

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

Form #3

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

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

CITE AUTHORITY: 5A-3-4

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Purchasing Division

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

Agency: Department of Administration
Purchasing Division

Rule Type: Legislative

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

STATEMENT OF CIRCUMSTANCE AND BRIEF SUMMARY

The passage of House Bill 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. The proposed modifications make the following changes:

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.



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

ROBERT W. FERGUSON, JR.
CABINET SECRETARY

JOE MANCHIN III
GOVERNOR

July 28, 2006

Via Hand-Delivery

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

Re: Legislative Rules


Dear Secretary Ireland,

I am enclosing an original and fifteen copies of the documents listed below for filing. The proposed rules are in regard to the Purchasing Division. I will provide the copies of the enclosed documents to the Legislative Rule Making Review Committee once they are marked filed by your office.

The documents enclosed consist of the following:

1. Notice of Agency Approval of a Proposed Rule and Filing with the Legislative Rule-Making Review Committee,
2. Statement of Circumstance and Brief Summary of the rules,
3. Brief Summary of comments received, agency response, and amendments,
4. Proposed Rules,
5. Fiscal Note
6. Questionnaire,
7. Disc containing 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

Enclosures

BRIEF SUMMARY OF COMMENTS RECEIVED; AGENCY RESPONSE; AND AMENDMENTS

The Department of Administration received voluminous comments from vendors, community rehabilitation programs, board members, associations, municipalities and state agencies in regard to the proposed purchasing rule modifications. Several persons made comments and suggestions concerning rules which simply restate the current law. Additionally, many people asked questions about future procedures which have yet to be determined. The Department of Administration received documents which were not comments, but rather strike through and insert of the rules. Since no statement or comment was noted, the Department of Administration did not respond. The following briefly outlines the comments received that are substantive in nature for which the Department of Administration believes a response is warranted. Following the Department of Administration's summary, please find attached all comments received by the Department of Administration.

Community Rehabilitation Programs Comments:

The Department of Administration received several letters from community rehabilitation programs throughout the state and related associations and boards. Most of the letters received contained the same comments and concerns which are outlined below:

Comment 1: The rule modifications exceed the scope of HB 4031.

Agency Response 1: The law does not require that a Statute change be made prior to an agency being allowed to modify legislative rules. The Purchasing Division may make revisions to their legislative rules at any time as long as they go through the appropriate process that is in place. The proposed amendments not only reflect the Statute changes made in HB 4031, but they also clean up outdated language as well as clarify language that could be interpreted incorrectly.

Amendment 1: No amendments made as a result of these comments.

Comment 2: The Statement of Circumstance and Brief Summary does not mention the changes about which the community rehabilitation programs are concerned.

Agency Response 2: The Statement of Circumstance and Brief Summary is simply a brief summary of the major changes. No major changes have been proposed that were not noted. The proposed modifications of concern to the rehabilitation programs were technical corrections for clarification purposes only.

Amendment 2: No amendments made as a result of these comments.

Comment 3: The proposed rule modifications will remove the responsibilities from the Governor's Committee and bring the whole process into the Division of Purchasing for management of the sheltered workshops.

Agency Response 3: This comment misinterprets the Department of Administration's proposed amendments. The proposed amendment merely clarifies what is in statute.

Amendment 3: No amendments made as a result of these comments.

Comment 4: The proposed modification at §148-1-4(l) places the sheltered workshop system into a competitive bid status.

Agency Response 4: The modification made at this section did not place any additional requirements on the community rehabilitation programs nor the Governor's Committee. The Purchasing Director has the responsibility to sign and approve every contract or to exempt a contract from the process. The proposed modification simply clarified the Director's ability to confirm that the price for a contract is "comparable" by any method he determines.

Amendment 4: The Department of Administration has deleted "...as determined by the Director by competitive bid or other methods" from the proposed amendments to the rules.

Comment 5: Modification at §148-1-4(m) removes the responsibilities of the central nonprofit agency and places it within the Department of Administration. It also removes the current arrangement of WVARF to serve as the central nonprofit agency.

Agency Response 5: The proposed modification is for clarification purposes only. This modification relates only to the employee of the Purchasing Division who coordinates the work of the community rehabilitation programs. This change does not prohibit the Purchasing Division employee from providing information or assistance to the Governor's Committee or the community rehabilitation programs just as he/she would do for any other customer. This simply clarifies that the employee is, in fact, an employee of the Division of Purchasing and not any other entity and is not required to act as their employee. The proposed rules do not change the current arrangement of WVARF to serve as the central nonprofit agency since there is no Statute or rule which requires WVARF to be the CNA.

Amendment 5: No modifications made as a result of these comments.

Vendors Comments:

Comment 6: I would like to add to 7.1.2 the words "or equal". The idea being what is the item to be compared by: smell, color, size, quickness, etc.

Agency Response 6: The language "or equal" is already in the proposed rules.

Amendment 6: No amendment being made as a result of this comment.

Comment 7: Concerned that the language that states that an agency must pay interest if payment is not made within 60 days has been stricken from the rules. See §148-1-9.

Agency Response 7: The language is redundant as it is in the prompt payment act.

Amendment 7: No amendment being made as a result of this comment.

Comment 8: I was told that it is the responsibility of the Purchasing Division to insure that all vendors are registered with all appropriate state agencies, including the Secretary of State, Department of Revenue and Department of Motor Vehicles. This requirement should be added to the rules.

Agency Response 8: The Statute does not place the responsibility to ensure that all vendors are registered with all other state agencies upon the Division of Purchasing. The Purchasing Division does, however, require all vendors to sign a "No Debt Affidavit" in which they must self certify that they are registered with all appropriate state agencies.

The Purchasing Division will add language to the proposed rules to clarify that vendors must be registered with all appropriate state agencies.

Amendment 8: The rules will be amended as a result of this comment.

Comment 9: In 6.2.5, the proposed amendments appear to make it possible for vendors to view the bids only immediately after the bid opening at Purchasing. Vendors should be able to view any time after the bid opening.

Agency Response 9: The Department of Administration's intent was not to limit public access to documents. In order to clarify its intent, the Department of Administration will replace "immediately" with "at any time"

Amendment 9: The rules will be amended as a result of this comment.

Comment 10: The notice of hearing for suspended vendors appears to have been eliminated.

Agency Response 10: The Department of Administration mistakenly deleted this language.

Amendment 10: The rules will be amended as a result of this comment.

Comment 11: In section 6.5.3, it states that the Purchasing Director shall develop standard specifications, which shall include cost of maintenance and other standards. Some products may not be appropriate for this requirement.

Agency Response 11: The proposed amendment only requires the Director to include maintenance and other standards when the Director determines there are nationally accepted standards. Therefore, the requirement would not apply if there were no nationally accepted standards. Further, the Director is not required to develop standard specifications when its not appropriate.

Amendment 11: No amendment being made as a result of this comment.

Comment 12: Several comments received in regard to section 6.6.1 where it states "no spending unit personnel shall have any communication with any vendors during the solicitation, bid evaluation, or award periods". The comments point out that vendors need to be able to ask questions of the people who actually know what all aspects of the bid specifications mean.

Agency Response 12: The Department of Administration included this amendment in order to ensure the playing field is level for all vendors. The Department of Administration agrees, however, that vendors need access to State employees at times.

Amendment 12: The rules will be amended as a result of this comment.

Comment 13: The proposed rules state that the Purchasing Director shall evaluate bids. Does this mean that the agencies have no input?

Agency Response 13: It was not the intent to strip the agency of input into the process. In order to clarify its intent, the Department of Administration will delete §148-1-6.6.2.

Amendment 13: The rules will be amended as a result of this comment.

Comment 14: Bid protests are due within five days of the award and vendors are responsible for knowing the bid award dates. Vendors are notified when their bids are unsuccessful, but not the date of the award to the successful vendor.

Agency Response 14: Vendors shall remain responsible for knowing the bid opening and award dates. Unsuccessful vendors are notified at the time of award.

Amendment 14: No amendment is being made as a result of this comment.

Comment 15: The rules appear to be for only "commodities, services, or printing". The rules should be more specific as to what each of these categories include.

Agency Response 15: The definitions of "commodities" and "printing" are defined in WV Code §5A-1-1(1) & (9). The Department of Administration disagrees that services needs further definition as to do so may unduly limit the term.

Amendment 15: No amendment being made as a result of this comment.

Comment 16: It sounds like the intent of the proposed rules is to move away from RFP's and only allow them for "commodities, services and printing while giving the agency or Director the ability to subjectively decide which bid is better without any supporting documentation from the vendor. I believe that best value procurement could lead to more bid protests because of the subjectiveness.

Agency Response 16: "Best Value Procurement" is the "umbrella" under which all purchasing decisions are made. RFP's are merely one method of procurement under the overarching idea of best value procurement, and the two should not be confused as two different types of procurement. In all cases, all contracts will be awarded based upon specified criteria in each solicitation.

Amendment 16: No amendment being made as a result of this comment.

Comment 17: Several comments were received regarding section 7.7.2 as it was modified to state RFP's can be utilized only for contracts for services estimated to cost in excess of \$500,000. This section should state that RFP's cannot be used to acquire architectural or engineering services due to 5G of the WV Code.

Agency Response 17: Since architectural and engineering services are subject to Chapter 5G, the proposed amendment to the purchasing rules would not apply to their services.

Amendment 17: No amendment being made as a result of this comment.

Comment 18: The elimination of duplicate bids for vendor reviews are invaluable to the vendors. Reviews take time and need to be done in person utilizing the actual documents for comparisons. Also, there have been discrepancies found during these reviews that have allowed the correct vendor to be chosen.

Agency Response 18: The duplicate bid package with the Auditor was eliminated in the Statute. Bids can be viewed at the Purchasing Division immediately after the bid opening online or online the same day or next day. The elimination of the duel bid with the Auditor will assure that bids are not thrown out due to technical reasons when one package did not include something the other package had or differences in filing times.

Amendment 18: No amendment is being made as a result of this comment.

Comment 19: How can the Purchasing Director be versed enough to develop standard specifications for very highly specific equipment being purchased? It is physically impossible for one person to have this type of pressure placed upon him.

Agency Response 19: The Director would enlist the assistance of spending units if standard specifications were appropriate and the subject matter was outside his/her area of expertise.

Amendment 19: No amendment being made as a result of this comment.

Comment 20: The City of Charleston would like the rules to include language that vendors should certify that they have complied with all taxes and fees that might be owed to a city or municipality in West Virginia.

Agency Response 20: The Department of Administration agrees and has amended the proposed rules accordingly.

Amendment 20: The rules will be amended as a result of this comment.

Comment 21: The Purchasing Division is thinking about placing advertising on the “no-bid list”. Without knowing all that is put out to bid during the year from the agencies, I do not know if this would be wise. Members worry that putting advertising on the no-bid list isn’t correct because advertising is biddable (unless a sole source) and opportunities will be missed because they were not advertised.

Agency Response 21: The Department of Administration agrees and will not place advertising on the no-bid list. The rules, however, do not specifically identify the items to be placed on the no-bid list. Consequently, no amendments are necessary.

Amendment 21: No amendment will be made to the rules as a result of this comment.

Comment 22: Under the authority and remedies of the Director “services” has been added. Can “services” be defined?

Agency Response 22: “Services” is neither a commodity or printing as defined in WV Code §5A-1-1. See also the Department of Administration’s response to Comment 15.

Amendment 22: No amendment is being made as a result of this comment.

Comment 23: In section 6.2.2, it states “the Director shall not accept any bid or part of any bid received by any other state spending unit or other recipient”. What does this section mean?

Agency Response 23: This prevents the Division of Purchasing from taking bids sent by mistake to the Auditor or any other agencies. The Department of Administration has amended its proposed rules in order to clarify.

Amendment 23: The rule is being amended as a result of this comment.

Comment 24: In current law, any contractor who withdraws a bid under the provisions of this section may not resubmit a bid on the same project. If the bid withdrawn is the lowest bid, the next lowest bid may be accepted. Should this language be included in 6.2.7?

Agency Response 24: No. The language which the commentor referenced is found in Article 22, Chapter 5 which refers exclusively to construction projects and is not applicable.

Amendment 24: No amendment being made as a result of this comment.

Comment 25: “Litigation bond” has been added to the requirements in 6.4.5. What is a litigation bond and when will it be required?

Agency Response 25: Litigation bonds are used to deter frivolous lawsuits. Further, the bond provides a mechanism for the State to recover damages including attorney fees, loss of revenue, loss of grants and travel expenses which may result from litigation.

Amendment 25: No amendment is being made as a result of this comment.

Comment 26: The Statute exempts government construction contracts and the purchase of supplies and materials from “discussion and final offers”. Shouldn’t these exemptions be noted in the rules?

Agency Response 26: The Department of Administration agrees and will add the language to the proposed rules.

Amendment 26: The rules are being amended as a result of this comment.

State Agency Comments:

Comment 27: Several comments were received as to the rules requiring that the person who does purchasing for the agencies shall take purchasing training, be approved or disapproved by the Purchasing Director, and shall have no other responsibilities. a) Can the Director know the capabilities of someone they see occasionally and can he dictate what responsibilities the agency will assign to that person?; b) This will give the Director of Purchasing the choice of who he wishes an agency to hire versus the head of the agency; c) Some agencies are small and their employee who performs purchasing tasks only work in that area a very small percentage of their time; and d) A small agency should not be required to hire an employee just to do purchasing duties.

Agency Response 27: The Department of Administration has modified the proposed rules in order to address concerns.

Amendment 27: The rules will be amended as a result of this comment.

Comment 28: The rules refer to storerooms. Does purchasing do that any more?

Agency Response 28: This is current language and the proposed modifications make no changes. The Department of Administration does not currently use storerooms but they may want to in the future.

Amendment 28: No amendment is being made as a result of this comment.

Comment 29: The rules state that purchasing should establish best practices for assigning amounts and remedies. It is very difficult to determine how much bonds and liquidated damages should be.

Agency Response 29: This is current language and the proposed modifications make no changes.

Amendment 29: No amendment is being made as a result of this comment.

Comment 30: In section 6.2.4 the code cite is not accurate.

Agency Response 30: The Department of Administration has corrected the citation.

Amendment 30: The rules are being modified as a result of this comment.

Comment 31: There is no subdivision 6.2(d) in this rule.

Agency Response 31: The Department of Administration agrees and will correct the rules.

Amendment 31: The rules are being amended as a result of this comment.

Comment 32: Usually bonds are established in an RFP and not an RFQ.

Agency Response 32: This is current law and the modifications do not make changes to the language in the rules.

Amendment 32: No amendment is being made as a result of this comment.

Comment 33: In the world of Information Technology the CTO sets the IT standards and works with the agencies and Purchasing to determine what IT statewide contracts the State needs and will use. Section 6.5.3 would allow the Director to develop standard specifications without regard to the direction that IT is going.

Agency Response 33: The WV Code allows the CTO to set IT standards. The Department of Administration has amended the proposed rules to allow the necessary flexibility for the rules to be compatible with the intent of the Code.

Amendment 33: The rules are being amended as a result of this comment.

Comment 34: Several comments were received regarding the rules wherein they state the Director shall evaluate bids received for purchases and then later says that he may solicit assistance. On RFP's or Best Value Procurement, the agency who prepared the

RFP would be better in evaluating it than Purchasing. Additionally, it says that the spending unit shall comply and perform any bid review and subsequent award recommendation within two weeks and failure may result in cancellation of the purchase request. Two weeks is not reasonable due to the time it takes to compile a committee and review the detailed RFP responses.

Agency Response 34: The Department of Administration does not agree with this comment. See response to comment 13.

Amendment 34: The rules are being amended as a result of this comment.

Comment 35: The rules state that spending units shall not use brand names to restrict competition and all brand name specifications shall be followed by the phrase "or equal" to promote and encourage competition. This is difficult for information technology.

Agency Response 35: The WV Code permits the CTO to set standards for information technology. When writing the specifications, the spending unit should include vital information in the requirements such as technicians being trained on a specific commodity or compatibility with current commodities.

Amendment 35: No amendment is being made as a result of this comment.

Comment 36: Information Technology will have problems with the language in 7.5.2 as it relates to posting of sole source as no one else can provide the telephone support covering fixes and any new software updates versions that come out during the year except IBM. Many vendors think they can offer maintenance but we have found out that a vendor may think they can save you money but you suffer in response time and quality of service.

Agency Response 36: The WV Code requires that sole source purchases be posted. Further, if there are qualifications that are vital to the success of a project, CTO can write them into the specifications.

Amendment 36: No amendment is being made as a result of this comment.

Comment 37: Do the rules say that best value procurement can only be used for services estimated to cost in excess of \$500,000? Software and IT services are best acquired by RFP. It should be up to the agency. The whole point of an RFP is to put out

an agency's requirements and let the vendor propose a solution.

Agency Response 37: In order to provide flexibility, the Department of Administration has eliminated §148-1-7.7.2 from the proposed rules.

Amendment 37: The rules are being modified as a result of this comment.

Comment 38: Contract management procedures are key to efficient contracts. My issue is whether the Director may require an agency to use a third-party contract manager, appointed by the Director, or hired by contract. The rules should add under 7.13: (e) require agencies to use the Office of Technology Project Management Office for all technology-associated projects.

Agency Response 38: The Department of Administration agrees and has amended the proposed rules accordingly.

Amendment 38: The rules will be amended as a result of this comment.

Comment 39: I question the fairness of requiring a person to know "any policy or procedure adopted by the Purchasing Division" and be personally liable for the cost of the purchase or contract.

Agency Response 39: This is the current law and the rule can not be changed as Statute takes precedence. Further, this rule merely points out that ignorance is not a defense.

Amendment 39: No amendment is being made as a result of this comment.

Comment 40: Several comments were received regarding the rules requiring all automated systems prescribed by the Director to be mandatory for spending units and failure to comply may require agencies to pay a fee not to exceed \$100 per purchase request or a \$10 per transaction fee for non-purchase requests. This could hurt a small agency that does not have tech support staff or proper technology available. Comments also suggest that more detail is needed as to whether any paperwork will be sent to Charleston and how this will cascade down to use of various software products.

Agency Response 40: The Department of Administration agrees this could be a problem for small agencies and will remove the monetary penalty.

Amendment 40: The rules are being amended as a result of that comment.

Comment 41: Several comments were received in regard to the inspectors. The rules allow the Purchasing inspectors to review and audit spending units. Outside professionals and the Auditor's office does not show up unannounced to review documents and purchasing should not be given this privilege. State agencies believe they should be given sufficient notice so schedules can be accommodated and required records obtained.

Agency Response 41: The Department of Administration does not agree with this comment and believes that giving a spending unit notice may hinder their ability to determine exactly what transpired. The Department of Administration, however, has deleted the express authority that Purchasing is not required to give notice prior to inspection.

Amendment 41: The rule is being amended as a result of this comment.

Comment 42: The rules give the Purchasing Division the ability to suspend or reduce purchasing authority for any spending unit that fails to report multiple contract awards that are deemed to circumvent the \$25,000 threshold within twelve months. This could keep the spending unit from completing their mission. This gives too much power to the Director of Purchasing which could easily be abused. Also, there is no process to appeal a decision.

Agency Response 42: This Section merely restates the Code. The Department of Administration believes it is important to also state this in the rules so that purchasing personnel will be aware of it.

Amendment 42: No amendment is being made as a result of this comment.

Comment 43: In section 6.5.2 it gives the Director the authority to approve or disapprove specifications. No one person can be considered an authority to write specifications for all commodities, services or printing needed by a spending unit. The end-user usually has the most knowledge of what they are asking for.

Agency Response 43: The Department of Administration agrees with this comment and that section will be deleted.

Amendment 43: The rules are being amended as a result of this comment.

Comment 44: The majority of our RFP's involve some type of equipment being provided and located on our site. This equipment is not being purchased by the agency; however, it is a necessity and requirement for the vendor to be able to perform the requested service. RFQ's are not feasible for most of our service proposals because a technical evaluation is necessary to assure that the vendor possesses the proper credentials, experience and qualifications.

Agency Response 44: See Comment number 37.

Amendment 44: The rules are being amended as a result of this comment.

Comment 45: Agencies should not be required to bear the costs of a third-party contract manager. Agencies do not need to incur additional costs of outside monitoring services. Generally, these are consultants that do not have the knowledge and expertise of in-house personnel.

Agency Response 45: The Department of Administration agrees and will delete this provision from the rules.

Amendment 45: The rules are being amended as a result of this comment.

Comment 46: The Director shall establish a list of commodities and services that are not possible to bid. Does this address true sole source issues? Will the list be made available for public review and posted?

Agency Response 46: The list will reflect sole source items and will be made available for public review.

Amendment 46: The rule is being amended as a result of this comment.

Comment 47: The rules allow minor irregularities in bids or specifications to be waived. This is a good provision in that it would prevent having to re-bid due to minor irregularities. How will this be defined to ensure consistency so they do not waive the same irregularity for one vendor and not another vendor.

Agency Response 47: This is current rule and no modification is being made to this provision.

