



OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

Betty Ireland
Secretary of State

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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

DATE FILED AS AN EMERGENCY AMENDMENT: August 4, 2006

DECISION NO. 15-06

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 15-06)

AGENCY: Department of Administration
RULE: Amendments, 148CSR1, Purchasing Division
FILED AS AN EMERGENCY RULE: June 16, 2006
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- par. 1 The Department of Administration (Department) has filed the above emergency amendment to an existing 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 August 4, 2006 and with the LRMRC August 4, 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:

The passage of HB 4031 during the 2006 session made major statutory changes in the purchasing process. The current emergency rules that are in effect were necessary so the rules are consistent with the current law and so it would not cause substantial harm to the public interest. The current emergency rules were filed simultaneously with proposed legislative rules and were out for comment at the same time. Voluminous comments were received and modifications have been made as a result of the comments to the agency approved rules. The Department of Administration would like to get an emergency amendment to the emergency rules which allow for the same modifications to the emergency rules that have been made to the proposed legislative rules. This would allow the emergency rules to mirror the proposed legislative rules that will become effective once they have passed the legislature. This is needed so that the spending units will be currently working under the correct processes and rules as anticipated in the future.

While some of the modifications made are only technical or provide clarification of their intent, some of the modifications are substantive in nature. The substantive changes do warrant an emergency amendment to the current emergency rules that are in effect.

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 15-06 or ERD 15-06 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

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