



OFFICE OF THE SECRETARY OF STATE  
STATE OF WEST VIRGINIA

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**Betty Ireland**  
Secretary of State

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

July 26, 2006

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Administration

RULE: Amendments, 148CSR1, Purchasing Division

DATE FILED AS AN EMERGENCY RULE: June 16, 2006

DECISION NO. 11-06

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

  
BETTY IRELAND  
Secretary of State

Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, West Virginia 25305

EMERGENCY RULE DECISION  
(ERD 11-06)

AGENCY: Department of Administration  
RULE: Amendments, 148CSR1, Purchasing Division  
FILED AS AN EMERGENCY RULE: June 16, 2006

- par. 1 The Department of Administration (Department) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Department filed this emergency rule with supporting documents with the Secretary of State June 16, 2006 and with the LRMRC June 16, 2006.
- par. 7 It is the determination of the Secretary of State that the Department has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §5A-3-4 reads:

***§5A-3-4. Rules of director.***

***(a) The director shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty- nine-a of this code to:***

***(1) Authorize a spending unit to purchase specified commodities directly and prescribe the manner in which such purchases shall be made;***

***(2) Authorize, in writing, a spending unit to purchase commodities in the open market for immediate delivery in emergencies, define such emergencies and prescribe the manner in***

*which such purchases shall be made and reported to the director; and for the purposes mentioned in subdivision (1) and this subdivision (2), the head of any spending unit, or the financial governing board of any institution, may, with the approval of the director, make requisitions upon the Auditor for a sum to be known as an advance allowance account, in no case to exceed five percent of the total of the appropriations for any such spending unit, and the Auditor shall draw his or her warrant upon the Treasurer for such accounts; and all such advance allowance accounts shall be accounted for by the head of the spending unit or institution once every thirty days or more frequently if required by the State Auditor or director;*

*(3) Prescribe the manner in which commodities shall be purchased, delivered, stored and distributed;*

*(4) Prescribe the time for making requisitions and estimates of commodities, the future period which they are to cover, the form in which they shall be submitted and the manner of their authentication;*

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

*(6) Prescribe the amount of deposit or bond to be submitted with a bid or contract and the amount of deposit or bond to be given for the faithful performance of a contract;*

*(7) Prescribe a system whereby the director shall be required, upon the payment by a vendor of an annual fee established by the director, to give notice to such vendor of all bid solicitations for commodities of the type with respect to which such vendor specified notice was to be given, but no such fee shall exceed the cost of giving the notice to such vendor, nor shall such fee exceed the sum of one hundred twenty-five dollars per fiscal year nor shall such fee be charged to persons seeking only reimbursement from a spending unit;*

*(8) Prescribe that each state contract entered into by the Purchasing Division shall contain provisions for liquidated damages, remedies, or provisions for the determination of the amount or amounts which the vendor shall owe as damages, in the event of default under such contract by such vendor;*

*(9) Prescribe contract management procedures for all state contracts except government construction contracts including but not limited to those set forth in article twenty-two, chapter five of this code;*

*(10) Prescribe procedures by which oversight is provided to actively monitor spending unit purchases, including but not limited to, all technology and software commodities and contractual services exceeding one million dollars, approval of change orders and final acceptance by the spending units.*

*(11) Prescribe that each state contract entered into by the purchasing division contain provisions for cancellation of the contract upon thirty days' notice to the vendor;*

*(12) Prescribe procedures for selling surplus commodities to the highest bidder by means of an internet auction site; and*

*(13) Provide for such other matters as may be necessary to give effect to the foregoing rules and the provisions of this article.*

*(b) The director shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty- nine-a of this code to prescribe qualifications to be met by any person who on and after the effective date of this section is to be*

*employed in the Purchasing Division as a state buyer. The rules must provide that a person may not be employed as a state buyer unless he or she at the time of employment either is: (1) A graduate of an accredited college or university; or (2) has at least four years' experience in purchasing for any unit of government or for any business, commercial or industrial enterprise. Persons serving as state buyers are subject to the provisions of article six, chapter twenty-nine of this code.*

par. 9 It is the determination of the Secretary of State that the Department has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

*(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.*

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Department are as follows:

1. The passage of HB 4031 during the 2006 session made major changes to the purchasing process & the rules must be modified to address those changes so they are consistent with the current law.