Amendment 47: No amendment is being made as a result of this comment.

Comment 48: The rules gives authority to the Director to direct the central storerooms of supplies for spending units. There is no state central supply depot so those items should be managed by the spending unit with oversight.

Agency Response 48: This is current rule and no modification is being made to this provision.

Amendment 48: No amendment is being made as a result of this comment.

Comment 49: Does the position referred to in the rules that works with the non-profit workshops already exist? There should be inspectors who were suppose to perform those tasks. Will agencies have to pay for the audits?

Agency Response 49: This position already exists. The rules are being modified to clarify for whom the person works.

Amendment 49: No amendment is being made as a result of this comment.

Comment 50: The rules indicated that the Director shall appoint inspectors to review and audit spending unit requests and purchases and other transactions. Define other, would it be procurement related? Do these inspectors represent new hires? If so, weren't these positions previously eliminated and deemed unnecessary?

Agency Response 50: The Department of Administration does not agree that a definition is required for "other transactions" as there would be no way to cover everything that may be reviewed depending on each circumstance. As for the inspectors being new employees, they are new hires. The positions were never established and then eliminated because they were unnecessary.

Amendment 50: No amendment is being made as a result of this comment.

Comment 51: The rules allow the Director to waive the annual vendor registration fee. Should you define how waiving the annual fee can be done without playing favorites and show how waiving the fee is in the best interest of the state?

Agency Response 51: The Statute addresses the fee issue. Also, the current rules are not being modified other than to change the amount of the fee to be consistent with the WV Code.

Amendment 51: No amendments are being made as a result of this comment.

Comment 52: In regard to suspending an agency for circumventing the \$25,000 threshold, how will this be applied? We do business with a number of vendors from which we purchase more than \$25,000 in combined purchases of products or services without a contract, especially when considering BHFF in the aggregate. How would this be determined?

Agency Response 52: The suspension relates to not reporting, not stringing. The spending unit simply must keep track of purchases which will keep stringing concerns on its radar. Further details have not been determined.

Amendment 52: No amendment is being made as a result of this comment.

Comment 53: The rules indicate that the Director shall schedule a hearing for suspended vendors. Does the Director have a time frame established to comply with this?

Agency Response 53: This language is current law and the rules are not being modified.

Amendment 53: No amendment is being made as a result of this comment.

Comment 54: We have vendors we purchase items from via the P-card that would not have paid the annual registration fee and may not be registered. Whose responsibility is it to assure this is done? The Department of Administration will need to do public relations work with the vendor community to explain the rules.

Agency Response 54: This is current law and no modifications are being made to the language in the rules.

Amendment 54: No amendment is being made as a result of this comment.

Comment 55: The Director may waive the registration requirements in the case of any vendor who is a sole-source provider. Why? Is this because the sole source provider refuse to pay because they know we don't have an alternative source?

Agency Response 55: This is current law and no modifications are being made to the language in the rules.

Amendment 55: No amendment is being made as a result of this comment.

Comment 56: The rules indicate that the bids shall be submitted prior to the date and time of the bid opening. The Director shall reject the bids received after the designated time and date. Shouldn't this time be uniform for all bids and correspond with the end of the business day? That way all bids received by a certain date would be acceptable.

Agency Response 56: The Department of Administration does not agree with this comment as the bid opening must be set when two employees in the Purchasing Division are present. While the vendors can attend the bid opening, it is not a requirement. It would be a waste of taxpayer dollars to require employees to work over to have the bid opening.

Amendment 56: No amendment is being made as a result of this comment.

Comment 57: How will an electronic signature of an individual work when the corporate signature is not acceptable? Also, are "transmission completed" e-mails acceptable? If so, if an individual submitted a bid via e-mail prior to the bid opening but it was not opened by the buyer would it be accepted?

Agency Response 57: The details of electronic e-procurement have not yet been established. The rules do not address such details.

Amendment 57: No amendment is being made as a result of this comment.

Comment 58: In regard to the rejection of an erroneous bid after the bid opening, cost has to be a factor as not being able to receive a product at a reduced cost in a timely

manner can be a significant hardship and a threshold should be set to determine when clarification can be obtained to correct the error from the bidder.

Agency Response 58: This is current law and the language in the rules is not being modified.

Amendment 58: No amendment is being made as a result of this comment.

Comment 59: The rules allow the Director to make a price adjustment on any purchase order if specific provisions for price adjustments have been incorporated in the RFQ and purchase order. In the event that no provisions for price adjustments has been made, discretion to grant a price adjustment rests with the Director. This should be with the spending unit's concurrence.

Agency Response 59: The rule was modified so that spending units will be offered the opportunity to concur with increases on spending unit contracts.

Amendment 59: The rules is being amended as a result of this comment.

Comment 60: The rules state that the vendor is solely responsible for delivering their bid to the Purchasing Division with the official time clock located in purchasing. How does the official time clock apply to bids received electronically or by e-mail?

Agency Response 60: The rules do not contain language in regard to the specific procedures. The details will be determined at a later date.

Amendment 60: No amendment is being made as a result of this comment.

Comment 61: The ten day requirement for shipping can be considered restrictive. This apparently applies to all types of commodities, services or printing. Some may not be able to deliver within 10 days.

Agency Response 61: This is current law and the language in the rules is not being modified.

Amendment 61: No amendment is being made as a result of this comment.

Comment 62: The Director may accept or reject any bid when he feels it is in the best interest of the state. If any bid is rejected a written explanation shall be placed in the purchase order file. If this is the lowest bid the bidder and the spending unit should be notified as to why it was rejected with an explanation of how clarification was sought.

Agency Response 62: This is the current rule and no modifications are being made thereto.

Amendment 62: No amendment is being made as a result of this comment.

Comment 63: When tie bids are received the award is made by allowing the tied vendors to make a "last and final offer". If, after the last and final offer there is still a tie then it should be done by the flip of a coin, draw of cards, or some other impartial method. This could lead vendors to question how partial the award really is. This should be done by other means and criteria such as history of the vendor or being a West Virginia vendor, etc.

Agency Response 63: This is the current rule and no modifications are being made to the language regarding ties.

Amendment 63: No amendment is being made as a result of this comment.

Comment 64: The rules state that purchases in excess of \$25,000 shall be made by the Purchasing Division. Should you further clarify that this does not include purchases made from open-end/blanket contracts? Otherwise, the literal verbiage here would lend itself that all of these purchases could be required to be processed through the Department of Administration?

Agency Response 64: The Department of Administration does not agree that exclusionary language needs to be added.

Amendment 64: No amendment is being made as a result of this comment.

Comment 65: The Director has the authority to waive the requirement to advertise when it is determined to be in the best interest of the state. When would it be in the best interest of the state NOT to advertise? Is there not going to be a defined time frame in order to advertise now?

Agency Response 65: The Department of Administration believes that there may be rare situations, such as emergencies, when expediency would dictate waiver.

Amendment 65: No amendment is being made as a result of this comment.

Comment 66: The provisions relating to emergency procurement should include a provision that would allow for emergency purchases in the event of a regulatory agency issuing citations and requiring timely action or in order to avoid fines or penalties.

Agency Response 66: The Department of Administration does not agree with this statement and believes the language is sufficient to include such a scenario.

Amendment 66: No amendment is being made as a result of this comment.

Comment 67: In regard to the RFP's only being used for contracts in excess of \$500,000, does the agency have to request in writing to utilize an RFP instead of an RFQ for services we would anticipate costing less than \$500,000.

Agency Response 67: See Comment number 37.

Amendment 67: The rule is being amended as a result of this comment.

Comment 68: The rules allow for participation in cooperative purchases with other public agencies and entities if they do not conflict with existing State of WV contracts unless the price is substantially lower than the state contract. "Substantially lower" should be defined by % or dollar amounts. Also, why is "best interest to the state" used and not "most cost effective"? Will there be examples of this or will it be subjective? (See §148-1-7.9)

Agency Response 68: The Department of Administration believes the current language is sufficient as they believe there must be some subjectivity in the decision making process.

Amendment 68: No amendment is being made as a result of this comment.

Comment 69: All requests to use cooperative purchasing contracts shall be submitted in advance to the Director with evidence and documentation as required by the Director. The Director may only approve the requests with evidence that justifies use of such contracts. This is too subjective whereas all contracts not approved should be reviewed by the Secretary of Administration, a committee or a board to determine if it is in the best interest of the taxpayers.

Agency Response 69: The Department of Administration believes the current language is sufficient as a spending unit can always petition the Secretary to override a decision of the Director.

Amendment 69: No amendment is being made as a result of this comment.

Comment 70: In regard to multi awards, why not include this language in solicitations where you know that by having multiple awards is advantageous. There is no difference as long as the specifications are written to inform potential bidders/vendors of the intent and willingness to consider more than one vendor.

Agency Response 70: There is nothing in the rules that forbids said inclusion.

Amendment 70: No amendment is being made as a result of this comment.

Comment 71: In regard to negotiation where all bids exceed available funds, justification for any change in maximum budgeted amount by a spending unit after the bid opening must be provided. Sometimes there is not a maximum budgeted amount set. Services must be paid regardless due to the legislative mandates. Would it be acceptable to provide guidelines as to what the previous years' expenses were? (See §148-1-7.11)

Agency Response 71: The Department of Administration believes that the current language in the rules is adequate as it prevents the appearance of impropriety. Additionally, changing amounts will prohibit negotiation.

Amendment 71: No amendments are being made as a result of this comment.

Comment 72: If all bids exceed the budgeted amount the Purchasing Division may negotiate a lower price with bidders meeting specifications. This should be with the concurrence of the spending unit. Also, if negotiation is not permitted, does this mean that the contract will be awarded to the lowest bidder or not awarded at all?

Agency Response 72: There is no need to include the spending unit in negotiation as the ceiling price the spending unit will pay is fixed by budget.

Amendment 72: No amendment is being made as a result of this comment.

Comment 73: Who hires the third-party contract manager, the Department of Administration or the spending unit? Shouldn't the spending unit have a say in this and approve such associated costs?

Agency Response 73: The Department of Administration agrees with this comment and will delete this provision from the rules.

Amendment 73: The rule is being amended as a result of this comment.

Comment 74: When there is a violation of the WV Code and suspension it should be for a minimum of one year and not a maximum of one year.

Agency Response 74: The Department of Administration disagrees with this comment. Further, this language is contained in current rule to which no modifications are being made.

Amendment 74: No amendment is being made as a result of this comment.

Comment 75: The Office of Technology needs to be able to establish technical standards and technical specifications. The lack of standards is costing the state millions in support costs and resulting in interoperability issues. In many areas of information technology it is financially prudent to set vendor specific standards and move forward with that specific vendor.

Agency Response 75: The Office of Technology has the ability by Statute to set standards.

Amendment 75: No amendment is being made as a result of this comment.

Comment 76: In section 6.6.1 the clause "without the consent of the Director" needs to be added. It is very inefficient to explain technical questions to the buyer, then buyer

transfers to the vendor, then the vendor answers back to the buyer and finally the buyer answers back to the evaluator. When evaluating an RFP there are many times that points need to be clarified.

Agency Response 76: The rule permits this interaction.

Amendment 76: No amendments are being made as a result of this comment.

Comment 77: The Office of Technology disagrees with section 7.1.2. New legislation passed that empowers the Office of Technology to set and enforce technology standards. I want to make sure the purchasing rules do not restrict that authority.

Agency Response 77: The language in these rules does not change the Statutory authority.

Amendment 77: No amendment is being made as a result of this comment.

Comment 78: Additional conditions need to be added to sole source such as the decision not to select a specific vendor will result in interoperability issues with existing or previously acquired state assets and the decision not to select a specific vendor will result in significant conversion costs.

Agency Response 78: The Department of Administration has the ability to consider these factors when warranted and the language contained in the rules is sufficient.

Amendment 78: No amendment is being made as a result of this comment.

Comment 79: In section 6.4.1 how do you define “responsible”?

Agency Response 79: There is no definition of “responsible” in the rules.

Amendment 79: No amendment is being made as a result of this comment.

Comment 80: The sentence “An RFP or EOI are awarded based on criteria specified in instructions to bidders, including price in RFP” is not clear. Prices are only included in bids, RFP’s are the specifications.

Agency Response 80: This comment is incorrect and price is part of the evaluation criteria (typically 30%) for an RFP.

Amendment 80: No amendment is being made as a result of this comment.

Comment 81: The rules prohibit additional responsibilities for the spending unit procurement manager. In DRS' case the Procurement Manager also has other duties. Would these additional duties be prohibited?

Agency Response 81: The Department of Administration is revising the rules to address this concern.

Amendment 81: The rules are being amended as a result of this comment.

Comment 82: Please define or at least provide a few examples of what a "non-purchase" request might be.

Agency Response 82: The Department of Administration is deleting this sentence from the rules to avoid confusion.

Amendment 82: The rule is being amended as a result of this comment.

Comment 83: Is the provision at 6.6 discretionary on the part of the Purchasing Division Buyer? I was recently asked to write clarification letters to bidders on a bid being processed by Purchasing. If so, they may want to add "unless requested by the Purchasing Division Buyer" at the end of the last sentence.

Agency Response 83: The Department of Administration agrees with this comment and the rules will be modified.

Amendment 83: The rules are being amended as a result of this comment.

Comment 84: I thought all purchase orders processed by Purchasing were sent to the Auditor. Does this mean the spending unit will be responsible for sending copies of purchase orders to the Auditor's office after award or with the first invoice?

Agency Response 84: This language is contained in the current rule and no modifications are being made to the provisions in the rules.

Amendment 84: No amendment is being made as a result of this comment.

Comment 85: Will there be a minimum number of ads required? The rule has been changed from the minimum two ads to no number given.

Agency Response 85: The decision has not yet been made.

Amendment 85: No amendment is being made as a result of this comment.

Comment 86: What method will be used to make spending units aware of open-end contracts done by other spending units that we will be required to use?

Agency Response 86: The method has not yet been determined.

Amendment 86: No amendment is being made as a result of this comment.

Comment 87: How many times or for how long will the sole source transactions be advertised? Will the advertising appear in the Purchasing Bulletin?

Agency Response 87: Those decisions have not yet been made. The determination will be made at a later date.

Amendment 87: No amendment is being made as a result of this comment.

Comment 88: Will the negotiations allow changes to specifications to allow lower quantities or drop services requested in the original bid?

Agency Response 88: No. Negotiations will be for the price only.

Amendment 88: No amendment is being made as a result of this comment.

Comment 89: Open end statewide contracts should not be mandatory. They are not necessarily the best value or the best level of service for the State. Better quality, better price, and better service are often obtainable elsewhere outside of these contracts. Certain statewide contract vendors have become complacent over their rank and provide poor service and significant hassles to agencies trying to do their business. Agencies need better pricing and quality services and Purchasing should try harder to accomplish that in the contracts if use of those contracts must be mandatory.

Agency Response 89: The Department of Administration believes that the provisions are necessary in order to have economies of scale.

Amendment 89: No amendment is being made as a result of this comment.

Comment 90: Public advertisement of sole source requests will cause unnecessary delays in procurement and may invite inadequate vendors to try to convince the Director that their product is equal when it does not provide the same complete functionality. Please delete this requirement to advertise.

Agency Response 90: This is current law by Statute and cannot be changed in the rules.

Amendment 90: No amendment is being made as a result of this comment.

Comment 91: I disagree strongly with section 7.9.1 regarding contracts issued by other public agencies and entities as forcing agencies to pay more on existing contracts adds up. Also, it is not the responsibility of state government to ensure the viability of WV vendors whose business is so narrow that they cannot survive without sales to the State government agencies.

Agency Response 91: The Department of Administration believes that the provisions are necessary in order to have economies of scale.

Amendment 91: No amendment is being made as a result of this comment.

Comment 92: The ability to negotiate when all bids exceed available funds should be at the agency's discretion and not the Director of Purchasing. The Director of Purchasing

can not decide if more funds can be allocated to a requisition.

Agency Response 92: The Department of Administration does not agree as the agencies should not be able to change available budget as a way to select or reject a vendor. Further, the Director will not negotiate unless budget limit is given to him/her in advance.

Amendment 92: No amendment is being made as a result of this comment.

Comment 93: The Director may establish a list of commodities or services that are not possible to bid. Does that mean that the contract or purchase order for those items is not required to be approved by the Purchasing Division regardless of the dollar amount?

Agency Response 93: Yes. By placing the commodity or service on the list, the Director is approving it's purchase and the agency would not need additional approval by the Purchasing Division.

Amendment 93: No amendment is being made as a result of this comment.

Comment 94: Are central storerooms being brought back in place of office statewide contracts?

Agency Response 94: No. The language in the rules regarding central storerooms is existing law and no modification is being made.

Amendment 94: No amendment is being made as a result of this comment.

Comment 95: Do eligible vendors have to complete a registration form or just pay the fee? Do vendors receiving payment via the p-card exceeding \$1,000 have to register and pay the fee? One of the main selling points of the P-card Program at the time of implementation was that the agencies would not have to register vendors and vendors would not have to pay the annual vendor fee since payment was being made to the card issuer. If the agency chooses to use the p-card, the vendor must be listed in FIMS with a designation of corporation and verified by a W-9. No vendor should be added to FIMS unless they are first registered with the Purchasing Division.

Agency Response 95: All vendors must register and all vendors who receive more than \$1,000 annually must pay the fee.

Amendment 95: No amendment is being made as a result of this comment.

Comment 96: Scanning bids and posting them on the Purchasing website for public inspection, which is currently being done, could result in cost increase when all bids have to be rejected. We recommend that bids be scanned and available via the intranet for agencies to access for evaluation purposes and only opened up t the general public after award of the contract.

Agency Response 96: This is simply another way to provide the public with access to documents.

Amendment 96: No amendment is being made as a result of this comment.

Comment 97: Agency heads should be given the opportunity to justify delay of evaluation when there is a scheduling conflict or other extenuating circumstances. The end user should be consulted prior to making an award when alternatives have been quoted. arbitrarily canceling the purchase request could result in increased cost. Two weeks is not sufficient time to evaluate the RFP.

Agency Response 97: The Department of Administration agrees and will modify the rules.

Amendment 97: The rule is being amended as a result of this comment.

Comment 98: How will section 7.5.1c be implemented? Is the agency responsible for researching the open market?

Agency Response 98: There has been no change to the current rule in regard to this provision.

Amendment 98: No amendment is being made as a result of this comment.

Comment 99: In regard to section 7.5.2, what is the definition of "other interested parties"? Will cooperative agreements be subject to the same advertising requirements? This may keep the state from receiving federal funds or benefitting from participation in cooperative efforts with multiple states.

Agency Response 99: The specifics have not yet been determined.

Amendment 99: No amendment is being made as a result of this comment.

Comment 100: In section 7.5.3 clarification as to what circumstances this would be implemented should be included in the rules. Will the agency be required to advertise the intent to award a sole source between \$2,501 and \$25,000?

Agency Response 100: The specifics have not yet been determined.

Amendment 100: No amendment is being made as a result of this comment.

Comment 101: In section 7.8 will technical, profession or other services be addressed in another section of the legislative rule? How will these services be procured? This section is used for medical, educational, research, entertainment services, legal services, level three grievance hearing examiners, and other miscellaneous services not routinely bid.

Agency Response 101: The provisions will not be addressed in another section of the rules. However, an example list will be established and made available for public review.

Amendment 101: No amendment is being made as a result of this comment.

Comment 102: In section 7.7.3 other best value methods should be included such as life-cycle costing. There should also be some type of best value permitted in RFQ's whenever the criteria for award are specified in advance.

Agency Response 102: The Department of Administration believes that this section is flexible to address these comments.

Amendment 102: No amendment is being made as a result of this comment.

Comment 103: Can cooperative agreement language be included in section 7.9.1? There is no existing contract until the cooperative agreement is entered into and is limited to the interested parties.

Agency Response 103: The Department of Administration does not believe that any additional language is warranted.

Amendment 103: No amendment is being made as a result of this comment.

Comment 104: Will the spending unit be permitted to participate in the negotiation? The end user may have the expertise or specific knowledge of the market not available in the Purchasing Division.

Agency Response :104 Yes. The rules do not prohibit the Purchasing Division from consulting with the spending unit.

Amendment 104: No amendment is being made as a result of this comment.

Comment 105: Guidelines must be established and an appeal process in place when there is a disagreement between the Director of Purchasing and the agency head. This could be so expensive that it would be detrimental to the operation of the agency.

Agency Response 105: Establishing an appeal process would be costly and grind the wheels of government to a halt. As such, no such bureaucracy is warranted.

Amendment 105: No amendment is being made as a result of this comment.

Comment 106: Surplus Property should consider offering equipment for sale on site at different agency locations using the internet. Surplus Property does not pick up equipment in a timely manner and agencies cannot afford to transport it to Surplus Property. Equipment deteriorates, losing value, just sitting at the facilities waiting for pick up.

Agency Response 106: Surplus Property currently allows for the sale on site on occasion.

Amendment 106: No amendment is being made as a result of this comment.

