase order file.

6.4.3. When tie bids are received, the award is made by allowing the tied vendors to make a "last and final offer," by flip of a coin, draw of the cards, or any other impartial method considered prudent by the Director.

6.4.4. Vendor Preference-All purchases of ~~commodities and printing~~ 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 ~~Tax and Revenue~~. In addition, all purchases of ~~commodities and printing~~ 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.

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 not acceptable. Provision for these requirements is usually incorporated into the Request for Quotation and purchase order. When any contract is satisfactorily completed on which a surety bond or other deposit has been previously submitted, the spending unit shall certify the completion in writing to the Purchasing Division. Upon receipt of the notification, the Purchasing Division shall return the check or deposit to the vendor.

6.5 Specifications

6.5.1 Specifications are written to encourage competition and meet the needs of the spending units. No spending unit shall write specifications to limit competition or favor or disfavor a particular vendor. No person shall attempt to influence specifications to favor or disfavor another vendor.

6.5.2 The Director shall have authority to approve or disapprove specifications. Any specification disapproved shall be returned to the spending unit for revision.

6.5.3 The Director shall develop standard specifications that govern statewide and other contracts used by multiple agencies. These 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 nationally accepted standards for commodities, services or printing. Use of these specifications shall be mandatory unless an exception is granted by the Director.

6.6 Bid Evaluation

6.6.1. Evaluators of solicitations must certify no conflict of interest, including financial or personal, with any vendor or vendor representative in the evaluation of the specific solicitation. During the evaluation of solicitations in excess of \$25,000, evaluators shall not contact vendors, except through the Purchasing Division buyer. No spending unit personnel shall have any communication with any vendors during the solicitation, bid, evaluation or award periods.

6.6.2. The Director shall evaluate bids received for purchases. The Director may solicit the assistance of spending unit personnel. In the event this assistance is solicited, spending units shall comply and perform any bid review and subsequent award recommendation within two weeks of such request. Failure to comply may result in cancellation of the purchase request.

§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 shall not use brand names to restrict competition. All brand name specifications shall be followed by the phrase "or equal" to promote and encourage competition. The Director shall return any request that uses brand name specifications unless the spending unit agrees to include the phrase "or equal".

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

7.2. Purchases of ~~\$10,000~~ \$25,000 or less.

Spending units may make purchases ~~(of no more than) \$10,000~~ of \$25,000 or less for certain ~~commodities, printing and services~~ commodities, services or printing under guidelines pursuant

to the most current Purchasing Division procedures and requirements established by the Director. The spending unit shall keep on file these records of the purchases are kept on file with the spending unit and made make them available for public inspection during the normal office hours of the spending unit.

7.3. Purchases In Excess of \$10,000. \$25,000

7.3.1. Purchases of ~~commodities and printing~~ commodities, services or printing estimated to be in excess of \$10,000 \$25,000 ~~are~~ shall be made by the Purchasing Division in the form of sealed bids:

7.3.2. Request for offers or bids estimated to cost in excess of \$10,000 \$25,000 ~~are~~ shall be advertised at least two times, whenever possible, using advertising media such as the Purchasing Bulletin, newspapers, trade journals, the Purchasing bulletin board and journals in the Purchasing offices, or any other media the Director considers advisable. The Director may waive the requirement to advertise when it is determined to be in the best interest of the State.

7.4. Open End Contracts.

The State may secure open end contracts to obtain ~~commodities and/or printing~~ commodities, services or printing to supply the repetitive needs of the State spending units in the form of statewide contracts, blanket orders, or ~~price agreements, spending unit contracts.~~ Use of these contracts by the agencies shall be mandatory. The Director may solicit requirements for similar ~~commodities, printing, and services~~ commodities, services or printing to determine the best methods for acquisition. The Director may grant exceptions to spending units from utilizing existing statewide contracts, ~~blanket orders, price agreements, 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. Non-Competitive Sole Source Procurement.

7.5.1. The Director of Purchasing may approve the purchase of ~~commodities and/or printing~~ 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.

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

(b.) The item is unique and not available from any other source. The spending unit must provide written documentation to the Director certifying that no other sources are available and that the spending unit exhausted all attempts to secure competition.

(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 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: (1) reject the sole source request and require the spending unit to submit a requisition for public advertisement and formal bidding; or, (2) accept the request and approve the sole source; or (3) take other action as necessary.

7.5.3 The Director may require potential sole source requests at any dollar level above \$2,500 to be subject to review, approval and processing as described in 7.5.2.