2. Without having the emergency in place, it will cause substantial harm to the public interest as the current rules are inconsistent with the new statute & 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 & 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. 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 & language for internet auction is being included in the proposed modifications.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare"

par. 14

This decision shall be cited as Emergency Rule Decision 11-06 or ERD 11-06 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Department of Administration, the Attorney General and the Legislative Rule Making Review Committee.

  
BETTY IRELAND  
Secretary of State

Entered \_\_\_\_\_

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SECRETARY OF STATE



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

JOE MANCHIN III  
GOVERNOR

ROBERT W. FERGUSON, JR.  
CABINET SECRETARY

July 26, 2006

**Via Hand-Delivery**

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

Attn: Judy Cooper

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2001 JUL 28 A 9:19  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**Re: Legislative Rules**

Dear Secretary Ireland,

This letter is in follow up to my telephone conversation with Judy Cooper regarding the status of your decision on the Purchasing Emergency Rules. It is my understanding that no decision has yet been made as to whether to approve the emergency rules. Therefore, I would like to offer additional information that may be of assistance in rendering an opinion.

As you are aware, HB 4031 passed during the legislative session which made drastic changes to the purchasing statute. As a result, the entire purchasing rules needed to be revised to reflect those statute changes. It is imperative that the proposed rules be approved as emergency rules since the new law has already taken affect. Although statutes trump rules as to conflicts, having old rules in effect that do not accurately describe the new processes may, as you can imagine, cause mass confusion among the vendors who do business with the state and may create huge problems for the constitutional officers.

Of utmost concern to the Department of Administration is the potential for spending large sums of tax payer dollars needlessly as our Purchasing Division may be required to throw out lowest bids as a result of technical errors made by the vendors that relied upon the old rules that are no longer consistent with the new laws. Not only will this require the State to pay more money for the product itself but defending protests and lawsuits will require the State to incur legal fees and costs because the State's purchasing rules were not accurate with the statute. This could also result in bad press for the State and the parties involved. We want to avoid the perception of wrongdoing on behalf of the State in the press if at all possible.

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I would like to point out some specific differences for your information below:

- Old rules does not allow the Purchasing Division to inspect agency compliance while the new rule establishes that authority. Without the new rule, Purchasing may not be able to discover and prevent fraudulent purchases. Fraudulent purchases damage the competitive bid system, cause increased pricing to the state, vendor complaints and possible lawsuits.
- Old rules do not provide Purchasing the authority to penalize agencies for purchasing outside the law and rules while the new rule provides this authority. Without the new rule, Purchasing has no authority to prevent fraudulent purchases. Fraudulent purchases damage the competitive bid system, cause increased pricing to the state, vendor complaints and possible lawsuits.
- Old rules do not permit agencies to self report violations while the new rule provides that requirement. Without the new rule, agencies may be able to deny/hide violations, which cause fraudulent purchases. Fraudulent purchases damage the competitive bid system, cause increased pricing to the state, vendor complaints and possible lawsuits.
- Old rules permit processing of sole source purchases without public notification while the new rule requires public notification prior to approving sole source purchases. Without the new rule, the state will never know for certain if the price paid for the product or service purchased via sole source was the best possible price. Accordingly, the new rule will save money.
- Old rules do not permit price negotiation in certain situations while the new rule provides for that process. Without the new rule, if the state cannot afford the lowest responsible bid meeting specifications, the entire process must be canceled and rebid. New rule will allow negotiation of price and save the state time and money.
- Old rules require award to one bidder while the new rule allows award to multiple bidders. Without the new rule, the state will pay more for commodities/services in rapidly changing industries, and in situations where more than one vendor is needed to meet all of the state's needs.
- Old rules do not require contract management while the new rule provides for this requirement. Without the new rule, many state contracts will not contain benchmarks, meetings, etc between agencies and vendors to assure the state receives appropriate value for services received. Without the new rule, the state may pay for services not received.

- Old rules do not permit electronic bidding while the new rule permits this type of transaction. Without the new rule, Surplus Property cannot be sold on systems such as EBay causing the state to potentially lose money. Without the new rule, the state cannot buy products and services using electronic procurement which facilitates savings of time, money and provides effective reporting, tracking, etc.

Thank you very much for allowing me to provide additional information on this very important issue. If you have any questions, or need any additional information, please do not hesitate to give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read "Donna M. Lipscomb". The signature is written in a cursive style with a large initial "D".

Donna M. Lipscomb  
Executive Coordinator