Comment 107: The cost of a third party vendor to coordinate internet sales should not be passed on to the agencies required to dispose of all equipment through Surplus

Property.

Agency Response 107: The Department of Administration does not agree with this comment as Surplus Property must recover their costs.

Amendment 107: No amendment is being made as a result of this comment.

Comment 108: We need clarification on when we should use sheltered workshops and if we need bids to do this. Also, is the procedure of getting a letter claiming sole source for purchases from \$2,500 to \$5,000 going to remain the same.

Agency Response 108: This information is contained in the Purchasing Handbook.

Amendment 108: No amendment is being made as a result of this comment.

Comment 109: The WV Code does not mention commodities and services not possible to bid.

Agency Response 109: See WV Code § 5A-3-10 and 5A-3-11.

Amendment 109: No amendment is being made as a result of this comment.

Comment 110: This rule does not include the veteran vendor preference that becomes effective July 17, 2006.

Agency Response 110: This provision will be added.

Amendment 110: The rule is being amended as a result of this comment.

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FILED

TITLE 148

2006 JUL 28 P 4: 44

DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 1

PURCHASING

§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 should take available purchasing training and have responsibility for the function of purchasing. Each spending unit

shall process all purchases through this person(s), who shall be responsible for correspondence and communication with the Purchasing Division.

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

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

The Director shall:

- (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. The Director shall make said list available for public review. Purchases of the commodities and services on this list, which 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.
- (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.

(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. 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.

6.1.7. The vendor must be licensed and in good standing in accordance with any and all state and local laws and requirements by any state or local agency of West Virginia, including, but not limited to, the West Virginia Secretary of State's Office, the West Virginia Tax Department, West Virginia Insurance Commission,

or any other State agencies or political subdivision. Furthermore, the vendor must provide all necessary releases to obtain information to enable the Director or spending unit to verify that the vendor is licensed and in good standing with the above entities.

6.2. Bidding

6.2.1. All bids are F.O.B. destination unless otherwise clearly indicated by the vendor in the bid.

6.2.2. Bidders shall submit their bids or proposals prior to the date and time of the bid opening on the Request for Quotation ("RFQ") forms provided by the Director ~~of the Purchasing Division~~ to the bidders. Substitutions for the RFQ form are acceptable only if the substituted terms, conditions, or provisions are approved by the Director. Bidders shall submit their bids ~~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 as the bidder's submission or response 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 is 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 at any time 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 6.2.4 of this rule.

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

6.3. Vendors' Rights and Duties.

6.3.1. Each vendor is solely responsible for 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: 9. If a vendor is suspended and requests a hearing, one will be scheduled with the Director. The vendor shall be notified, in writing, of the date, time and place of the hearing.

6.4. Awards

6.4.1. The Director shall make an award to the lowest responsible bidder meeting minimum specifications. The Director shall consider such factors as quality (meeting specifications), price, time of delivery, cost of delivery, and other terms and conditions considered prudent. Unit prices shall prevail in all cases. In some cases the Director shall make multiple or split awards when they are in the best interest of the State. ~~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.

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

6.4.5. Requirements for bonds and deposits- The Director shall determine the applicability and amount of bonds or deposit required of a vendor at any time, if, it is judged that security is necessary to safeguard the State from undue risk. The Director may require the vendor to submit a certified check, certificate of deposit, performance bond, litigation bond or any other security acceptable to the Director, payable to the State of West Virginia. Neither personal checks or company checks are ~~not~~ acceptable. Provision for these requirements is usually incorporated into the RFQ and purchase order. When any contract is satisfactorily completed on which a surety bond or other deposit has been previously submitted, the spending unit shall certify the completion in writing to the Purchasing Division. Upon receipt of the notification, the Purchasing Division shall return the check or deposit to the vendor.

6.5. Specifications

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

6.5.3-2. Where appropriate, 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 or with his/her consent. No spending unit personnel shall have any communication concerning the particular solicitation, bid, evaluation or award with any vendors during the solicitation, bid, evaluation or award periods except through the Purchasing Division buyer or with his/her consent.

§148-1-7. Purchasing Methods.

7.1. General

7.1.1. Specifications are written to maximize and encourage competition. In certain cases, a "brand name or equal" is used as a specification.

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

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

7.2. Purchases of ~~\$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;
- (b) The item is unique and not available from any other source; or
- (c) The item is available from a State spending unit or other institution with preference under the West Virginia Code, provided the price, availability, and quality are comparable to those in the open market.

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

7.5.3. The spending unit must provide written documentation to the Director certifying that no other sources are available and that the spending unit exhausted all attempts to secure competition.

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

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

7.5.6. 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 written request and issue 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 or printing. An RFP or EOI are awarded based on criteria specified in instructions to bidders, including price in RFP's.

7.7.2. Where practical, RFOs should be the primary method of competitive procurement. Any spending unit desiring to use an RFP shall provide written justification to the Director.

7.7.3. The Director may use best value procurement, except for government construction

contracts, when he determines, in writing, such contract to be in the best interest of the state. All best value procurements shall be made after formal advertisement and inclusion of award criteria in the RFP. No proposal 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:

- (a) 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;
- (b) Will not cause a West Virginia vendor that offers like products and services to lose substantial business, unless the Director determines based on submitted documentation from the spending unit that the difference is so great that the Director believes the state's best interest is served by using the non-West Virginia contract; and
- (c) Does not cause extensive hardship to any spending unit offered preference under the West Virginia Code.

7.9.2. All requests to use such contracts shall be submitted in advance to the Director with 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:

- (a) More than one vendor is required to fulfill the needs of the spending units; or
- (b) 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.

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

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

7.11.5. The Director shall determine the method of negotiation.

7.12. Discussion and Final Offers

7.12.1. The Director may conduct discussions to obtain best and final offers from bidders

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

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

7.12.3. Construction contracts are exempt from this section pursuant to 5A-3-11(b)(1)(2).

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

§148-1-8. Protests.

8.1. Submission of Protest.

8.1.1. Protests based on bid specifications must be submitted no later than five (5) working days prior to bid opening. Protest of a purchase order or contract awards must be submitted no later than five (5) working days after the award. The vendor is responsible for knowing the bid opening and award dates. Protests received after these dates may be rejected at the option of the 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 or contract numbers;
- (c) a statement of the grounds of protest;
- (d) supporting documentation, if necessary; and
- (e) the resolution or relief sought.

Failure to submit this information shall be grounds for rejection of the protest by the Director. ~~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 a purchase order or 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 or 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.*

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.

Date: 7-28-06

Signature of Agency Head or Authorized Representative

Robert M. Ferguson Jr.

QUESTIONNAIRE

DATE: July 28, 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

LEGISLATIVE RULE TITLE: 148, Series 1, Purchasing Division

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

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

June 16, 2006

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

E-mailing to all Purchasing Coordinators for all State Agencies and related entities, e-mailing to the Governor's Purchasing Reform Work Group, and posting the proposed rules on the Purchasing web site.

c. Date of Public Hearing(s) or Public Comment Period Ended:

July 17, 2006

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

Attached X No comments received _____

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

July 28, 2006

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

Donna Lipscomb, Executive Coordinator

Department of Administration

1900 Kanawha Boulevard, East

State Capitol, Room E-119

Charleston, WV 25305

304-558-3392

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)

David Tincher, Director of Purchasing

2019 Washington Street, East

Charleston, WV 25301

304-558- 2538

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.

N/A

b. Date of hearing or comment period:

June 16, 2006 through July 17, 2006

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

July 13, 2006



Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd E
Charleston, WV 25305

Dear Ms. Lipscomb:

On behalf of SW Resources, Inc., I am writing you to say SW Resources and the other sheltered workshops across the state need you and your department to look at HB 4031. Otherwise individuals with disabilities will no longer be given the opportunity to be tax payers rather than tax takers, which 99% do not want to be takers.

As I understand, when HB 4031 was developed and introduced there was no significant changes in the language relating to workshops. This included the exemption part regarding competitive bidding. Furthermore, the legislature adopted the bill without discussion to change or amend this exception. It appears the law, as now presented, would delete the responsibilities from the Governor's Committee to set administrative rates, and remove the exemptions from workshops for competitive bidding, among other things. This process would force the closure of many CRP's and hurt others. And most certainly, it will deeply affect individuals with disabilities depending on workshop services. I ask how you and your division can allow this to happen? I urge you to investigate why there are changes that weren't there when the bill was developed and introduced.

SW Resources is proud of the fact \$997,069 was returned to the State of WV in wages paid to individuals with disabilities. A large percent of this is a direct result of State Use contracts. Other shops are realizing the same success for their clients.

I understand WVARF has also written you voicing their concerns for workshops under the proposed changes. SW Resources and associates urge you and your division to promptly take action to revert HR 4031 back to the language introduced in the bill.

Thank you for consideration given, but most of all thank you for remembering, "all people are special to those who love them and different only to those who misunderstand them."

With regards,

A handwritten signature in cursive script, appearing to read 'Gloria'.

Gloria Cox
President/CEO

A BUSINESS BUILT ON SOCIAL RESPONSIBILITY

SW Resources • 1007 Mary Street • Parkersburg, WV 26101
Phone: 304.428.6344 • Fax: 304.485.9019

A United Way Agency
Accredited by the Commission on Accreditation of Rehabilitation Facilities



West Virginia Association of Rehabilitation Facilities

July 7, 2006

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., E.
Charleston, WV 25305

Dear Ms. Lipscomb:

The purpose of this letter is to register comments regarding the proposed Legislative Rule for the Purchasing Division of the WV Department of Administration, Title 148. Secondly, I want to use this opportunity to reflect on the recent decisions of your department and their impact on the success of the current sheltered workshop system in West Virginia.

When HB 4031 was developed and introduced, there were no significant language changes to the sections relating to sheltered workshops, including the exemption section from competitive bidding. The legislature adopted this bill with no discussion to amend this exemption for the sheltered workshops.

The rules as promulgated would remove the responsibilities from the Governor's Committee to set administrative rates, remove the exemptions from sheltered workshops from competitive bidding and apparently take the whole process into the Division of Purchasing for management of sheltered workshops (if any exist in the future). It appears to us that the Department of Administration along with this rule will "Wal-Martinize" the sheltered workshop system in our state and only look at the lowest price, giving no consideration to the mission of assisting disabled individuals find and maintain work. Furthermore, the "Statement of Circumstance and Brief Summary" makes no mention of the proposed changes to §148-1-4 "Authority and Remedies of Director" (l) & (m). These proposed changes are major changes, and we believe they go against the legislature's intent of HB 4031.

WVARF believes the proposed rule exceeds the legislative intent and should be amended. Specifically, WVARF opposes the changes in the rules relative to §148-1-4. Authority and Remedies of Director subsections (l) and (m).

- 1) WVARF believes the proposed rule exceeds the scope of HB 4031 specifically in the following sections:

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

(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.~~

The current code provides protection FROM the competitive bid process, as passed in March. It was made clear that legislators expected to protect the sheltered workshop system in West Virginia from the competitive process and the new language here places the workshops into a competitive bid status. The new language "or other methods" is even more open as to what to expect when soliciting contracts for work by workshops employing those with disabilities. We support DELETING the new language "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~~

July 7, 2006

Purchasing Division and have no reporting or other responsibilities to the workshops, committees or other public or private bodies.

The new language in (m) removes the responsibilities from the CNA and places it all within the Department of Administration. Additionally, it denudes the Governor's Committee from any oversight and there is no language in the code directing this change. Additionally, it removes the current arrangement of WVARF to serve as the CNA which, in our opinion exceeds the scope of the rule. WVARF supports removing the last sentence in (m).

- 2) WVARF has identified 17 locations where the proposed rule is different from the current rule and the proper strikethroughs and underscoring are not marked. This leads me to request that the rule be cleaned up. I listed them below:
 1. §148-1-4 (k) – deleted “and/or” replacing with “or” and did not mark “...remedies or other damage...”
 2. §148-1-4 (o) – deleted “and make chemical and physical tests of samples submitted” and did not mark “...deliveries or commodities (deleted) with bids...”
 3. §148-1-4 (0) – deleted “(determined to be in)” and did not mark “...with bids and samples (deleted) compliance with specifications”
 4. §148-1-4 (q) – originally was §148-1-4 (p) but changed to “q” without marking
 5. §148-1-5.1 (c) – deleted “and/or” replacing with “or” without markup “...or conditions of a contract, this rule, or State law.”
 6. §148-1-5.1 (c) (ii) – deleted “and/or” replacing with “or” without markup “...or this rule; or...”
 7. §148-1-6.1.4 – deleted “and/or” replacing with “or” without markup “Vendors receiving orders for goods or services...”
 8. §148-1-6.6 – deleted “prior to issuance of a purchase order.” Language not even contained in new document. “...registered with the Purchasing Division prior to issuance of a purchase order.”
 9. §148-1-6.22 – deleted “and/or” two times replacing with “or” without mark up. “Bidders shall submit their bids or proposals...if the substituted terms, conditions, or provisions...”
 10. §148-1-6.3.7 – entered new language “contact” without marking as new. “Vendors may contact the Purchasing Division...”
 11. §148-1-6.4.1 – deleted “and/or” replacing with “or” without mark up. “In some cases the Director shall make multiple or split awards...”
 12. §148-1-6.4.5 – deleted “and/or” two times replacing with “or” without mark up. “The Director shall determine the applicability and amount of bonds or deposit required...Neither personal checks or company checks are acceptable.”
 13. §148-1-7.1.3 -- Originally was §148-1-7.1.2 but was not marked as changed.
 14. §148-1-7.7.1 – deleted “of” without mark up “...Requests for Proposals (RFP), Expressions of Interest...”
 15. §148-1-7.7.1 – deleted “and/or” replacing with “or” without mark up “An RFP or EOI are awarded...”
 16. §148-1-7.8.1 – originally was §148-1-7.10 but contains no markup
 17. §148-1-10.1 – deleted “and/or” replacing with “or” without markup. “...contracts violating the West Virginia Code or this rule...”

WVARF is concerned about the whole tenor of the Department of Administration in regards to serving the disabled in West Virginia. WVARF urges the Department of Administration to make the changes WVARF proposes in the proposed rule. Thank you for your consideration.

Respectfully,



Glenn D. McEndree
Executive Director

cc: WVARF Membership
Sen. Walt Helmick
Sen. Edwin Bowman
Del. Harold Michael
Del. J. D. Beane



A DIVISION OF RANDOLPH COUNTY SHELTERED WORKSHOP

July 10, 2006

Donna Lipscomb
Department of Administration
1900 Kanawha Blvd., East
Room E-119
Charleston, WV 25305

Ms. Lipscomb:

This letter is to officially register my comments and concerns regarding the proposed Legislative Rule for the Department of Administration Purchasing Division Title 148.

There are two sections of this Proposed Rule that I find particularly troublesome: 148-1-4 (l) and 148-1-4 (m). Separately and together, these paragraphs seem to be an attempt to subvert the will of the WV Legislature relative to the State Use Program and the protections provided to non-profit workshops in the State. HB 4031, passed during the last Legislature, made **no significant changes** to the laws governing this program.

Specifically, 148-1-4 (l) removes the authority of the Governor's Committee for the Purchase of Commodities and Services from the Handicapped to determine fair market price by giving the Director of Purchasing the authority to determine price by competitive bid. The WV Legislature **intentionally exempted** sheltered workshops from competitive bidding.

Section 148-1-4 (m) further erodes the authority of the Governor's Committee and reduces or abolishes the role of the Central Non-Profit Agency in the administration of the State Use Program. Attempting to establish a position within the Division of Purchasing to administer this program **with no oversight, no checks and balances**, is extremely self-serving. I am confident that the Legislature never intended, or contemplated, such an authoritarian position.

It is also curious that **neither of these major changes** to the Legislation were referenced in the Statement of Circumstance and Brief Summary that prefaces the Proposed Rule. Equally curious is the claim that these changes are offered in order to comply with HB 4031, which, to my reading, does not intend to change the existing State Use Program.

In light of these facts, I would strongly recommend that the Department of Administration eliminate proposed changes in sections 148-1-4 (l) and 148-1-4 (m) from the Proposed

Donna Lipscomb
July 10, 2006
page 2

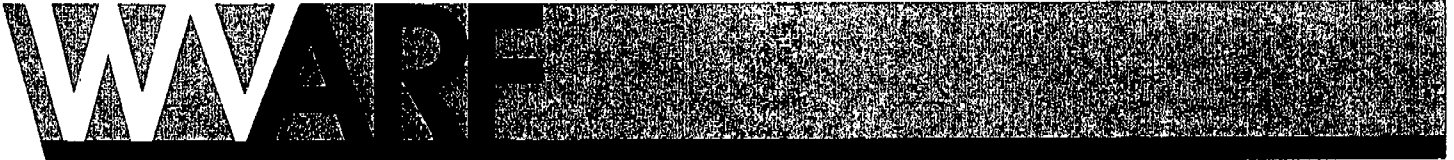
Legislative Rules. At a minimum, these sections should be rewritten to comply with existing Legislation.

Sincerely,

A handwritten signature in black ink that reads "Bob McCoy". The signature is written in a cursive style with a long, sweeping underline.

Bob McCoy
Executive Director

cc **Senator Walt Helmick**
 Senator Clark Barnes
 Representative Bill Proudfoot
 Representative Bill Hartman
 Governor's Committee Members
 Joe Martin, Deputy CoS



West Virginia Association of Rehabilitation Facilities

July 7, 2006

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., E.
Charleston, WV 25305

Dear Ms. Lipscomb:

The purpose of this letter is to register comments regarding the proposed Legislative Rule for the Purchasing Division of the WV Department of Administration, Title 148. Secondly, I want to use this opportunity to reflect on the recent decisions of your department and their impact on the success of the current sheltered workshop system in West Virginia.

When HB 4031 was developed and introduced, there were no significant language changes to the sections relating to sheltered workshops, including the exemption section from competitive bidding. The legislature adopted this bill with no discussion to amend this exemption for the sheltered workshops.

The rules as promulgated would remove the responsibilities from the Governor's Committee to set administrative rates, remove the exemptions from sheltered workshops from competitive bidding and apparently take the whole process into the Division of Purchasing for management of sheltered workshops (if any exist in the future). It appears to us that the Department of Administration along with this rule will "Wal-Martinize" the sheltered workshop system in our state and only look at the lowest price, giving no consideration to the mission of assisting disabled individuals find and maintain work. Furthermore, the "Statement of Circumstance and Brief Summary" makes no mention of the proposed changes to §148-1-4 "Authority and Remedies of Director" (l) & (m). These proposed changes are major changes, and we believe they go against the legislature's intent of HB 4031.

WVARE believes the proposed rule exceeds the legislative intent and should be amended. Specifically, WVARE opposes the changes in the rules relative to §148-1-4. Authority and Remedies of Director subsections (l) and (m).

1) WVARE believes the proposed rule exceeds the scope of HB 4031 specifically in the following sections:

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

(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.

*The current code provides protection **FROM** the competitive bid process, as passed in March. It was made clear that legislators expected to protect the sheltered workshop system in West Virginia from the competitive process and the new language here places the workshops into a competitive bid status. The new language "or other methods" is even more open as to what to expect when soliciting contracts for work by workshops employing those with disabilities. We support DELETING the new language "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

July 7, 2006

Purchasing Division and have no reporting or other responsibilities to the workshops, committees or other public or private bodies.

The new language in (m) removes the responsibilities from the CNA and places it all within the Department of Administration. Additionally, it denudes the Governor's Committee from any oversight and there is no language in the code directing this change. Additionally, it removes the current arrangement of WVARF to serve as the CNA which, in our opinion exceeds the scope of the rule. WVARF supports removing the last sentence in (m).

- 2) WVARF has identified 17 locations where the proposed rule is different from the current rule and the proper strikethroughs and underscoring are not marked. This leads me to request that the rule be cleaned up. I listed them below:
 1. §148-1-4 (k) – deleted “and/or” replacing with “or” and did not mark “...remedies or other damage...”
 2. §148-1-4 (o) – deleted “and make chemical and physical tests of samples submitted” and did not mark “...deliveries or commodities (deleted) with bids...”
 3. §148-1-4 (0) – deleted “(determined to be in)” and did not mark “...with bids and samples (deleted) compliance with specifications”
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 6. §148-1-5.1 (c) (ii) – deleted “and/or” replacing with “or” without markup “...or this rule; or...”
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 17. §148-1-10.1 – deleted “and/or” replacing with “or” without markup. “...contracts violating the West Virginia Code or this rule...”

WVARF is concerned about the whole tenor of the Department of Administration in regards to serving the disabled in West Virginia. WVARF urges the Department of Administration to make the changes WVARF proposes in the proposed rule. Thank you for your consideration.

Respectfully,



Glenn D. McEndree
Executive Director

cc: WVARF Membership
Sen. Walt Helmick
Sen. Edwin Bowman
Del. Harold Michael
Del. J. D. Beane



Goodwill Industries of KYOWVA Area, Inc.