7.5.4 The Director shall issue prior approval or disapproval for used equipment to be purchased directly 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 prior written request and issue prior written approval or disapproval for emergency purchases exceeding ~~\$10,000.~~ \$25,000. An "Emergency Situation" requiring a purchase of ~~commodities, printing, or services~~ 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 are should be obtained if possible.

7.7. Used Equipment:

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

7.8. Agreements:

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

7.9.7. Requests for Proposals and Expressions of Interest.

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

specified in instructions to bidders, including price in RFP's.

7.7.2 Requests for Proposals shall only be used for contracts for services estimated to cost in excess of \$500,000. RFP's shall not be used to acquire: (1) equipment; or (2) any combination of equipment AND services. Exceptions to the \$500,000 requirement may be made in writing to the Director for consideration.

7.7.3 The Director may use best value procurement, except for government construction contracts, when he 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 Request for Proposals (RFP). No proposal shall be evaluated using any criteria other than the criteria specified in the RFP. All RFP awards shall be made to the highest scoring vendor.

7.10-8. Deliveries

7.8.1 Spending units are responsible for the inspecting inspection of goods commodities, services or printing, ensuring that purchases meet contractual requirements, and maintaining records receipt for goods 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 and services 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 other public agencies and entities. 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 is 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:

- (1) Do not conflict with existing State of West Virginia contracts unless the prices on the non-West Virginia contract is substantially lower than the state contract based on an equal comparison. No price comparison shall be based on differing specifications as determined by the Director.
- (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 is so great that the Director believes the state's best interest is served by using the non-West Virginia

contract.

(3) 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 evidence and documentation as required by the Director. The Director shall only approve those requests with submitted evidence that convincingly justifies use of such contracts. Any request that is not supportable shall be returned by the Director 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 such action would be in the best interest of the State of West Virginia. Reasons for this action include but are not limited to:

- (1) More than one vendor is needed to fulfill the needs of the spending units
- (2) Rapidly changing pricing and availability of commodities, services or printing

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. This budgeted amount shall not be changed after the bid opening.

7.11.2 If all bids meeting requirements exceed this budgeted maximum amount, 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. If agencies fail to provide a valid maximum budgeted amount, negotiation shall not be permitted. The Director shall determine the method of negotiation.

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.

7.12 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.

7.13 Contract Management

7.13.1 The Director may prescribe contract management procedures for all government 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;
- (d.) requiring agencies to use a third party contract manager, appointed by the Director or one hired by contract.

7.13.2 All expenses related to contract management shall be paid by the spending unit.

§148-1-8. Protests.

8.1. Submission of Protest.

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

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

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

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

8.2. Protest Review.

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

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

~~§148-1-9. Late Payments:~~

~~9.1. Before July 1, 1991:~~

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

~~9.2. On or After July 1, 1991:~~

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

~~9.2.2. On or after July 1, 1992, if a properly registered and qualified vendor who supplies services or commodities to the Division of Highways, the Public Employees Insurance Agency or the Department of Health and Human Resources does not receive payment within sixty (60) days following receipt by the spending unit of a legitimate uncontested invoice, the vendor shall receive interest at the current rate determined by the State Tax Commissioner from the sixtieth day until the date the State check is mailed to the vendor.~~

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

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

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

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

9.2.5. The State spending unit initially receiving the legitimate uncontested invoice shall process the invoice for payment within ten (10) days of receipt, with exceptions for the Department of Health and Human Resources, the Division of Highways, and the Public Employees Insurance Agency, who have fifteen (15) days from receipt to process the invoice for payment. Although all invoices should be processed promptly, invoices subject to a cash discount should be processed expeditiously to benefit the spending unit.

9.2.6. Any other State spending unit charged by law with processing requisitions for payment of legitimate uncontested invoices shall either process the requisition or reject it for good cause within ten (10) days after the State spending unit receives the requisition. If the State spending unit fails to process or reject the requisition for good cause within ten (10) days, then it is liable for payment of that portion of interest attributable to its actions.

§148-1-10. Violations.

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

10.2. The Purchasing Director shall suspend from bidding on State purchases up to one year, any vendor violating the West Virginia Code, this rule, or any policy or procedure adopted by the Purchasing Division. Appeal of the suspension may be made to the Secretary of Administration.

10.3. Any person receiving anything of value from a known interested party in awarding a purchase order is subject to the provisions of West Virginia 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 *West Virginia Code §5A-3-45.*

11.2 Property will be made available for five (5) working days prior to offering via an Internet auction site to ensure eligible organizations have first priority.