P.O. Box 7365 Huntington, WV 25776-7365

Voice: 304.525.7034 Fax: 304.525.7038 www.goodwillhunting.org

Board of Directors

July 12, 2006

Officers

Stephen Lamb, Board Chair
Suzanne Oxley, Esq., First Vice Chair
Greg Howard, Esq., Secretary
Tom Bell, Treasurer
Kimberly B. Lewis, Executive Director

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., E.
Charleston, WV 25305

Directors

Dear Ms. Lipscomb:

I am writing to offer my comments on the proposed Legislative Rule for the Purchasing Division of the West Virginia Department of Administration, Title 148. It is my belief that the proposed Legislative Rule goes beyond the intent of HB 4031. The proposal is written as follows:

Nancy Cartmill
Jim Chandler
Steve Christo
S. Brooks Dean
Dr. Violette Eash
Rev. Dr. Larry Green
David N. Harris
Arch Keller
Tim Kinsey
Stan Lambert
Roy F. Layman, Esq.
Dale Loy
Dr. William T. Myers
Frank Norton
Huey Perry
Steve Perry
Dr. Bruce Ratcliff
Chuck Romine
Rev. Dr. Paul Russell
Lottie Simms
Jody Smirl
Tony Spiegelberg
Sam Vallandingham
Susan Weinberger

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

(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.

The current code provides protection from the competitive bid process, as passed in March. It is clear that legislators expected to protect the sheltered workshop system from the competitive process and the new language places the workshops into a competitive bid status. The new language "or other methods" is even more open to interpretation as to what to expect when soliciting contracts for work by workshops employing people with disabilities. I would support **DELETING** the new language "as determined by the director by competitive bid or other methods."

Also, the "Statement of Circumstance and Brief Summary" does not address the changes in §148-1-4 "Authority and Remedies of Director" (l) listed above & (m), proposed as follows:

- (m) Employ a person whose responsibilities, in addition to other duties, are to identify ~~commodities and printing, commodities,~~

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OF THE RIVER CITIES

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Employment Skills Training Services
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Community Employment Services

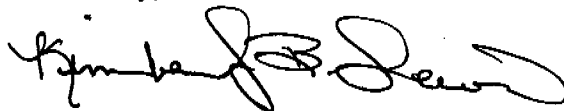


services or printing available for purchase from nonprofit sheltered workshops evaluate the needs for the ~~commodities and printing; commodities, services or printing;~~ coordinate workshops in their production efforts; and provide information to workshops about available opportunities within State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

The new language in (m) removes the responsibilities from the CNA and places it all within the Department of Administration. It strips the Governor's Committee from any oversight responsibilities and there is no language in the code directing this *change*. Furthermore, it removes the current arrangement of WVARF to serve as the CNA which, in my opinion exceeds the scope of the rule. As a member of WVARF and the Executive Director of Goodwill Industries of KYOWVA I support removing the last sentence in (m).

Thank you for the opportunity to comment on the proposed Legislative Rule for your assistance in continuing to employ people with disabilities in the state of West Virginia.

Sincerely,

A handwritten signature in black ink, appearing to read "Kimberly B. Lewis". The signature is fluid and cursive, with a large initial "K" and a long, sweeping underline.

Kimberly B. Lewis
Executive Director

Jackson County Developmental Center, Inc.

112 Industrial Lane



Millwood, WV 25262

Phone: (304) 273-9311

Fax: (304) 273-5131

July 13, 2006

Ms. Donna Lipscomb, Executive Director
Department of Administration
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear Ms. Lipscomb:

This letter is to comment on proposed legislative rules regarding the West Virginia State Use Program. I do not intend to quote chapter and verse, as I am certain that you are familiar with the areas of possible concern to the sheltered workshop system in our State.

HB 4031, as defined by legislative authority in March of 2006, fairly represents the original intent of the program. The authority of the Director of Purchasing is clear and the exemption from competitive bid from sheltered workshops is a rule that has served us well. The centers provide costing information to the Governor's Committee who sets fair market value. It seems that once the Committee agrees that the price is fair there would be no need for the Director of Purchasing to determine an open market price "...by competitive bid or other methods." May we have your support in deleting this particular language from the proposed rules?

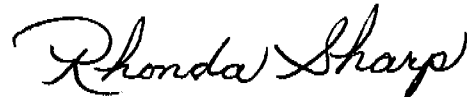
JCDC participated with the Division of Purchasing with set-aside contracts long before the State Use Program became law. I recall working closely with Mr. Joe Poniatowski and later with Mr. Dick Estell who both represented the Purchasing Division as outlined in §148-1-4 (m). The relationship worked well between Purchasing and our center. The representative did, however, hold a seat on the Governor's Committee. As proposed, the person would have no reporting or other responsibilities to the workshops or committees. It's a good idea to demand as much accountability as possible from a person who is charged with assisting with a program of this importance AND with remaining loyal beyond reproach with the Division. We have not been aware for many years that a person holds this capacity and reinstating the practice may be a duplication of efforts toward the program. It is, in part, the mission of the WV Association of Rehabilitation Facilities to seek work opportunities for its membership across WV through State Use. Will you consider a measure of answerability for the position by compelling a measure of reporting to its constituents on both sides thereby insuring a win-win situation for the State and for its citizens with disabilities?

Ms. Donna Lipscomb
July 13, 2006
Page 2

The West Virginia State Use Law a vital piece of legislature for community rehabilitation programs. JCDC can only begin to tell you its impact on our employees throughout the years. We are hopeful that its original intent will be upheld as was done with HB 4031 with no corrections.

Please feel free to discuss these comments with me at you leisure by calling us toll free at 1-888-330-9311.

Respectfully,

A handwritten signature in cursive script that reads "Rhonda Sharp". The signature is written in black ink and is positioned above the printed name and title.

Rhonda Sharp
Executive Director

GATEWAY INDUSTRIES, INC.



299 East Edgar Avenue
Ronceverte, WV 24970
July 11, 2006

Telephone: (304) 645-3165
Fax: (304) 645-3193
E-mail: gii@gatewayind.com
www.gatewayind.com

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., E.
Charleston, WV 25305

Dear Ms. Lipscomb,

The purpose of this letter is to officially register comments regarding the proposed Legislative Rule for the Purchasing Division of the WV Department of Administration, Title 148.

I will make this brief.

On behalf of Gateway Industries Board of Directors, Staff, and Clients, we are opposed to proposed changes 148-1-4 L and 148-1-4M.

We are concerned that the proposed Legislative Rule would allow the hiring of an individual in the Department of Administration to determine which contracts we could bid on and the rule further states this individual could not have communication with the workshops or the Association (WVARF). Why the secrecy? How does such a proposal aid the public-private healthy relationship we have developed over the years between WVARF acting for our clients and us, and state government?

We are also concerned that the proposed Legislative Rule would REMOVE the protection from competitive bids that sheltered workshops currently have.

Please consider our opinion on this very important matter.

Thanking you in advance.

Sincerely,

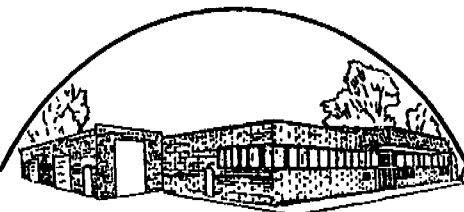
A handwritten signature in black ink, appearing to read "Phyllis F. Cantrell-Massie". The signature is fluid and cursive, written over the printed name.

Phyllis F. Cantrell-Massie
Executive Director

Cc: Senator Guills, Delegate Canterbury, Delegate Campbell

H. C. S. W., INC.

1100 Pennsylvania Avenue
Weirton, West Virginia 26062
anderson.hcsw@1st.net



HANCOCK LAUNDRY

304 748-2370
1-888-422-2370
304 748-3910Fax

Burl J. Anderson
Executive Director

Michael Hagg
Assistant Director

Charles Nucci
Finance/HR Director

Duane Farrington
Laundry Director

July 11, 2006

Ms. Donna Lipscomb
Executive Coordinator
Department of Administration
1900 Kanawha Boulevard
East Charleston, WV 25305

Dear Ms. Lipscomb:

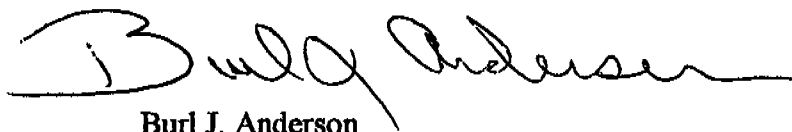
I wish to register comments regarding the proposed Legislative Rule for the Purchasing Division of the West Virginia Department of Administration Title 148. As I understand, this Rule significantly impacts Legislatures intent in House Bill 4031. My conversations with Legislators regarding House Bill 4031 specifically dealt with the way Sheltered Workshops would be able to do business within the State Use Program. It is my understanding that House Bill 4031 was adopted with no discussion to amend the exemption from competitive bidding for Sheltered Workshops. The rules seemingly are written to circumvent responsibilities of the Governor's Committee for the purchase of commodities and services from the handicapped. The current Code would provide protection from the competitive bid process. 148-1-4 is the specific example. The last line "determined by the director by competitive bidder or other methods" would seem to be in conflict with House Bill 4031 and should be deleted.

There is also language in (M) which also appears to be in direct opposition to the Legislator's intent in House Bill 4031. The last sentence indicates "This person shall report to the Purchasing Director and have no reporting or other responsibilities to the workshops, committees, or other public or private bodies." There is a system in place in which the CNA currently West Virginia Association of Rehabilitation Facilities, historically and currently functions to the advantage of the sheltered workshop system in the State of West Virginia. As the Executive Director of the Hancock County Sheltered Workshop, I continue to strongly endorse the efforts of West Virginia Association of Rehabilitation Facilities to maintain the current system as it exists as a result I request that line be stricken.

It does not seem wise, cost effective or appropriate to employ a person whose responsibility is to identify commodities, services or printing available for purchase from non-profit Sheltered Workshops when this is currently being done in a very effective manner at a controlled minimum cost by the West Virginia Association of Rehabilitation Facilities. The Hancock County Sheltered Workshop is currently seeking to develop a State Use contract to provide services, and we have been extremely pleased with the major effort put forth by qualified staff utilizing professional skills with unmatched experience and knowledge of the Sheltered Workshop client in which House Bill 4031 is intended to protect.

Thank you for your consideration in allowing my comment regarding the proposed Legislative Rule changes for the Purchasing Division of the West Virginia Department of Administration Title 148.

Sincerely yours,

A handwritten signature in cursive script that reads "Burl J. Anderson". The signature is written in dark ink and is positioned above the printed name and title.

Burl J. Anderson
Executive Director

BJA/gjj

EMMA SUE SMITH
EXECUTIVE DIRECTOR

GREEN ACRES REGIONAL CENTER, INC.

POST OFFICE BOX 240 - ROUTE 2
LESAGE, WEST VIRGINIA 25537

PHONE 762-2522



July 13, 2006

Ms. Donna Lipscomb
Executive Coordinator
Department of Administration
1900 Kanawha Blvd, East
Charleston, West Virginia 25305

Dear Ms. Lipscomb:

On behalf of the Green Acres Board of Directors, clients and staff, we would like to register our concerns regarding the proposed Legislative Rule for the Purchasing Division of the West Virginia Department of Administration, Title 148. We also want to take this opportunity to reflect on the recent decisions of your department and their impact on the current Sheltered Workshop System in West Virginia.

When HB 4031 was developed and introduced, there were no significant language changes to the sections relating to sheltered workshops. The legislature adopted this bill with no discussion to amend the exemption section for sheltered workshops from competitive bidding.

The rules as proposed would remove the responsibilities from the Governor's Committee to set administrative rates. Sheltered workshops would participate in competitive bidding and the Division of Purchasing would administer the process of managing sheltered workshops. It would appear to us that the Department of Administration along with this rule will diminish the mission of the sheltered workshop system in our state and only look at the lowest price. Green Acres Center has been committed for over 35 years to assist disabled individuals to be productive members of society and this rule could impact our mission.

Green Acres believes the proposed rule exceeds the legislative intent and should be amended. Specifically, Green Acres opposes the changes in the rules relative to §148-1-4 Authority and Remedies of Director subsections (1) and (m).

- (1) Green Acres believes the proposed rule exceeds the scope of HB 4031 specifically in the following sections:

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

- (1) Exempt purchases of commodities, services or printing with 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.

The current code provides protection FROM the competitive bid process, as passed in March. It was made clear that legislators expected to protect the sheltered workshop system in West Virginia from the competitive process and the new language here places the workshops into a competitive bid status. The new language "or other methods" is even more open as to what to expect when soliciting contracts for work by workshops employing those with disabilities. We support DELETING the new language "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, services or printing available for purchase from non-profit sheltered workshops evaluate the needs for 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. 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.

The new language in (m) removes the responsibilities from the CNA and places it all within the Department of Administration. Additionally, it removes the Governor's Committee from any oversight and there is no language in the code directing this change.

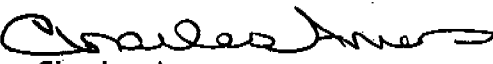
Green Acres Center is concerned about the Department of Administration and its commitment to supporting the disabled workers in our sheltered workshops. We encourage the Department of Administration to carefully consider the changes Green Acres outlines in the proposed rule.

Thank you for your attention to this correspondence.

Sincerely,

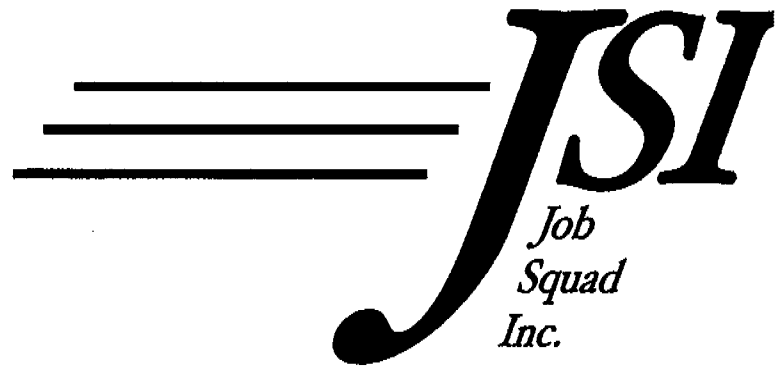


Emma Sue Smith
Executive Director



Charles Amos
Chairman
Green Acres Board of Directors

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West Virginia
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July 13, 2006

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., E.
Charleston, WV 25305

Dear Ms. Lipscomb,

The purpose of this letter is to register comments regarding the proposed Legislative Rule for the Purchasing Division of the WV Department of Administration, Title 148.

There were no significant language changes to the sections relating to sheltered workshops when HB 4031 was developed and introduced. Specifically, there was no discussion to amend the exemption from competitive bidding. Most of the sheltered workshops or Community Rehabilitation Programs are small and cannot be as competitive as larger companies. The value and intent of the State Use Program is not only delivering the lowest price to the government, but includes reducing the unemployment of individuals with severe disabilities and thereby decreasing dependence on government assistant programs. I believe the language, "as determined by the director by competitive bid or other methods" should be deleted.

Another proposed Legislative rule change is that the person whom the Purchasing Division employs to perform tasks related to the State Use Program, "shall report only to the Purchasing Division and have no reporting or other responsibilities to the workshops, committees, or other public or private bodies." I support removing the last sentence in (m) because it strips the Governor's Committee from any oversight and there is no language in the code directing this change.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Brenda B. Hellwig".

Brenda B. Hellwig
Executive Director

Employment
opportunities
for
People

watch

**Wheeling Area Training Center
for the Handicapped**

2600 Main St.
Wheeling, WV 26003
(304) 232-1750
FAX (304) 232-8134

Thursday, July 13, 2006

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., E.
Charleston, WV 25305

Dear Ms. Lipscomb,

Enclosed you will find a copy of WVARF's objections and our comments on recently published, proposed rules for the big purchasing bill the legislature passed this past session, HB 4031. A small part of the bill dealt with the work of sheltered workshops.

I am the Director of Operations at the Wheeling Area Training Center for the Handicapped, or WATCH. We at our facility serve sixty-one individuals from Ohio and Marshall Counties. These people are earning their own income rather than subsisting on government subsidies.

The purpose of this letter is to state my position regarding the proposed legislative rule for the Purchasing Division of the WV Department of Administration, Title 148 and how it will affect the future success of WATCH and other sheltered workshops.

Upon introduction of HB 4031, there were no significant language changes to the sections relating to sheltered workshops, including the exemption section from competitive bidding. The legislature adopted this bill with no apparent plan to amend this exemption for sheltered workshops.

I would like to remind you that these exemptions are there because sheltered workshops are required to employ a minimum ratio of 75/25 percent of individuals with disabilities. West Virginia workshops exceed this requirement with an 82.5 percent rate this year. Collectively this past year, the 29 workshops employed 891 individuals with disabilities and provide a payroll of \$4.9 million to persons with disabilities.

The rules as stated would remove the responsibilities from the Governor's Committee to set administrative rates, remove the exemptions from sheltered workshops from competitive bidding and take the whole process into the Division of Purchasing for management of sheltered workshops.

It seems that by doing this, the Department of Administration is not considering the best interest of the sheltered workshops and their mission to assist and empower people with disabilities.

By removing the exemptions from sheltered workshops from competitive bidding, the goal to assist disabled individuals find and maintain employment will be ignored. Instead contractors will simply choose the lowest bidder, overlooking the intentions of the sheltered workshops.

The Statement of Circumstance and Brief Summary makes no mention of the proposed changes to §148-1-4. Authority and Remedies of Director (l) & (m). These proposed changes would make a major impact in our work and we feel that the proposed Legislative Rule goes beyond the intent of HB 4031.

I urge you to accept the amendments recommended by WVARF and make every effort to avoid doing great harm to the current system of sheltered workshops. I would be happy to discuss this issue with you at your convenience. Thank you in advance for your interest.

Sincerely,



Sherrie Briggs
Director of Operations, WATCH

Enclosure (letter of WVARF objections to proposed rule to Donna Lipscomb
Letter of our agency objections to proposed rule to Donna Lipscomb)

WVARE

West Virginia Association of Rehabilitation Facilities

July 7, 2006

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., E.
Charleston, WV 25305

Dear Ms. Lipscomb:

The purpose of this letter is to register comments regarding the proposed Legislative Rule for the Purchasing Division of the WV Department of Administration, Title 148. Secondly, I want to use this opportunity to reflect on the recent decisions of your department and their impact on the success of the current sheltered workshop system in West Virginia.

When HB 4031 was developed and introduced, there were no significant language changes to the sections relating to sheltered workshops, including the exemption section from competitive bidding. The legislature adopted this bill with no discussion to amend this exemption for the sheltered workshops.

The rules as promulgated would remove the responsibilities from the Governor's Committee to set administrative rates, remove the exemptions from sheltered workshops from competitive bidding and apparently take the whole process into the Division of Purchasing for management of sheltered workshops (if any exist in the future). It appears to us that the Department of Administration along with this rule will "Wal-Martinize" the sheltered workshop system in our state and only look at the lowest price, giving no consideration to the mission of assisting disabled individuals find and maintain work. Furthermore, the "Statement of Circumstance and Brief Summary" makes no mention of the proposed changes to §148-1-4 "Authority and Remedies of Director" (l) & (m). These proposed changes are major changes, and we believe they go against the legislature's intent of HB 4031.

WVARE believes the proposed rule exceeds the legislative intent and should be amended. Specifically, WVARE opposes the changes in the rules relative to §148-1-4. Authority and Remedies of Director subsections (l) and (m).

- 1) WVARE believes the proposed rule exceeds the scope of HB 4031 specifically in the following sections:

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

(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.~~

The current code provides protection FROM the competitive bid process, as passed in March. It was made clear that legislators expected to protect the sheltered workshop system in West Virginia from the competitive process and the new language here places the workshops into a competitive bid status. The new language "or other methods" is even more open as to what to expect when soliciting contracts for work by workshops employing those with disabilities. We support DELETING the new language "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~~

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Institute, West Virginia 25112
(304) 766-4891 Fax (304) 766-4607
www.wvarf.org

July 7, 2006

Purchasing Division and have no reporting or other responsibilities to the workshops, committees or other public or private bodies.

The new language in (m) removes the responsibilities from the CNA and places it all within the Department of Administration. Additionally, it denudes the Governor's Committee from any oversight and there is no language in the code directing this change. Additionally, it removes the current arrangement of WVARF to serve as the CNA which, in our opinion exceeds the scope of the rule. WVARF supports removing the last sentence in (m).

- 2) WVARF has identified 17 locations where the proposed rule is different from the current rule and the proper strikeouts and underscoring are not marked. This leads me to request that the rule be cleaned up. I listed them below:
 1. §148-1-4 (k) – deleted “and/or” replacing with “or” and did not mark “...remedies or other damage...”
 2. §148-1-4 (o) – deleted “and make chemical and physical tests of samples submitted” and did not mark “...deliveries or commodities (deleted) with bids...”
 3. §148-1-4 (0) – deleted “(determined to be in)” and did not mark “...with bids and samples (deleted) compliance with specifications”
 4. §148-1-4 (q) – originally was §148-1-4 (p) but changed to “q” without marking
 5. §148-1-5.1 (c) – deleted “and/or” replacing with “or” without markup “...or conditions of a contract, this rule, or State law”
 6. §148-1-5.1 (c) (ii) – deleted “and/or” replacing with “or” without markup “...or this rule; or...”
 7. §148-1-6.1.4 – deleted “and/or” replacing with “or” without markup “Vendors receiving orders for goods or services...”
 8. §148-1-6.6 – deleted “prior to issuance of a purchase order.” Language not even contained in new document. “...registered with the Purchasing Division prior to issuance of a purchase order.”
 9. §148-1-6.22 – deleted “and/or” two times replacing with “or” without mark up. “Bidders shall submit their bids or proposals...if the substituted terms, conditions, or provisions...”
 10. §148-1-6.3.7 – entered new language “contact” without marking as new. “Vendors may contact the Purchasing Division...”
 11. §148-1-6.4.1 – deleted “and/or” replacing with “or” without mark up. “In some cases the Director shall make multiple or split awards...”
 12. §148-1-6.4.5 – deleted “and/or” two times replacing with “or” without mark up. “The Director shall determine the applicability and amount of bonds or deposit required...Neither personal checks or company checks are acceptable.”
 13. §148-1-7.1.3 – Originally was §148-1-7.1.2 but was not marked as changed.
 14. §148-1-7.7.1 – deleted “of” without mark up “...Requests for Proposals (RFP), Expressions of Interest...”
 15. §148-1-7.7.1 – deleted “and/or” replacing with “or” without mark up “An RFP or EOI are awarded...”
 16. §148-1-7.8.1 – originally was §148-1-7.10 but contains no markup
 17. §148-1-10.1 – deleted “and/or” replacing with “or” without markup. “...contracts violating the West Virginia Code or this rule...”

WVARF is concerned about the whole tenor of the Department of Administration in regards to serving the disabled in West Virginia. WVARF urges the Department of Administration to make the changes WVARF proposes in the proposed rule. Thank you for your consideration.

Respectfully,



Glenn D. McEndree
Executive Director

cc: WVARF Membership
Sen. Walt Helmick
Sen. Edwin Bowman
Del. Harold Michael
Del. J. D. Beane

Jackson County Developmental Center, Inc.

112 Industrial Lane

Millwood, WV 25262

Phone: (304) 273-9311



Fax: (304) 273-5131

July 13, 2006

Ms. Donna Lipscomb, Executive Director
Department of Administration
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear Ms. Lipscomb:

This letter is to comment on proposed legislative rules regarding the West Virginia State Use Program. I do not intend to quote chapter and verse, as I am certain that you are familiar with the areas of possible concern to the sheltered workshop system in our State.

HB 4031, as defined by legislative authority in March of 2006, fairly represents the original intent of the program. The authority of the Director of Purchasing is clear and the exemption from competitive bid from sheltered workshops is a rule that has served us well. The centers provide costing information to the Governor's Committee who sets fair market value. It seems that once the Committee agrees that the price is fair there would be no need for the Director of Purchasing to determine an open market price "...by competitive bid or other methods." May we have your support in deleting this particular language from the proposed rules?

JCDC participated with the Division of Purchasing with set-aside contracts long before the State Use Program became law. I recall working closely with Mr. Joe Poniatowski and later with Mr. Dick Estell who both represented the Purchasing Division as outlined in §148-1-4 (m). The relationship worked well between Purchasing and our center. The representative did, however, hold a seat on the Governor's Committee. As proposed, the person would have no reporting or other responsibilities to the workshops or committees. It's a good idea to demand as much accountability as possible from a person who is charged with assisting with a program of this importance AND with remaining loyal beyond reproach with the Division. We have not been aware for many years that a person holds this capacity and reinstating the practice may be a duplication of efforts toward the program. It is, in part, the mission of the WV Association of Rehabilitation Facilities to seek work opportunities for its membership across WV through State Use. Will you consider a measure of answerability for the position by compelling a measure of reporting to its constituents on both sides thereby insuring a win-win situation for the State and for its citizens with disabilities?

Ms. Donna Lipscomb
July 13, 2006
Page 2

The West Virginia State Use Law a vital piece of legislature for community rehabilitation programs. JCDC can only begin to tell you its impact on our employees throughout the years. We are hopeful that its original intent will be upheld as was done with HB 4031 with no corrections.

Please feel free to discuss these comments with me at you leisure by calling us toll free at 1-888-330-9311.

Respectfully,

A handwritten signature in black ink that reads "Rhonda Sharp". The signature is written in a cursive, flowing style.

Rhonda Sharp
Executive Director

GATEWAY INDUSTRIES, INC.



299 East Edgar Avenue
Ronceverte, WV 24970
July 11, 2006

Telephone: (304) 645-3165
Fax: (304) 645-3193
E-mail: gii@gatewayind.com
www.gatewayind.com

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., E.
Charleston, WV 25305

Dear Ms. Lipscomb,

The purpose of this letter is to officially register comments regarding the proposed Legislative Rule for the Purchasing Division of the WV Department of Administration, Title 148.

I will make this brief.

On behalf of Gateway Industries Board of Directors, Staff, and Clients, we are opposed to proposed changes 148-1-4 L and 148-1-4M.

We are concerned that the proposed Legislative Rule would allow the hiring of an individual in the Department of Administration to determine which contracts we could bid on and the rule further states this individual could not have communication with the workshops or the Association (WVARF). Why the secrecy? How does such a proposal aid the public-private healthy relationship we have developed over the years between WVARF acting for our clients and us, and state government?

We are also concerned that the proposed Legislative Rule would REMOVE the protection from competitive bids that sheltered workshops currently have.

Please consider our opinion on this very important matter.

Thanking you in advance.

Sincerely,

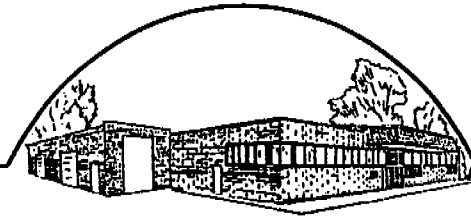
A handwritten signature in black ink, appearing to read "Phyllis F. Cantrell-Massie". The signature is written in a cursive, flowing style.

Phyllis F. Cantrell-Massie
Executive Director

Cc: Senator Guills, Delegate Canterbury, Delegate Campbell

H. C. S. W., INC.

1100 Pennsylvania Avenue
Weirton, West Virginia 26062
anderson.hcsw@1st.net



HANCOCK LAUNDRY

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1-888-422-2370
304 748-3910Fax

Burl J. Anderson
Executive Director

Michael Hagg
Assistant Director

Charles Nucci
Finance/HR Director

Duane Farrington
Laundry Director

July 11, 2006

Ms. Donna Lipscomb
Executive Coordinator
Department of Administration
1900 Kanawha Boulevard
East Charleston, WV 25305

Dear Ms. Lipscomb:

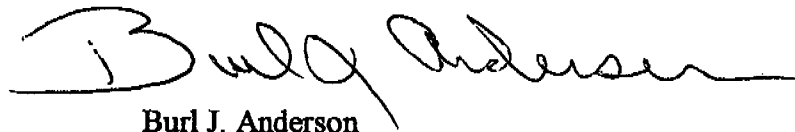
I wish to register comments regarding the proposed Legislative Rule for the Purchasing Division of the West Virginia Department of Administration Title 148. As I understand, this Rule significantly impacts Legislatures intent in House Bill 4031. My conversations with Legislators regarding House Bill 4031 specifically dealt with the way Sheltered Workshops would be able to do business within the State Use Program. It is my understanding that House Bill 4031 was adopted with no discussion to amend the exemption from competitive bidding for Sheltered Workshops. The rules seemingly are written to circumvent responsibilities of the Governor's Committee for the purchase of commodities and services from the handicapped. The current Code would provide protection from the competitive bid process. 148-1-4 is the specific example. The last line "determined by the director by competitive bidder or other methods" would seem to be in conflict with House Bill 4031 and should be deleted.

There is also language in (M) which also appears to be in direct opposition to the Legislator's intent in House Bill 4031. The last sentence indicates "This person shall report to the Purchasing Director and have no reporting or other responsibilities to the workshops, committees, or other public or private bodies." There is a system in place in which the CNA currently West Virginia Association of Rehabilitation Facilities, historically and currently functions to the advantage of the sheltered workshop system in the State of West Virginia. As the Executive Director of the Hancock County Sheltered Workshop, I continue to strongly endorse the efforts of West Virginia Association of Rehabilitation Facilities to maintain the current system as it exists as a result I request that line be stricken.

It does not seem wise, cost effective or appropriate to employ a person whose responsibility is to identify commodities, services or printing available for purchase from non-profit Sheltered Workshops when this is currently being done in a very effective manner at a controlled minimum cost by the West Virginia Association of Rehabilitation Facilities. The Hancock County Sheltered Workshop is currently seeking to develop a State Use contract to provide services, and we have been extremely pleased with the major effort put forth by qualified staff utilizing professional skills with unmatched experience and knowledge of the Sheltered Workshop client in which House Bill 4031 is intended to protect.

Thank you for your consideration in allowing my comment regarding the proposed Legislative Rule changes for the Purchasing Division of the West Virginia Department of Administration Title 148.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Burl J. Anderson". The signature is fluid and cursive, with a long horizontal flourish at the end.

Burl J. Anderson
Executive Director

BJA/gjj

EMMA SUE SMITH
EXECUTIVE DIRECTOR

GREEN ACRES REGIONAL CENTER, INC.

POST OFFICE BOX 240 – ROUTE 2
LESAGE, WEST VIRGINIA 25537

PHONE 762-2522



July 13, 2006

Ms. Donna Lipscomb
Executive Coordinator
Department of Administration
1900 Kanawha Blvd, East
Charleston, West Virginia 25305

Dear Ms. Lipscomb:

On behalf of the Green Acres Board of Directors, clients and staff, we would like to register our concerns regarding the proposed Legislative Rule for the Purchasing Division of the West Virginia Department of Administration, Title 148. We also want to take this opportunity to reflect on the recent decisions of your department and their impact on the current Sheltered Workshop System in West Virginia.

When HB 4031 was developed and introduced, there were no significant language changes to the sections relating to sheltered workshops. The legislature adopted this bill with no discussion to amend the exemption section for sheltered workshops from competitive bidding.

The rules as proposed would remove the responsibilities from the Governor's Committee to set administrative rates. Sheltered workshops would participate in competitive bidding and the Division of Purchasing would administer the process of managing sheltered workshops. It would appear to us that the Department of Administration along with this rule will diminish the mission of the sheltered workshop system in our state and only look at the lowest price. Green Acres Center has been committed for over 35 years to assist disabled individuals to be productive members of society and this rule could impact our mission.

Green Acres believes the proposed rule exceeds the legislative intent and should be amended. Specifically, Green Acres opposes the changes in the rules relative to §148-1-4 Authority and Remedies of Director subsections (1) and (m).

- (1) Green Acres believes the proposed rule exceeds the scope of HB 4031 specifically in the following sections:

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

- (1) Exempt purchases of commodities, services or printing with 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.

The current code provides protection FROM the competitive bid process, as passed in March. It was made clear that legislators expected to protect the sheltered workshop system in West Virginia from the competitive process and the new language here places the workshops into a competitive bid status. The new language "or other methods" is even more open as to what to expect when soliciting contracts for work by workshops employing those with disabilities. We support DELETING the new language "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, services or printing available for purchase from non-profit sheltered workshops evaluate the needs for 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. 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.

The new language in (m) removes the responsibilities from the CNA and places it all within the Department of Administration. Additionally, it removes the Governor's Committee from any oversight and there is no language in the code directing this change.

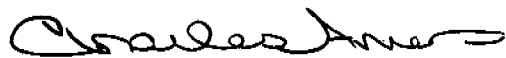
Green Acres Center is concerned about the Department of Administration and its commitment to supporting the disabled workers in our sheltered workshops. We encourage the Department of Administration to carefully consider the changes Green Acres outlines in the proposed rule.

Thank you for your attention to this correspondence.

Sincerely,



Emma Sue Smith
Executive Director



Charles Amos
Chairman
Green Acres Board of Directors

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July 13, 2006

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., E.
Charleston, WV 25305

Dear Ms. Lipscomb,

The purpose of this letter is to register comments regarding the proposed Legislative Rule for the Purchasing Division of the WV Department of Administration, Title 148.

There were no significant language changes to the sections relating to sheltered workshops when HB 4031 was developed and introduced. Specifically, there was no discussion to amend the exemption from competitive bidding. Most of the sheltered workshops or Community Rehabilitation Programs are small and cannot be as competitive as larger companies. The value and intent of the State Use Program is not only delivering the lowest price to the government, but includes reducing the unemployment of individuals with severe disabilities and thereby decreasing dependence on government assistant programs. I believe the language, "as determined by the director by competitive bid or other methods" should be deleted.

Another proposed Legislative rule change is that the person whom the Purchasing Division employs to perform tasks related to the State Use Program, "shall report only to the Purchasing Division and have no reporting or other responsibilities to the workshops, committees, or other public or private bodies." I support removing the last sentence in (m) because it strips the Governor's Committee from any oversight and there is no language in the code directing this change.

Thank you for your consideration.

Sincerely,

Brenda B. Hellwig
Brenda B. Hellwig
Executive Director

Employment
Opportunities
for
People
with

Everette Sullivan

110 Pine Street
Dunbar, WV 25064

July 14, 2006

Donna Lipscomb
Department of Administration
1900 Kanawha Blvd., East
Room E-119
Charleston, West Virginia 25305

Dear Ms. Lipscomb:

As a long-standing member of the Governor's Committee for the Purchase of Commodities and Services from the Handicapped and as a tax paying citizen of this state, I would like to register my concerns and comments with the proposed Legislative Rule for the Department of Administration, Purchasing Division Title 148.

First I must say that I am very dismayed that the Governor's Committee not only didn't have the opportunity to participate in the rules' development, but weren't even made aware of their existence at our regularly scheduled meeting that took place 6 days after their registration. Given the fact the proposed changes directly affects the Committee, I feel somewhat intentionally left "out of the loop." Seeing that some of these proposed rules go against the intent of the legislature and would change the scope of responsibility for the Governor's Committee, I must register my serious concerns regarding them as written.

As the Labor Representative on the Governor's Committee, my first concern is regarding section 148-1-4 (l). The language as written would make the purpose of the Governor's Committee null and void by taking away one of our main purposes: to determine fair market price. As written, the proposed rule gives that authority to the Director of Purchasing by allowing for competitive bid. This competitive bid system has been highlighted in the Charleston newspapers almost daily now for a few weeks as more and more out of state firms win over tax paying West Virginia citizens. No doubt, without the oversight of the Governor's Committee, this same scenario would eventually come true for at least part of the \$11 million worth of State Use contracts. These same contracts are responsible for employing 891 West Virginians with disabilities with an annual payroll of \$4,914,319 paid to persons with disabilities. As the Labor Representative, I feel compelled to request this section be removed in order to protect these individuals and their jobs

It is also of my opinion that Section 148-1-4 (m) would have a devastating effect on the effectiveness and subsequently the need for the existence of the Governor's Committee. While I do agree that the Division of Purchasing should abide by the existing statute and provide an employee to assist in the growth of the State Use Program, I believe that the language in this section goes too far in overstepping authority clearly given to the Committee. The wording clearly outlines that the Purchasing Division's employee would have no oversight whatsoever by any one person, committee, or organization outside of State government

and, again, I believe that to be in total disagreement with the intent of the legislature and the spirit of the law. After years of sitting on the Governor's Committee, I am convinced that our current arrangement works very well. This is proven in our ranking among other State Use programs around the nation. I have seen first hand the jobs this program offers our disabled citizens and we should not tolerate anything that could jeopardize them, as I believe these changes eventually would.

Again, as the Labor Representative on the Governor's Committee for the Purchase of Commodities and Services from the Handicapped, I highly recommend that the proposed changes in sections 148-1-4 (l) and 148-1-4 (m) be eliminated, and that future energies be spent in supporting and strengthening our existing program as established.

Sincerely,



Everett Sullivan
Labor Representative
Governor's Committee for the Purchase
Of Commodities and Services from the Handicapped



Prestera Center ^{FOR} Mental Health Services ^{INC}

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P O BOX 8069 • PHONE (304) 525-7851
HUNTINGTON, WEST VIRGINIA 25705
FAX (304) 525-1504
www.prestera.org

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KANAWHA COUNTY • BOONE COUNTY • CLAY COUNTY • PUTNAM COUNTY

July 11, 2006

Donna Lipscomb
Department of Administration
1900 Kanawha Blvd., East
Room E-119
Charleston, West Virginia 25305

Dear Ms. Lipscomb,

Please accept this letter to officially register my comments and concerns regarding the proposed Legislative Rule for the Department of Administration Purchasing Division Title 148.

Within these proposed changes, there are two sections of particular concern: 148-1-4 (l) and 148-1-4 (m). These two sections seem to have a very definite intent, and that intent appears to be in direct contradiction to what the West Virginia Legislature has openly supported for several years. Overwhelmingly, the Legislature has continued to give support to the State Use Program and the protections provided to non-profit workshops in the State. This support was reiterated as recently as this past Legislative session when HB 4031 passed with no significant changes to the laws regarding the State Use program.

To begin with, section 148-1-4 (l) would strip the Governor's Committee for the Purchase of Commodities and Services from the Handicapped of its ability to determine fair market price by giving the Director of Purchasing the authority to determine price by competitive bid. The Governor's Committee is a well-represented group of individuals that insure the system, as is, is fair and efficient. The WV Legislature's intention has always been to exempt sheltered workshops from competitive bidding, and can do so through the oversight efforts of the Governor's Committee and the CNA. Each year the Legislature receives a report, as does the Committee monthly, that shows this system works, and this proposed section overrides both the authority of the Committee and the intent of the Legislature.

Section 148-1-4 (m) goes even further in eliminating the security of having the Governor's Committee in its oversight capacity. It also would eliminate the advocacy and experience provided by the Central Non-Profit Agency in the administration of the State Use Program. It is apparent that the State Use program has grown phenomenally under the guidance of the current set-up. To replace this system with another state position within the Division of Purchasing to administer this program with no oversight or no checks and balances, seems to be contradictory to what is in the best interest for the citizens and taxpayers of West Virginia. It could be assumed that the Legislature never intended, or contemplated, such an authoritarian position.

One other note of concern is that neither of these major changes to the Legislation was referenced in the Statement of Circumstance and Brief Summary that prefaces the Proposed Rule. Again, HB 4031 was thoroughly examined and passed without any changes to the existing State Use Program. To move forward with these proposed changes would seem to be not only a waste of time, but in direct contradiction to the work of the legislators and Governor's Committee.

I am also concerned about the motive for these proposed changes since they have the potential to do serious harm to the non-profit sheltered workshops in the State, and the many disabled workers they employ. I would appreciate hearing from you on your rationale for these proposed changes, but do understand that to me out of the scope of this process. Another request may be forthcoming to do so.

Given this, I would like to suggest eliminating the changes in sections 148-1-4 (l) and 148-1-4 (m) from the Proposed Legislative rules and that the Department of Administration support the work of both the Legislature and Governor's Committee. That would be accomplished by having these sections rewritten to comply with existing Legislation.

Sincerely,



Bob Hansen
Executive Director

cc Senator Dan Foster
 Senator Edwin Bowman
 Delegate J.D. Beane
 Representative Cory Palumbo
 Governor's Committee Members
 Joe Martin, Deputy Chief of Staff



Precision Services, Inc.

July 13, 2006

Donna Lipscomb
Department of Administration
1900 Kanawha Boulevard, East
Room E-119
Charleston, WV 25305

Dear Ms. Lipscomb:

The purpose of this letter is to register my comments regarding the proposed Legislative Rule for the Purchasing Division of the WV Department of Administration, Title 148.

I am concerned about the proposed Legislative Rules that would allow the hiring of an individual in the Department of Administration to determine which contracts we could bid on and the rule further states this individual could not have communication with the workshops or the Association we currently have that does this work for us (WVARF).

Under §148-1-4 Authority and Remedies of Director, our organization supports deleting the new language for the following:

- (l) as determined by the director by competitive bid or other methods
- (m) 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.

We feel that eliminating WVARF and the Governor's Committee from the bid process would not be beneficial for the State of West Virginia or for the sheltered workshops located throughout the State. Both groups have been an asset to our organization by being liaisons between us and the variety of agencies we serve.

I'm asking that you please take into consideration our concerns with this issue.

Sincerely,

Jack Holcomb
Executive Director

HC 62, Box 3, Gassaway, West Virginia 26624
Phone: 304-364-3500 / Fax: 304-364-3501

CLAY COUNTY SERVICES UNLIMITED, INC.
13072 Clay Highway
Lizemores, WV 25125

July 14, 2006

Ms. Donna Lipscomb, Executive Coordinator
Department of Administration
Room E-119
1900 Kanawha Blvd., East
Charleston, WV 25305

Re: Proposed Legislative Rule Amendment, Title Number: 148, CITE Authority 5A-3-4, Series #1; Comment Period Ending 7/17/2006

Dear Donna:

Thank you for the opportunity to comment regarding these Proposed Rules as filed with the Secretary of State's Office on June 16, 2006.