11.3 Items may be offered for sale on nationally recognized Internet sites, as approved by the Director.

11.4 Property will be listed on the Surplus Property website at least five (5) days prior to availability on an Internet site.

11.5 The state spending unit for surplus property may contract with a third party vendor to coordinate the Internet sales, pursuant to purchasing rules as outlined within this provision of the *West Virginia Code.*

EMERGENCY RULE QUESTIONNAIRE

DATE: June 16, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Boulevard, East, Room E-119
Charleston, WV 25305
304-558-3392

EMERGENCY RULE TITLE: Division of Purchasing

1. Date of filing June 16, 2006
2. Statutory authority for promulgating emergency rule:
WV Code § 5A-3-4
3. Date of filing of proposed legislative rule: June 16, 2006
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule? Amends the current legislative rule
5. Has the same or similar emergency rule previously been filed and expired?
No.
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.

The passage of HB 4031 during the 2006 session made major statutory changes in the purchasing process and the rules must be modified to address those changes so they are consistent with the current law. Without having the emergency rules in place, it will cause substantial harm to the public interest as the current rules are inconsistent with the new statute and vendors who do business with the state may inadvertently follow the wrong process in submitting their bids. This could result in bids being thrown out and a resulting lawsuit against the state for failure to have appropriate rules in place with the correct

data for vendors to rely upon. If a bid is thrown out then the state could be required to award a contract to a higher priced vendor. Additionally, HB 4031 gave authority for emergency rules as it relates selling of surplus property by means of internet auction site. Surplus property is included in the current purchasing legislative rules and language for internet auction is being included in the proposed modifications. Emergency rules are necessary in order for the Department of Administration to be authorized to carry out the requirements now set forth in the Statute and to preserve the public peace, health, safety and welfare of the citizens of the State of West Virginia. Without the emergency rules the State could be required to expend public funds unnecessarily for possible defending of lawsuits and to pay higher costs for commodities and services which could result in taking away funding for other much needed projects for our citizens thereby harming their health, safety and welfare as critical programs may be cut due to the lack of funding.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

Not applicable

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See response to number 6 above which outlines the need for these emergency rules.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 148, Series 1

Type of Rule: X Legislative Interpretive Procedural

Agency: Department of Administration

Address: 1900 Kanawha Boulevard, East
Capitol Complex, Room E-119
Charleston, WV 25305

Phone Number: 304- 558-3392 Email: dlipscomb@wvadmin.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 passage of House Bill 4031 during the 2006 legislative session makes substantial 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. There will be minimal costs associated with the passage of the proposed rules on the State's finances as the statute changes already put into place the increased vendor registration fees which make up the majority of the fiscal impact. Therefore, the fiscal impact should be de minimus.

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	2005 Increase/Decrease (use "-")	2006 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Equipment			
Other			
2. Estimated Total Revenues			

Rule Title: Purchasing

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

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

Although the fiscal impact with the passage of the proposed rules should be minimal, there may be some costs to the agencies as a result of the fees to be charged when the agency refuses to use e-procurement. However, those cost should be revenue neutral to the State as it would shift the costs from that particular agency to the Purchasing Division.

Additionally, the Purchasing Division intends to hire additional staff necessary to adequately staff the agency in order to implement the new purchasing laws. However, the additional staff is necessary regardless of whether the proposed rules are adopted. The additional costs associated with increased staffing was appropriated by the Legislature in the budget process.

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.

[Empty box for identifying 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: 6-16-06

Signature of Agency Head or Authorized Representative





JOE MANCHIN III
GOVERNOR

STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
OFFICE OF THE CABINET SECRETARY

ROBERT W. FERGUSON, JR.
CABINET SECRETARY

June 15, 2006

Via Hand-Delivery

The Honorable Betty Ireland
Secretary of State
Building 1, Suite 157K
1900 Kanawha Boulevard, East
Charleston, WV 25305

Re: Emergency Legislative Rules

Dear Secretary Ireland,


I am enclosing an original and fifteen copies of the documents listed below for filing. The proposed emergency rules are being filed in regard to Purchasing.

The documents enclosed consist of the following:

1. Notice of an Emergency Rule,
2. Statement of Circumstance and Brief Summary,
3. Proposed Rules,
4. Emergency Rule Questionnaire, and
5. Fiscal Note for Proposed Rules.

Thank you very much for your assistance. If you have any questions, or need any additional information, please do not hesitate to give me a call.

Sincerely,


Donna M. Lipscomb
Executive Coordinator

DMP:dp
Enclosures