First, let me state broadly that, a change in many of our Purchasing Regulations for the State of West Virginia was sorely needed and I am glad our Legislators were brave enough to take a Giant Step in updating and streamlining some State Purchasing Laws.

However, in these Rules as proposed, I have **only one** serious concern which is (m) under 148-1-4., Authority and Remedies of Director. Specifically, I believe it is very possible that the last sentence as added, "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." goes beyond the scope and intent of the Legislators upon passage of House Bill 4031.

Let me explain my concern. It is good and appropriate and has been the Statute for some time that the Purchasing Division would employ a person as originally stated under (m) concerned with the duties as was initially described and the person would of course report to the Purchasing Division. Because this Employee, would be working specifically with regard to products and services provided by Sheltered Workshops, that they would work very closely with the Governor's Committee, whose charge under the Law, is to monitor the State Use Program.

Page 2

Ms. Donna Lipscomb

July 14, 2006

In fact, it would seem an excellent and most efficient method, to have this person work as a liaison between the State Purchasing Division and the Governor's Committee. They would be, of course, responsible to the Purchasing Division but working cooperatively with that Committee, and therefore, the persons with disabilities would be the winners as the program continued to be managed in a fair and equitable manner.

Thank you again for your attention and I respectfully request that you give my comments fair consideration.

Sincerely,

CLAY COUNTY SERVICES UNLIMITED, INC.



Elizabeth J. Sampson, WV-LICSW, ACSW
Executive Director

Sheltered Workshop of Nicholas County, Inc.
A Community Rehabilitation Program 'Where Rehabilitation Works'

PO DRAWER 730
CRAIGSVILLE, WV 26205
Phone (304) 742-6202
Fax (304) 742-6280
Email gbs01153@mail.wvnet.edu

Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Blvd., East
Charleston, WV 25305

July 14, 2006

Dear Donna;

My letter to you is in reference to the Legislative Rule changes as proposed for HB 4031. I have been actively involved with the Sheltered Workshop program beginning in 1983 with this facility. During these years of progress for the Community Rehabilitation Programs in West Virginia, the West Virginia Association of Rehabilitation Facilities (WVARF) has developed an effective employment resource for individuals with disabilities and assisted CRP's to strengthen their effectiveness through a viable network of information and support services. I would recommend WVARF continue as the CNA. The membership, consisting of the CRP's has the responsibility of selecting and setting the course of business for the CNA.

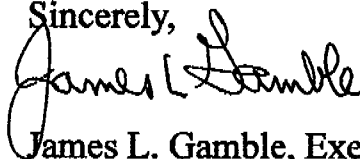
In reference to the charges for the Legislative Rule, my position is to adopt the changes recommended by WVARF, section 148-1-4 (l) & (m).

The Governor's Committee has been an effective monitoring program for the Department of Administration to ensure services and products purchased or contracted for, meet the required guide line. The committee is a good example of management serving the needs of the general public through an active monitoring system. Their are positive advantages for structuring the Committee with business, WV State employees, and CRP representatives, as they all expect proper

management of state dollars, with the best possible benefit for the CRP program in West Virginia.

Donna, as Executive Coordinator you have many areas of state government requiring your attention and support. Governmental control is not an avenue of direction required to keep the sheltered workshop system moving forward in accountability and performance. I am of the opinion that WVARF as the CNA and the Governors Committee are working in the best direction for West Virginia. The proposed rule changes submitted by WVARF are in the best interest for both West Virginia, WVARF and the membership (CRP's).

Sincerely,

A handwritten signature in cursive script that reads "James L. Gamble". The signature is written in black ink and is positioned above the typed name.

James L. Gamble, Executive Director

From: <larry9159@aol.com>
To: <dlipscomb@wvadmin.gov>
Date: 6/20/2006 9:03:53 AM
Subject: {Fraud?} Legislative Purchasing Rules

Ms. Libscomb,

I would like to propose an addition to the Purchasing Rules. My suggestion would be to add to Paragraph 7.1.2 [the use of brand names and the phrase "or equal"] the following:

"Properties which are required must be clearly identified." [Or words to this effect. The idea being what is the item to be compared by: smell, color, size, quickness, etc?]

Very respectfully,

Joseph A. R. "Jay" Larry
(304) 741-0224

Check out AOL.com today. Breaking news, video search, pictures, email and IM. All on demand. Always Free.

CC: <fcrozier@jmt.com>

From: "Jim Pitrolo" <jpitrolo@wv.gov>
To: "Donna Lipscomb" <DLipscomb@wvadmin.gov>
Date: 6/29/2006 9:50:13 AM
Subject: RE: FW: Purchasing legislative rules

Thanks

—Original Message—

From: Donna Lipscomb [mailto:DLipscomb@wvadmin.gov]
Sent: Thursday, June 29, 2006 9:44 AM
To: Jim Pitrolo
Subject: Re: FW: Purchasing legislative rules

Another vendor had the same question. It was taken out of the rules simply because it is in statute and no need to have it both places. The Statute overrules the legislative rules so just trying to save some trees!!!!

>>> "Jim Pitrolo" <jpitrolo@wv.gov> 6/27/2006 11:29 AM >>>
Donna, I have not had time to check this out. Do you know the answer please. Jim

From: Richard Stephens [mailto:rstephens@stephensauto.com]
Sent: Tuesday, June 27, 2006 10:13 AM
To: WVCAR@aol.com
Subject: RE: Purchasing legislative rules

My biggest concern would be with the elimination of language related to late payments (near the end of the document). They have stricken the language that says an agency must pay interest if payment is not made within 60 days.

Maybe this is language is redundant because of the prompt pay act but I would like to know.
Can you ask someone? Maybe the Auditor's office?
Thanks,
Richard

—Original Message—

From: WVCAR@aol.com [mailto:WVCAR@aol.com]
Sent: Monday, June 19, 2006 9:58 AM
To: rstephens@stephensauto.com
Subject: Fwd: Purchasing legislative rules

Richar:

See what you think and what we need to do.

Thanks

Ruth Lemmon

From: Donna Lipscomb
To: Pitrolo, Jim
Date: 6/29/2006 9:58:06 AM
Subject: Re: Purchasing rules

It is the vendor's responsibility to be registered with the Secretary of State and they have to sign a form certifying they are registered with all applicable agencies to do business, etc. That is why it is not in the rules. However, I will get with the Purchasing Director and see if we can also state that in the rules. He probably will agree to it since it is what we do now. However, I do not believe he would agree with making it the purchasing office's responsibility to check that because they would then have to confirm if they owed debt to WC, taxes, etc. and it would take too much staff time. I'll get back to you with all our comment responses once all the comments have been received to make sure you are ok with our responses prior to filing them. See ya.

>>> "Jim Pitrolo" <jpitrolo@wv.gov> 6/28/2006 5:10 PM >>>
Gary Grady called and asked if the Dept. of Admin. had not agreed to check with the SOS office to be sure the bidder is registered to do business in WV before they award the bid. I remember discussing this at the work group and thought the Secretary had agreed to do this. I know the bill does not require the buyer to do this but it does say the bidder must be registered and no one else would be in a position to verify it. Should we put this in the rules so that our buyers know where the responsibility lies? Jim

CC: Kirby, James; Tincher, David

From: Donna Lipscomb
To: Pitrolo, Jim
Date: 6/29/2006 9:44:03 AM
Subject: Re: FW: Purchasing legislative rules

Another vendor had the same question. It was taken out of the rules simply because it is in statute and no need to have it both places. The Statute overrules the legislative rules so just trying to save some trees!!!!

>>> "Jim Pitrolo" <jpitrolo@wvgov.org> 6/27/2006 11:29 AM >>>
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Sent: Tuesday, June 27, 2006 10:13 AM
To: WVCAR@aol.com
Subject: RE: Purchasing legislative rules

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—Original Message—

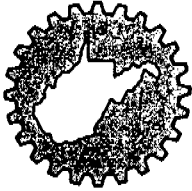
From: WVCAR@aol.com [<mailto:WVCAR@aol.com>]
Sent: Monday, June 19, 2006 9:58 AM
To: rstephens@stephensauto.com
Subject: Fwd: Purchasing legislative rules

Richar:

See what you think and what we need to do.

Thanks

Ruth Lemmon



WEST VIRGINIA TRACTOR COMPANY

CONSTRUCTION, MINING, MUNICIPAL & INDUSTRIAL EQUIPMENT

P.O. BOX 473, 214 VIRGINIA ST. W., CHARLESTON, WV 25322/25302 • (304) 346-5301

July 7, 2006

West Virginia Dept. of Administration
1900 Kanawha Blvd. East, Room E-119
Charleston, WV 25305
Attn: Donna Lipscomb

Subj: Comments on Amendment to Legislative Rule 148-1

Dear Ms. Lipscomb:

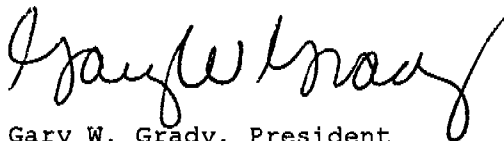
As per your instructions, we are submitting our comments about your proposed changes to Legislative Rules 148-1 governing the Purchasing Division. They are as follows:

- 6.1.6 I was told last fall by the Governor's office that it was the responsibility of the Purchasing Division to insure that all vendors must not only be registered with Purchasing but with all other appropriate state agencies, such as the West Virginia Secretary of State, the West Virginia Department of Tax and Revenue, and the West Virginia Division of Motor Vehicles. I suggest that this requirement be added to 148-1.
- 6.2.3 With the elimination of duplicate bids to the Auditor, this section appears to make it possible to view the bids only immediately after the bid opening at Purchasing. Vendors should be able to view the bids at any time after the bid opening. If that is the intent of your changes, the wording should be changed to properly reflect that.
- 6.3.10 The notice of a hearing for suspended vendors appears to have been eliminated. Why was it eliminated?
- 6.5.3 This section states that the Purchasing Director shall develop standard specifications, which shall include cost of maintenance and other standards. Some products may not be appropriate for this requirement.
- 6.6.1 This section states that no spending unit personnel shall have any communication with any vendors during the solicitation, bid evaluation, or award periods. In many cases it is the agencies that have the most informed information about their needs and the products and services they require. Bid specifications are not always completely clear or open. Vendors need to be able to ask questions of the people who actually know what all aspects of the bid specifications mean.

- 6.6.1 This section states that the Purchasing Director shall evaluate bids. Does this mean that the agencies have no input? Agencies have the most knowledge about their needs and should be making decisions about their purchases.
- 8.8.1 Bid protests are due within five days of the award, and vendors are responsible for knowing the bid award dates. Vendors are notified when their bids are unsuccessful, but not the date of the award or the successful vendor, which can be integral to the protest.
- 148.1.8 The late payment and interest provisions were eliminated. Why?

If you have any questions or comments, please feel free to call me at any time. Thank you very much for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Gary W. Grady". The signature is written in dark ink and is positioned above the typed name.

Gary W. Grady, President

From: "Williams, David H." <david.h.williams@unisys.com>
To: "Donna Lipscomb" <DLipscomb@wvadmin.gov>
Date: 7/13/2006 2:19:07 PM
Subject: RE: Purchasing legislative rules

Hi Donna, I hope this finds you doing well!

I have read the proposed Purchasing Rule changes and believe the intent is good, however I am concerned about a couple of points. A couple of comments/questions regarding the proposed rules follows...

* The rules appear to be for only "commodities, services, or printing." The rules should be more specific as to what each of these categories "commodities, services, or printing." includes. Would you please request consideration for defining what falls under each of the headings as "commodities, services, or printing?"

* Under Section §148-1-2. Definitions, paragraph (D) Best Value Procurement. (BVP) is defined as: "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." That is the definition and intent of a Request for Proposal (RFP). Yet it sounds like the intent of the proposed rules is to move away from RFPs, and to only allow RFQ bids for "commodities, services, or printing," while giving the agency or the Director the ability to subjectively decide which bid is better without any supporting documentation from the vendor, to assist in making that determination. Is that the intent here? I believe BVP could lead to more bid protests because of the subjectiveness of the BVP process without full knowledge of the products being bid.

I would appreciate seeing a more definitive description of each of the points above included in any rule changes.

Thanks & Regards,

Dave Williams | Portfolio Sales Executive | Systems & Technology |

Unisys | 290 Association Drive | Charleston WV, 25311 | 304-340-4422

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—Original Message—

From: Donna Lipscomb [mailto:DLipscomb@wvadmin.gov <mailto:DLipscomb@wvadmin.gov>]
Sent: Monday, June 19, 2006 9:27 AM
To: puy@access.k12.wv.us; bcantrell@andersonequip.com; cqvaq93b@aol.com; jodymay@aol.com; wvcar@aol.com; ddingess@archcoal.com; kmmclanahan@bblinc.com; mclowser@cawv.org; billmichael@cdocpr.com; bwilliams@champion-industries.com; lmoore@chapman-industrial.com; gbelcher@chapttech.com; mountaineerwholesale5606@charterinternet.com; mccourt+amdspm@citynet.org; davidbroughton@deanfoods.com; khess@djs.state.wv.us; amoorman@dot.state.wv.us; jhash@dot.state.wv.us; lclendenon@dot.state.wv.us;

mbevins@dot.state.wv.us; pasnuffer@dot.state.wv.us; gyoung@gandgbuilders.com;
 cneidig@gus.state.wv.us; pasic1@hotmail.com; bmarcum@ikon.com; motoole@imageserv.net;
 dbrown@labor.state.wv.us; bobl@libertydistributors.com; jpauley@logancorp.com;
 nseecker@mail.wvnet.edu; pdavenport@mcjunkin.com; jim@middletowntractor.com;
 ksloan@mines.state.wv.us; dallaskt@msa.com; wvtractor@msn.com; rex@mtncad.com;
 paulcontgal@netscape.net; psanter@netscape.net; jclayman@ntelos.com; jan@omegawv.com;
 mchapman@putnamco.org; jcalvert@senecacom.com; tpotts@silling.com;
 rstephens@stephensauto.com; carnett@thinks.com; mratliff@tygart.com; Williams, David H.;
 rick.harless@usfood.com; ccampbell@usgarch.com; family@wirefire.com; tractorsales@wirefire.com;
 dcox@workforcewv.org; dbess@wvdep.org; wwwwww@wvdesco.com; bpollock@wvdfi.net;
 dmeadow@wvdhhr.org; jessieasmith@wvdhhr.org; jmelton@wvdhhr.org; sherriellis@wvdhhr.org;
 beverlycarte@wvdnr.gov; csmith@wvdo.org; dbrowning@wvdo.org; asc@wvengineers.com;
 tsmarr@wvfiber.net; Pat Carney; roysmith@wvsbt.org; carl@zmm.com
 Subject: Purchasing legislative rules

The Department of Administration is proposing to modify their Legislative Rules in regard to Purchasing. The proposed modifications have been filed with the Secretary of State for a comment period. The comment period will end July 17, 2006, at 9:00 a.m. I am attaching a copy of the proposed rules hereto for your review. If you want to make any comments regarding the proposed rule modifications you need to submit them to me, in writing, via e-mail or hard copy at 1900 Kanawha Boulevard, East, Room E-119, Charleston, WV 25305 before the deadline. Any comments received after the deadline will not be considered. Any comments not received in writing will not be considered.

If you have any questions, please do not hesitate to contact me at 558-3392.

CC: <puy@access.k12.wv.us>, <bcantrell@andersonequip.com>, <cvaq93b@aol.com>, <jodymay@aol.com>, <wvcar@aol.com>, <ddingess@archcoal.com>, <kmmclanahan@bblinc.com>, <mclowser@cawv.org>, <billmichael@cdocpr.com>, <bwilliams@champion-industries.com>, <lmoore@chapman-industrial.com>, <gbelcher@chapttech.com>, <mountaineerwholesale5606@charterinternet.com>, <mccourt+amdspr@citynet.org>, <davidbroughton@deanfoods.com>, <khess@djs.state.wv.us>, <amoorman@dot.state.wv.us>, <jhash@dot.state.wv.us>, <clendenon@dot.state.wv.us>, <mbevins@dot.state.wv.us>, <pasnuffer@dot.state.wv.us>, <gyoung@gandgbuilders.com>, <cneidig@gus.state.wv.us>, <pasic1@hotmail.com>, <bmarcum@ikon.com>, <motoole@imageserv.net>, <dbrown@LABOR.STATE.WV.US>, <bobl@libertydistributors.com>, <jpauley@logancorp.com>, <nseecker@mail.wvnet.edu>, <pdavenport@mcjunkin.com>, <jim@middletowntractor.com>, <ksloan@mines.state.wv.us>, <dallaskt@msa.com>, <wvtractor@msn.com>, <rex@mtncad.com>, <paulcontgal@netscape.net>, <psanter@netscape.net>, <jclayman@ntelos.com>, <jan@omegawv.com>, <mchapman@putnamco.org>, <jcalvert@senecacom.com>, <tpotts@silling.com>, <rstephens@stephensauto.com>, <carnett@thinks.com>, <mratliff@tygart.com>, "Williams, David H." <david.h.williams@unisys.com>, <rick.harless@usfood.com>, <ccampbell@usgarch.com>, <family@wirefire.com>, <tractorsales@wirefire.com>, <dcox@workforcewv.org>, <dbess@wvdep.org>, <wwwwww@wvdesco.com>, <bpollock@wvdfi.net>, <dmeadow@wvdhhr.org>, <jessieasmith@wvdhhr.org>, <jmelton@wvdhhr.org>, <sherriellis@wvdhhr.org>, <beverlycarte@wvdnr.gov>, <csmith@wvdo.org>, <dbrowning@wvdo.org>, <asc@wvengineers.com>, <tsmarr@wvfiber.net>, <roysmith@wvsbt.org>, <carl@zmm.com>

148CSR1, Title 148, Department of Administration, Purchasing Division

COMMENTS

148-1-2. Definitions

What is the difference between "Best Value Procurement" and a "Request for Proposal"?

148-1-3. Applicability

"...The person(s) named shall take all purchasing training and be approved or disapproved by the Director..." "...This person(s) shall not have additional responsibilities..." I would think Purchasing would discuss with agency. Can Purchasing really know the capabilities of someone they see occasionally and can Purchasing really dictate what responsibilities the agency will assign to that person? Wouldn't it be better to say Purchasing will work with the agency both in the assignment of the Procurement Officer and the workload of that person?

148-1-4. Authority and Remedies of Director

(i) Storerooms – does Purchasing do that anymore?

(j) and (k) Purchasing should establish Best Practices for assigning amounts and remedies. It is very difficult to determine how much bonds and liquidated damages should be.

(l) What is meant by "Exempt purchases of commodities, services or printing within State government..." Is the Director going to put things out for bid and after the bids are in, determine that the Sheltered Workshop or an agency within State government will receive the bid? What will the vendors say?

148-1-6. Registration, Bidding and Award

6.2.4 – I don't think the Code mentioned here - 5A-1-1(6) -- is accurate.

6.2.6 – There is no Subdivision 6.2(d) in this rule.

6.4.5 – Usually bonds are established in an RFP, not an RFQ.

6.5.3 – In the world of Information Technology, the CTO sets the IT standards and works with the agencies and Purchasing to determine what IT statewide contracts we need and will use. This paragraph as written would allow the Director to develop standard specifications without regard to the direction that IT is going.

6.6.1 – "No spending unit personnel shall have any communication with any vendors..." The evaluation team cannot communicate with the vendors but also no one in the agency can communicate with the vendors. That seems quite strict. In most instances, someone in the agency must speak to the vendor but wouldn't have anything to do with the bid, i.e., Telephone billing must talk to Verizon but both entities have nothing to do with the bid.

6,6.2 – This says that "The Director shall evaluate bids received for purchases," and later says that he may solicit assistance. On RFP's or Best Value Procurements, the agency who prepared the RFP would be better in evaluating it than Purchasing. For RFQ's, I totally understand that price is the determining factor and in most instances, the buyer may know if all mandatory requirements have been met, but for RFP's, the Director should send it to the agency. Also, the paragraph says, "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." Depending on the volume and complexity of the bid, two weeks as the requirement is not reasonable. Again, if the section was named "Bid Evaluations for RFQ's", I would have no problem with it.

148-1-7. Purchasing Methods

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." What if an agency has standardized on Cisco routers, the agency's staff has been trained to support Cisco routers, and the agency keeps a parts inventory for Cisco routers. When that agency wants Cisco routers, Purchasing is going to require them to put, "Cisco routers or equal"? The other manufacturer may come in with a lower purchase price but looking at the additional training required, the time lost with flying in parts, and the frustration of the technicians, it could be costly to the State. Another example is printers – many agencies have standardized on Lexmark printers. The technicians have been trained on Lexmark printers and the agency stockroom just has to stock one type of printer cartridge and other replaceable components required from time to time.

7.5.2 – I don't mind posting SAS software maintenance for public advertisement – no one is going to respond except the software manufacturer. This is true with most software on the mainframe, i.e., MVS, the IBM operating system for the IBM mainframe. No one else can give me telephone support covering fixes and any new software updates versions that come out during the year except IBM. I am going to have a problem with this when you consider IBM Maintenance for the mainframe. Many other vendors think they can offer maintenance but as we found out several years ago, in some instances, the vendor can tell you you'll save money but you suffer in response time and quality of service. The mainframe is a 24-hour, 7-day operation and is critical that it is up and operational 99.999% of the time.

7.7.1 – Can you award an Expression of Interest? I thought that was like an RFI – Request for Information.

7.7.2 – Are we saying that Best Value Procurements can only be used for services estimated to cost in excess of \$500,000? Software and IT services are best acquired by RFP. Hardware and implementation services, i.e., an imaging system for a mid-sized agency covering two different divisions, is best acquired by RFP. It should be up to the agency. The whole point of an RFP was to put out an agency's requirements and let the vendor propose a solution. Yes, if you know exactly what you want, an RFQ is the way to go but in so many instances, we don't know everything and we want to ask the vendors to let us in on how they think it would be best to resolve our problem.

7.13 – Contract management procedures are key to efficient contracts. My issue is under (d.), the Director may require an agency to use a third-party contract manager, appointed by the Director, or one hired by contract. The Office of Technology Code names a Project Management Office which is geared to manage IT contracts. This section should add: (e.) require agencies to use the Office of Technology Project Management Office for all technology-associated projects.

148-1-10. Violations

10.1 – I realize this section is not new but I question the fairness of requiring a person to know "...any policy or procedure adopted by the Purchasing Division..." and be personally liable for the cost of the purchase or contract. Wouldn't it be better to say, "any policy or procedure published on Purchasing's web site"?

From: "Greg Belcher" <gbelcher@chaptech.com>
To: <dlipscomb@wvadmin.gov>
Date: 7/13/2006 8:01:18 AM
Subject: Purchasing Legislative Rules Comments

Donna,

The only comment I have at this time is more like a clarification, but I think it would be wise to include it to avoid confusion with respect to A/E services ad 5G of WV Code.

Section 7.7.2 has been modified to state RFP's can be utilized for contracts for services estimated to cost in excess of \$500,000. It continues stating that RFP's cannot be used to acquire 1) equipment; or 2) any combination of equipment AND services.

I am suggesting that this section also state that RFP's cannot be used to acquire A/E services.

If you have any questions, please contact me at your earliest convenience.

Thank you for your consideration of this matter.

Greg Belcher, PE
Chapman Technical Group

CC: <info@wengineers.com>



MOUNTAIN INTERNATIONAL TRUCKS, INC.

P.O. BOX 7771, CHARLESTON, WV 25356

T 304 776 5600

F 304 776 4184

cwhitlow@mountaininternational.com

July 11, 2006

**West Virginia Department of Administration
1900 Kanawha Boulevard, East
Room E-119
Charleston, West Virginia 25305**

Attention: Ms. Donna Lipscomb

Subject: Legislative Rule 148-1

Dear Ms. Lipscomb:

I would like to submit some comments on the above legislative rule that will affect future purchasing procedures for our state.

Some months ago, I attended a WVDOT pre-bid conference in which specifications of truck products and related body items were discussed. During the course of the meeting, it was discovered that some previously purchased units did not, in fact, meet the specifications laid out in the existing bid. This information brought about in depth discussions about "pilot" reviews on high dollar capital expense items and how to handle discrepancies found during the process. Issues such as this will come about from time to time no matter what the unit cost. The concern I have is with the process.

Within the new rule 148-1, there are some extraordinary changes that could lead to making the process of purchasing more difficult for the state and vendors. There is a relationship that is developed here that needs to continue to mature.

6.2.3 - There is an elimination of duplicate bids for vendor reviews. These auditor copies are invaluable to vendors, especially when the items being purchased are very complicated in specifications. Reviews take time and need to be done in person utilizing the actual documents for comparisons. Also, there have been discrepancies found during these reviews that have allowed the correct vendor to be chosen.

6.5.3 - I am confused by this section. How can the purchasing director be versed enough to develop standard specifications for very highly specified equipment being purchased. This

Page two

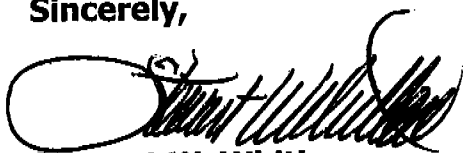
**West Virginia Department of Administration
Ms. Donna Lipscomb**

is not to demean the position or intelligence of this person, but simply to point out that it is a physical impossibility for any one person to have this type pressure placed upon them.

6.6.1 - I am totally confused by this section. Why would you want to eliminate the involvement of personnel who have the greatest amount of knowledge about highly specialized and technical pieces of equipment? Vendors, such as myself, often need clarification on specific areas of bids even after pre-bids are completed. I must reiterate that my firm is involved in the quotation of motor trucks and allied equipment which is very complicated in its nature. We need to be able to confer with the personnel that will be the end users to insure proper understandings of a bid offering.

Thank you for this opportunity to comment. Our desire is to continue to serve the State of West Virginia with our products. However, being successful is a multifaceted process, which requires input from both sides. I think you will find that vendors value the relationships built over the many years of service to our state. And, these relationships seem to be diminished in this rule change.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stewart W. Whitlow', written over a large, light-colored oval shape.

**Stewart W. Whitlow
VP – Director of New Truck Sales**



CITY OF CHARLESTON
P.O. Box 2749
CHARLESTON, WEST VIRGINIA 25330

July 12, 2006

Ms. Donna Lipscomb
Department of Administration
Capitol Building, Room E119
1900 Kanawha Boulevard, East
Charleston, WV 25305

Re: Comment on Purchasing Division Legislative Rule 5A-3-4

Dear Ms. Lipscomb:

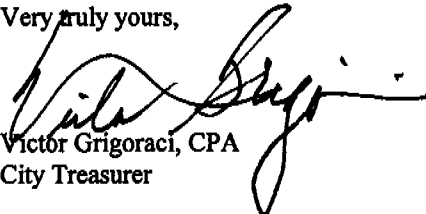
Enclosed is a copy of a fax to Mr. Robert Ferguson regarding Overhaul of State Purchasing Regulations, dated January 26, 2006, together with comments discussed with Mr. Ferguson and a copy of a letter to Mr. Ferguson, dated August 29, 2005, all from me, regarding the request of the City of Charleston to add appropriate language to your purchasing regulations that require your vendors to certify that they have complied (or will comply) with all taxes and fees that might be owed to a city or municipality in West Virginia.

I again discussed the attached with Mr. Ferguson on July 6, 2006 at the West Virginia Tax Modernization Project meeting in the Charleston Civic Center and gave him a copy thereof.

He is agreeable with including the appropriate requirement in your purchasing rules. He did express concern about verifying the accuracy of the certification, and my reply was that we only want the certification. However, perhaps the Division could produce and send a hard copy or disc, on a quarterly basis, to each city that has been identified in the certification.

Please let me know if I may be of any assistance with respect to this request, and thank you for considering it.

Very truly yours,



Victor Grigoraci, CPA
City Treasurer

VG/sr
Enclosures

cc: Mr. Robert W. Ferguson, Director
The Honorable Danny Jones, Mayor
The Honorable J. Thomas Lane, Charleston City Council President
The Honorable Bobby Reishman, Finance Committee Chairman
Mr. David Molgaard, City Manager
Mr. Joe Estep, Finance Director
Mr. Tom Capito, Assistant Treasurer
Ms. Shauna Pearson, City Collector

P.S. Bobby: Enclosed is a copy of the proposed Purchasing Division Legislative Rule 5A-3-4 for your information. As a follow-up to our conversation last week, let me take this opportunity to suggest that you appoint a committee to review our purchasing practices and see if they can be streamlined and reduce our costs. In particular, we should look at reducing our advertising costs, if possible, and use the internet or other sources to reduce our purchasing costs. The State used the enclosed *West Virginia Purchasing Bulletin* as a way to solicit bids and control advertising costs.

Grigoraci, Trainer, Wright & Paterno

Certified Public Accountants & Consultants
(A Partnership of Accounting Corporations)

- Accounting & Auditing
- Auto Dealer Specialists
- Tax Planning & Preparation
- Estate & Financial Planning
- Business Planning
- Quickbooks Professional Advisors

Facsimile Cover Sheet

FAX
1-26-06

608 Tennessee Avenue
Charleston, West Virginia 25302

GTW CF

To:	Robert W. Ferguson, Director Department of Administration
Company:	State of West Virginia
Phone:	(304) 558-4331
Fax:	(304) 558-2999
From:	Victor Grigoraci, CPA <i>VG</i>
Phone:	(304) 343-5511
Fax:	(304) 343-5514
Email:	gtwp@wvdsi.net
Date:	January 26, 2006
Pages including cover:	2
Reference:	Overhaul of State Purchasing Regulations

VM 7/8/06

VM 7/19/06

① REQUIRE VENDORS
TO CERTIFY THAT THEY
HAVE COMPLETED WORK
CITY TAXES, ETC

Comments: Dear Mr. Ferguson: Here is my "Second Request" in regard to the above mentioned subject. Please let me hear from you.

② LATER THIS YEAR - WE WANT LIST OF VENDORS & DOLLARS PAID BY STATE - OUT-OF-STATE ONLY. WILL LOOK INTO IT. *VG 7/19/06*

CONFIDENTIALITY NOTE: The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this facsimile is strictly prohibited. If you have received this facsimile in error, please immediately notify us by telephone and mail the original message to us at the above address. Thank you.

If you have any problems with this fax transmission, please call (304) 343-5511.



CITY OF CHARLESTON
P.O. Box 2749
CHARLESTON, WEST VIRGINIA 25330

August 29, 2005

Mr. Robert W. Ferguson, Director
Department of Administration
Capitol Building, Suite E119
1900 Kanawha Boulevard, East
Charleston, WV 25305

SECOND REQUEST

Re: Overhaul of State Purchasing Regulations

Dear Mr. Ferguson:

Since you are looking into overhauling the purchasing of goods and services by State Government, I would like to suggest a way to help our cities and municipalities.

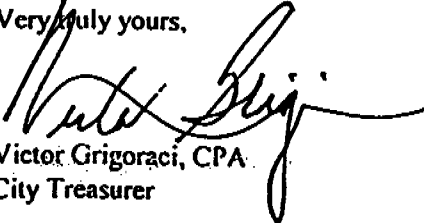
It is my suspicion that many vendors are not paying the proper taxes and fees to our cities and municipalities.

Thus, it is my suggestion that you add a requirement (perhaps through Executive Order) of your vendors that they certify that they have complied (or will comply) with all taxes and fees that they might owe to a city or municipality. I would be happy to assist in developing the necessary purchase order language.

I can tell you that the City of Charleston requires its vendors to comply—but we can't say that for the many State vendors.

If this requirement needs statutory authority, please let me know so that I may pursue it.

Very truly yours,



Victor Grigoraci, CPA
City Treasurer

VG/sr

cc: Ms. Donna Lipscomb, Executive Coordinator
Mr. David Tincher, Director, Purchasing Division
The Honorable Joe Manchin III, Governor
The Honorable Earl Ray Tomlin, President of the Senate
The Honorable Robert S. Kiss, Speaker of the House
The Honorable Walt Helmick, Senate Finance Chairman
The Honorable Harold Michael, House Finance Chairman
The Honorable Virgil T. Helton, Acting Tax Commissioner
The Kanawha County Delegation, Senate Members
The Kanawha County Delegation, House Members
The Honorable Dale Martin, Delegate, Putnam County
Ms. Brenda Nichols Harper, Legal Counsel, WV Chamber of Commerce
James M. Sturgeon, Jr., Esq., Chairman, West Virginia Society of CPA's Taxation Committee

From: "Michele Crist" <mcrist@wvba.com>
To: "Donna Lipscomb" <DLipscomb@wvadmin.gov>
Date: 7/14/2006 2:51:24 PM
Subject: Purchasing Rules

Donna,

Thank you for calling me back today. I know this is a very busy time for you. I would like to express my concern over the Purchasing Rules that are up for approval. I would hope that they follow all of the hard work and recommendations that were made during our Task Force work. David Tincher was kind enough to call me and let me know that they were thinking about moving advertising over to the "no-bid list." Without knowing all that is put out to bid during the year from the agencies I don't know if this would be wise. David did agree to keep the Lottery package as an item that still needed to be bid out, it is quite large. Some of my members still worry that putting it on the "no bid list" isn't correct because advertising is biddable (unless it is sole source) and secondly opportunities will missed because they were not advertised. I know this apple can be sliced a hundred different ways! I appreciate your committee giving this item some discussion.

I do want to thank you and David Tincher for always keeping me in the loop. It's a lot to keep up with and your "open door" has been a big help. I hope I am available to help you if ever needed. Thank you

Michele C. Crist

Executive Director

WV Broadcasters Association

140 Seventh Ave.

So Charleston WV 25303

Phone: 304-744-2143 Fax: 304-744-1764

Email: <mailto:mcrist@wvba.com> mcrist@wvba.com

All material within this email is confidential or privileged information..
Disclosure or use of any part of this message by persons other than the
intended recipient is prohibited.

From: "Michele Crist" <mcrist@wvba.com>
To: "Donna Lipscomb" <DLipscomb@wvadmin.gov>
Date: 7/14/2006 2:51:24 PM
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Michele C. Crist

Executive Director

WV Broadcasters Association

140 Seventh Ave.

So Charleston WV 25303

Phone: 304-744-2143 Fax: 304-744-1764

Email: <mailto:mcrist@wvba.com> mcrist@wvba.com

All material within this email is confidential or privileged information.. Disclosure or use of any part of this message by persons other than the intended recipient is prohibited.

From: "Holbert, Rodney" <RHolbert@burnip.com>
To: <dlipscomb@wvadmin.gov>
Date: 7/14/2006 2:12:08 PM
Subject: Proposed Purchasing Legislative Rules

Ms. Lipscomb,

I appreciate the opportunity to comment on the proposed purchasing legislative rules.

I work for an engineering/architectural firm located in Parkersburg, West Virginia.

The proposed legislative rules add some confusion to the process of obtaining engineering and architectural services.

Section 7.7 contains language that seems to conflict with Chapter 5G of the WV Code. I ask that any conflicting language in the proposed rules be modified to avoid confusion. Also, language that may infer a process that would circumvent a Qualification Based Selection (QBS) process be revised within the final rules.

If you need additional information to consider my comments, please let me know. Also, ACEC/WV and WV QBS Council has additional information concerning Qualification Based Selection for engineering and architectural services if any needs additional information on the process.

Thank you,
Rodney Holbert
Burgess & Niple
(304) 485-8541

Note:

These electronic documents are provided by Burgess & Niple (B&N) as a convenience to our clients.

* The official document is available as a manually signed, initialed, or sealed hard copy. If there is a discrepancy between electronic files and the hard copies, the hard copies shall prevail.

* It is our professional opinion that this electronic information provides information current as of the date of its release. Any use of this information is at the sole risk and liability of the user. The user is responsible for updating information to reflect any changes in the information following the preparation date of this transmittal.

The delivery of this information in electronic format is for the benefit of the owner for whom the services have been performed. Nothing in the transfer should be construed to provide any right to third parties to rely on the information provided, or that the use of this information implies the review and approval of Burgess & Niple.

From: "Holbert, Rodney" <RHolbert@burnip.com>
To: <dlipscomb@wvadmin.gov>
Date: 7/14/2006 2:12:08 PM
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Thank you,
Rodney Holbert
Burgess & Niple
(304) 485-8541

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Contractors Association of West Virginia

2114 Kanawha Boulevard, E., • Charleston, West Virginia 25311 • (304) 342-1166 FAX (304) 342-1074
www.cawv.org • cawv@cawv.org

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William Hilborn

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Vacant

Staff Assistant

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Executive Director

Asphalt Pavement Association

Patrick M. Parsons

Office Manager

Asphalt Pavement Association

Alice H. George

*Executive Committee

July 17, 2006

Ms. Donna Lipscomb
WV Department of Administration
1900 Kanawha Boulevard, East
Room E-119
Charleston, West Virginia 25305

Dear Ms. Lipscomb:

The Contractors Association of West Virginia has reviewed the proposed Legislative Rules in regard to H.B. 4031, the bill relating to the State Purchasing Division.

Your office did a fine job in developing rules to implement changes to the state purchasing rules as required by the legislation. We do have a few comments and questions that are attached with this letter.

We appreciate the opportunity to provide comment on the proposed rules, and please do not hesitate to contact me should you have any questions or need further information.

Sincerely,



Michael L. Clowser
Executive Director

cc: William H. Hilborn, CAWV President

Recipient of:

- AGC of America Chapter Public Relations Award
- ARTBA Public Relations and Education Award
- NUCA Merit Award for Annual Publications
- ARTBA Civic and Community Program Award
- American Society of Association Executives Gold Circle Award
- Public Relations Society of America WV Chapter Crystal Award



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

July 17, 2006

Questions and comments by the Contractors Association of West Virginia

§ 148-1-4 Authority and Remedies of Director

(a) "Services" has been added to this section. The question has arisen over the years as to what is included in services. **Can "services" be defined?**

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

6.2.2 - "The Director shall not accept any bid or part of any bid received by any other state spending unit or any other recipient." What does this sentence mean?

6.2.7 - Under current law, § 5-22-2 (c), "Any contractor who withdraws a bid under the provisions of this section may not resubmit a bid on the same project. If the bid withdrawn is the lowest bid, the next lowest bid may be accepted." Should this language be included in 6.2.7?

6.4.5 - "Litigation Bond" is added to the requirements for bonds and deposits. What is a litigation bond? What is its purpose? What type of projects, and when, will a litigation bond be required?

§ 148-1-7 Purchasing Methods

7.12 - In the new § 5A-3-11 (b) (1) and (2) exempts government construction contracts and the purchase of supplies and materials from "Discussion and Final Offers." Shouldn't these exemptions be noted under 7.12?

From: "MARK MILLER" <MMILLER@workforcewv.org>
To: "Donna Lipscomb" <DLipscomb@wvadmin.gov>
Date: 7/18/2006 1:17:16 PM
Subject: Fwd: Re: Purchasing legislative rules

Donna,

Sorry these are late but we were having e-mail problems yesterday.

Thanks, Mark

Mark S. Miller
Deputy Executive Director of Administration
Cost Center 5301
WORKFORCE West Virginia
Building 4, Room 618A
112 California Avenue
Charleston, West Virginia 25305-0112
Telephone: 304-558-2631
Fax: 304-558-3512
mmiller@workforcewv.org

§148-1-3

3.2 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.

This will be giving the Director of Purchasing to choose who he wishes an agency to hire verses the head of an agency choosing their staff. Also, this would be giving the Director of Purchasing duties or review qualifications that belong to Division of Personnel. This may also lead to not permitting promotion of good staff that has on the job training.

Also, the last sentence states this person may not have any other responsibility within the spending unit. This can hurt a small agency where you may have a single staff member responsible for multi duties. Some agencies are so small they may not be able to afford or justify a position that just does procurement.

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 a 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.

Once again, this could hurt a small or remote agency that does not have a tech support staff to give them the proper connections. Also, there may be remote sites that do not have the proper technology available to them for proper connection. This would not be proper to penalize such agencies.

§148-1-4

(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

Outside professionals and the Auditor Office do not show up unannounced to review documents. Purchasing Division should not be given this privilege. Spending agencies deserve to have proper notice so they may have the proper staff and documents on hand to provide the inspectors with the proper information and documents. On site storage is limited at most offices and a spending unit may need a few days to retrieve the proper documents from an off-site storage facility.

(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

Giving the Director of Purchasing the authority to suspend or reduce purchasing authority could keep the spending unit from completing their mission. This is giving too much power to the Director of Purchasing which could be easily abused. Furthermore, there is no process to appeal a decision. Does a spending agency not have a right to due process?

If they find a spending unit is not properly complying with state approved purchasing regulations, this should be reported to a higher authority to take appropriate action.

§148-1-6

6.5 Specifications

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.

No one person can be considered an authority to write specifications for all commodities, services or printing needed by all spending units. For this reason, it should not be up to the Director of Purchasing to approve or disapprove bid specifications. These specifications usually come from the end user of the commodity, services or printing that is required. The end-user usually has the most knowledge of the commodity, services or printing they are asking for.

§148-1-7

7.9.7. Requests for Proposals and Expressions of Interest.

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.

Mandating a RFP have a value of \$500,000 is too high. This will eliminate the RFP process for most spending units. There are times where a spending unit may only have \$100,000 for a project they have in mind but do not know enough about the industry to write the necessary exact specs for an RFQ.

Also, when a spending unit is bidding for a specific service, the qualifications of the vendor responding should be taken into consideration. This may be accomplished via an RFP not an RFQ. Thus, there should be some language which would allow an RFP if the

spending unit feels strongly vendor qualifications must be evaluated and considered.

From: "Nancy Swecker" <nswecker@mail.wvnet.edu>
To: <dlipscomb@wvadmin.gov>
Date: 7/17/2006 2:07:34 PM
Subject: Comments- Purchasing Division-Legislative Rule

Hi Donna-
Please find attached our comments- thanks!!

Nancy L. Swecker
Director of Administration
WV Division of Corrections
617 Leon Sullivan Way
Charleston, WV 25301

Tel # 304-558-8045 ext 108
Fax # 304-558-4878
nswecker@mail.wvnet.edu

CC: "Susan Harding" <SHARDING@mail.wvnet.edu>



STATE OF WEST VIRGINIA
DEPARTMENT OF MILITARY AFFAIRS & PUBLIC SAFETY
DIVISION OF CORRECTIONS



JOE MANCHIN III
GOVERNOR

JIM RUBENSTEIN
COMMISSIONER

JAMES W. SPEARS
SECRETARY

OFFICE OF THE COMMISSIONER
112 CALIFORNIA AVENUE-STATE CAPITOL COMPLEX
BUILDING 4, ROOM 300
CHARLESTON, WV 25305-0280
(304) 558-2036 TELEPHONE - (304) 558-5934 FAX

To: Donna Lipscomb
Executive Assistant
Department of Administration

From: Jim Rubenstein
Commissioner

Nancy Leonoro Swecker
Director of Administration

Date: July 17, 2006

Re: Legislative Rule – Purchasing
Comments

On behalf of the Division of Corrections and the West Virginia Parole Board, we commend Governor Manchin, the WV Legislature and the Purchasing Division for the recent revisions to the WV Code relating to the Purchasing Division.

The following comments are submitted regarding the proposed Legislative Rule governing purchasing practices:

Section 148-1-3. Applicability. Item 3.2**Comment**

The WV Division of Corrections and the WV Parole Board do not have a centralized dedicated position solely for Purchasing functions; nor is this the most efficient and effective method of best business practices for these agencies.

The WV Parole Board is a very small agency consisting of nine (9) members and six (6) administrative support personnel. Their operating expenses consist mostly of payroll, benefits, travel and routine office expenses. At most, their purchasing functions consist of approximately 3% of an employee's function; obviously, not warranting a full time position. The Division of Corrections has historically performed all budgetary, payroll, purchasing and payable functions for the Board, as it is not cost effective for this small agency to maintain a position for these functions.

This section of the rule would create the need for an additional position to be funded for the WV Parole Board by the Legislature; and, if funded due to this rule with the only dedicated function of purchasing, this is not a prudent expenditure of taxpayers' money.

The WV Division of Corrections would also require the creation and funding for a new position dedicated specifically for all purchasing activity within our agency. Again, this is not the best business/operation practice for our agency, as this creates a hindrance for business/operational effectiveness and efficiency at an additional cost to taxpayers.

The WV Division of Corrections operates thirteen (13) statewide correctional facilities. In addition, we operate our Training Academy at Montgomery, the Central Office in Charleston, and nineteen (19) parole offices Statewide.

Each correctional facility employs a Corrections Business Manager responsible for all business functions, including purchasing. Due to the volume of purchasing in our larger facilities, they employ one or two purchasing assistants solely dedicated to this function, with the final

approval resting with the Business Manager or his /her designee in their absence.

The smaller facilities do not warrant a full time position dedicated to this function, nor do they have the position or funding to do so, therefore this duty is assigned in addition to many other duties to one individual.

Due to the total volume of purchasing by all locations, and the efficiency and effectiveness of operations, this function is not centralized in our Central Office. We do not have the position or the funding for a centralized position, nor is this the best business practice. One individual could not maintain current pace with the volume of all purchasing activity in our agency as indicated in the proposed rule. This function needs to continue in its decentralized function other than as follows.

In addition, many purchases in our facilities are from statewide contracts that are bid and awarded by the Purchasing Division. We do not see the reason that these purchases would require approval from one centralized individual as our Business Managers have the ability for on-site approval based on institutional need and available funds.

It is our recommendation that purchasing functions continue in their present operational mode as a decentralized function other than as follows.

The Central Office does offer all assistance as necessary to all our field locations for purchases under the new threshold of \$25,000; however, Business Managers have the authority to authorize all purchases up to the threshold.

For all purchases, which exceed \$25,000, they are submitted through the Central Office for specification review and completeness with approval by the Director of Administration, who also functions as the Purchasing Coordinator for the Division of Corrections and then forwarded to the Purchasing Division.

The Division of Corrections has consolidated many purchases for services such as inmate food service and inmate medical services for the agency to capture consistency in services and economy of scale. We are currently exploring procuring common services with our sister agencies,

Division of Juvenile Services and Regional Jail Authority, for the same reasons.

Section 148-1-4. Authority and Remedies of Director. Paragraph (p).

Comment

When audits are conducted, agencies should be given sufficient notification so schedules can be accommodated and the required records, reports, etc. can be obtained and available for the audit/inspection.

Section 148-1-6. Registration, Bidding and Award. 6.6.1.

Comment

Many times when an open-end contract is ready to expire and a new bid is advertised, an agency must continue communication with the current vendor under the contract and more than likely this vendor is bidding on the new contract. Communication shall be limited to issues concerning the existing contract, not the current bid.

Section 148-1-7. Purchasing Methods. 7.7.2.

Comment

The majority of our Requests for Proposals involve some type of equipment being provided and located on our site. This equipment is not being purchased by the agency; however, it is a necessity and requirement for the vendor to be able to perform the requested service. Requests for Quotations are not feasible for most of our service proposals because a technical evaluation is necessary to assure that the vendor possesses the proper credentials, experience, and qualifications.

Example:

1. Quick Copy Center. We issued a RFP in order to obtain a service agreement for high speed digital copiers, on-site consultant, methods for improved copy quality, improved customer care, etc. This

scenario is a "turn-key" arrangement requiring the vendor to provide the copiers and associated equipment (rental), an on-site consultant and unlimited support from the vendor's corporate staff.

2. Correctional Facility Commissary – vendor was to provide all necessary automated equipment to perform the management and operation of the commissaries.
3. Correctional Medical Services – at some facilities, vendor was required to provide some medical equipment, in addition to full service inmate medical/mental health services.

Section 148-1-7. Purchasing Methods. 7.13.1. and 7.13.2

Comment

Agencies should not be required to bear the costs of a third party contract manager. We most definitely concur that a contract manager is a necessity. In fact, the WV Division of Corrections employs a Director of Contractual Services and one of her primary responsibilities, in addition to other duties is the monitoring of our large contracts: Inmate Medical Services, Inmate Food Services, Commissary Services and Inmate Telephone Services. We do not believe that agencies need to incur additional costs of outside monitoring services. Generally, these are consultants that do not have the knowledge and expertise of in-house personnel, particularly in Corrections.

From: "Alberta Kincaid" <albertakincaid@wvdhhr.org>
To: <DLipscomb@wvadmin.gov>
Date: 7/17/2006 1:55:37 PM
Subject: Re: Reform Comments

Okay, here you go! It is so much easier to read this way!

Thanks,
Alberta

>>> "Donna Lipscomb" <DLipscomb@wvadmin.gov> 7/17/2006 12:38:43 PM >>>
Absolutely, a color version will make my life a lot easier. Thanks a lot.

>>> "Alberta Kincaid" <albertakincaid@wvdhhr.org> 7/17/2006 12:20 PM
>>>
Hi, Ms Lipscomb

I brought over a package this morning with comments, etc. I struggled with printer problems this morning and was unable to print the changes/suggestions in color to make it easier to work with.

Would you accept a "color version" via email to help the review process?

Thanks,

Alberta Kincaid
Office of DHHR Purchasing
558-0953
albertakincaid@wvdhhr.org

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

§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. How granular will this get, i.e. Will there be new training requirements for all the folks already involved in the procurement process? What about smaller groups, etc

where purchasing/accounting function could be done by same person? Will this apply to the DHHR and/or other Agency's Purchasing Directors already in positions? Any others? Bureau personnel? Facility personnel? If it is determined that a separation of duties must be complied with, will there be additional State funds allocated for the position within the Bureaus?

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. Since this will be automated, will any paperwork be sent to Charleston? Or will it be kept by agencies and faxed? More detail needed.....How does this cascade down to use of various software products in the course of business related to procurement activities? What costs will be associated and charged back to the agencies for converting or using one central system as is alluded to here? Will agencies have any input into the development/deployment of such statewide system—they should as they will be helping to pay for it?

§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. Does this address true sole source items? Does this refer to items that spending units know they will need but that they have never been able to receive a competitive bid for? 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. Will this list be made available for public review and posted?
- (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; This is a good provision in that in it would prevent us from having to re-bid due to minor irregularities ... to ensure consistency in identifying what those irregularities are, these list of examples should be defined internally and shared with the spending units. Waiving Irregularity A for Vendor 1, but not waiving the same irregularity for Vendor 2 would be controversial.
- (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; To what extent? There isn't a state central supply depot. These items should be managed by the spending unit with oversight, as applicable, by the agency's purchasing director. This item probably needs to be deleted.

(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. Does this position already exist? There used to be Inspectors who were supposed to perform these duties—will agencies have to pay for the audits?

(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 (define other... procurement related, etc) 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. Does this represent new hires? Is this a new responsibility of DOA? Weren't these positions previously eliminated and deemed unnecessary?

(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. To avoid the appearance of "playing favorites", should this define how waiving an annual fee for a vendor is "in the best interest" of the state? There has been concern expressed that this fee increase could impose a hardship upon small in-state vendors in order to finance a new e-procurement system, but has anyone thought about proposing a lifetime vendor registration fee or one that would span a number of years? This could lead to an increase in immediate revenue to support the purchase of the new system, while providing smaller vendors with the choice of avoiding the increase.

(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 (for that spending unit) which may include (a requirement

that) all spending unit purchases, regardless of amount, be made by the Purchasing Division. Is this going to be applicable to exempt spending units? We do business with a number of vendors from which we purchase more than \$25,000 in combined purchases of products or services without a contract, especially when considering BHHF in the aggregate. We may buy \$30,000 of products from a vendor, but there may be multiple items involved. How would this be determined? Should a dedicated person be assigned to work on DHHR-wide commodities? This is a DHHR question to answer primarily and provide guidance. Short answer is yes, DHHR purchasing personnel need to work with spending units to develop such types of contracts to satisfy competitive bid requirements as well as streamlining the process and develop strategic price agreements and historical data to aid in successive years of obtaining various products.

§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 (why would this be a maximum of one year? Shouldn't that be the minimum?), 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. Is this determined through vendor complaints? Should a standard number of complaints be defined prior to automatic suspension? Should the severity of a complaint be described?
- (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 (does the Director have a time frame established to comply with this). 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. We likely will have vendors we purchase items from via PCard that would not have made an annual fee payment or may not be a registered vendor with the state. How can we ensure this is done...whose responsibility to enforce? the agency? DOA will need to do a fair share of "PR" and working with the vendor community to explain the rule and ROI on the required/increased fee esp. those that have not previously registered but do business with state government through acceptance of the Pcard as the increased fee is for the benefit of DOA's duties/focus. 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. Why? Is this because the sole source providers could, and probably would, refuse to pay because they know we don't have an alternative source? This item could be covered under item 148-1-4.q?? all vendors should have to pay the same fee irregardless

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. Shouldn't this time be uniform for all bids and correspond with the end of the business day? That way, all bids received by a certain date would be acceptable. ~~Placing a time of 10:00 am or 2:00 pm on different bids is at least inconsistent. We should be trying to reduce restrictions as much as possible.~~ 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. How will this work with electronic signatures, transmissions, etc?

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). Does the term "transmission completed" apply to emails? If a bid was submitted via email prior to the date and time specified, would it be acceptable even if the email might not have been opened timely by the DOA Buyer? 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 (considered) 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 which changes must be and be received by the Purchasing Division and State Auditor prior to the date and time (should be standard for all bids) 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) (this is 6.2.2, isn't it) 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 (cost has to be a factor – not being able to receive a product at a reduced cost in a timely manner can be a significant hardship and a threshold should be set to determine when clarification can be obtained from a bidder to correct for an error that would result awarding another bid at a higher cost to the state); 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, with spending unit concurrence.

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. How does the official time clock apply to bids received electronically? Again, if an email arrived in the in-box of the Buyer (or other appropriate person) by the date and time required, how does the official time clock come into play?

~~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) business days after receipt of order. This can be considered restrictive. This apparently applies to ALL types of "commodities, services or printing". Some may not be able to be delivered within 10 days.

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. If this is the lowest cost bid, the bidder and the spending unit should be notified as to why it was rejected with an explanation of how clarification was sought. There should not be just a written explanation placed in the file without communicating with the spending unit and bidder.

6.4.3. When tie bids are received, the award is made by allowing the tied vendors to make a "last and final offer," initially, then if a tie bid still exists, it may be determined by flip of a coin, draw of the cards, or any other impartial method considered prudent by the Director. Are vendors present at the coin flip or the draw of the cards? This could lead vendors to question how partial the award really is. The "last and final offer" should be the initial method of selection. If a tie persists, other criteria, such as history as being a state vendor, etc. should be used prior to flipping of coins, etc.

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; Is this verified by DOA?
- (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 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. Will the DOA Staff be required to also certify as to conflict of interest statements?

6.6.2. The Director shall evaluate bids received for purchases with the assistance of the spending unit personnel. 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. Due to the length of time required to compile a committee and to review detailed RFP responses, failure to comply with this request within two weeks should not be grounds for cancellation. Depending on the complexity of the solicitation and evaluation, per article 6.6.1 above, if the spending unit is not to have contact with the vendors and all communication is to be funneled through DOA, perhaps additional time should be considered on a case-by-case basis when the solicitation is highly technical and encompassing a major business process.

§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". How would this apply when, in order to purchase a component of a larger product, the spending unit would be required to buy a specific part, the cost of which may normally require a competitive bid?

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~~. Should you further clarify that this does not include purchases made from open-end/blanket contracts? Otherwise, the literal verbiage here would lend itself that all of these \$ purchases could be required to be processed through DOA.

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. When would it be in the best interest of the state NOT to advertise? Is there not going to be a defined time frame in order to advertise now?

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 as 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 to be used for hardship resulting from neglect, poor planning, or lack of organization by the spending unit. Competitive bids ~~are~~ should be obtained if possible. This should include a provision that would allow for emergency purchases in the event of a regulatory agency issuing citations and requiring timely action. This should include a provision that would allow for emergency purchases in order to avoid fines or penalties

~~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 of 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. We have to request in writing to utilize an RFP instead of an RFQ for services we would anticipate costing less than \$500K?

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~~ recommend the use of a contract issued by another public organization or recommend that 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 and spending unit 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. "Substantially lower" needs to be defined by % or \$ amounts, or both. 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. Why is this idea in here? How is "best interest" defined? "Most cost effective" should be in the best interest of the taxpayers.

(3) Does not cause extensive hardship to any spending unit offered preference under the West Virginia Code. Will there be examples of this or will it be subjective?

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 may only approve those requests with submitted with evidence that convincingly justifies use of such contracts. Any request that is not supportable shall be returned by the Director to the spending unit. This is too subjective whereas all contracts not approved should be reviewed by the Secretary of Administration, a committee or a board to determine if it is in the best interest of the taxpayers of WV.

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 and after concurrence with the spending unit. 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 or is deemed in the best interest of the state, the Director shall place a written explanation into the public file and the explanation should be communicated in writing to all bidders. 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. Why not include this language in solicitations where you know that by having multiple awards is advantageous. This is basically how DOA issues SWCs for copiers, etc. There really isn't a difference so long as the specifications are written to inform potential bidders/vendors of the intent and willingness to consider more than one vendor. This could be applicable for commodities, services or printing.

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. Justification for any change in maximum budgeted

amount by a spending unit after the bid opening must be provided by the spending unit to the Director. No award may be made or contract entered into if the spending unit certifies to the Director that award will have an adverse financial impact on the spending unit. ~~This budgeted amount shall not be changed after the bid opening.~~ Sometimes there is not a maximum budgeted amount set; services have to be paid regardless due to legislative mandates, etc. Would it be acceptable to provide guidelines as to what the previous years' expenses were?

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 with concurrence of the spending unit. If the negotiation does not lead to the budget amount being met, the Director may negotiate a lower price with the next lowest bidder with concurrence of the spending unit 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. If negotiation is not permitted, does this mean that the contract will be awarded to the lowest bidder? Or not awarded at all? It does not explain. 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 with concurrence of the spending unit 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 with concurrence of the spending unit, 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 propose ~~prescribe~~ contract management procedures for all government contracts bid through the DOA Purchasing Division. 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; Who would see to it that these meetings take place?

(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. Who would hire this third party? DOA or the spending unit? Shouldn't the spending unit have a say in this and approve such associated costs?

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. Shouldn't this address electronic submissions or protests, as electronic submission of bids were addressed? This does not distinguish between a "submitted" date and a "received" date. Is it okay if it is submitted within five days or received within five days? Should be inconsistent with how bids are received.

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 or 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 any vendor from bidding on State purchases up to one year, ~~any vendor~~ for violating the West Virginia Code, this rule, or any policy or procedure adopted by the Purchasing Division. Why not make this a minimum of one year, as opposed to one year being the maximum? 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.

From: "Kyle Schafer" <KSchafer@wvgot.org>
To: "Bryan Hoffman" <bhoffman@wvadmin.gov>, <DLIPSCOMB@wvadmin.gov>
Date: 6/29/2006 10:01:09 AM
Subject: FW: my comments on new Purchasing rules.

From: Kyle Schafer
Sent: Wednesday, June 28, 2006 4:15 PM
To: 'David Tincher'; 'JKIRBY@WVADMIN.GOV'
Cc: Robert Ferguson
Subject: my comments on new Purchasing rules.

Let's plan to get together next week and discuss.

From: "Kyle Schafer" <KSchafer@wvgot.org>
To: "James Kirby" <JKirby@wvadmin.gov>, "David Tincher" <DTincher@wvadmin.gov>
Date: 6/29/2006 10:31:29 AM
Subject: RE: my comments on new Purchasing rules.

Attached is the final legislation..... I have highlighted the language dealing with standardization. Even under the old code, the Director of IS&C (included below) had the authority to set standards, but for one reason or another, we've allowed ourselves, over the years to create an environment of technical incompatibility resulting in many functionality limitations, exorbitant maintenance costs, unnecessary duplication of labor and infrastructure reliability issues.

§5A-7-2. Division created; purpose; use of facilities; rules and regulations.

There is hereby created the information services and communications division of the department of administration for the purpose of establishing, developing and improving data processing and telecommunication functions in the various state agencies, for promulgating standards in the utilization of data processing and telecommunication equipment and for promoting the more effective and efficient operation of all branches of state government.

—Original Message—

From: James Kirby [mailto:JKirby@wvadmin.gov]
Sent: Thursday, June 29, 2006 9:43 AM
To: David Tincher; Kyle Schafer
Cc: Ferguson, Robert
Subject: Re: my comments on new Purchasing rules.

what is code section and the lang. that permits you to set standards?

James A. Kirby III
General Counsel
State of West Virginia
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>>> "Kyle Schafer" <KSchafer@wvgot.org> 6/28/2006 4:58 PM >>>
Let's plan to get together next week and discuss.

CC: "Ferguson, Robert" <rferguson@wvadmin.gov>, <DLIPSCOMB@wvadmin.gov>, "Tammie Means" <TMeans@wvgot.org>

I would like to suggest we get together and discuss the newly revised purchasing rules sent out to vendors last week. I have outlined my concerns below. I don't want to get into a back and forth with e-mail so there's no need to reply. I just want to outline my areas of concern so that we can specifically discuss and resolve.

6.5.1 – The Office of Technology needs to be able to establish technical standards. The lack of standards is costing the state millions in support costs and is resulting in interoperability issues. In many areas of IT, it is financially prudent to set vendor specific standards and move forward with that specific vendor. For example, Microsoft Windows at the desktop, Microsoft Office, Adobe, etc..... Selecting products other than these will result in increased support costs, multiple maintenance agreements and incompatibility issues. The same holds true for servers, storage, phone systems, etc....

6.5.2 – The Office of Technology needs to have the ability to establish technical specifications. I don't want to get into a back and forth discussion on approval and/or disapproval of specifications based on a lack of technical awareness within Purchasing.

6.6.1 – I would like to add a clause that says, “without the consent of the Director”. It is very inefficient to explain technical questions to the buyer, then buyer transfers to the vendor, then the vendor answers back to the buyer and finally the buyer answers back to the evaluator. When evaluating an RFP there are many times that points need to be clarified. In private industry, I had the option to set up a meeting, in conjunction with our Supply Chain Manager, to clarify points made in the RFP. This approach has proven to be very beneficial on large complex RFPs and much more efficient than the proposed process.

7.1.2 – I disagree with this section. New legislation passed during the regular session empowers the Office of Technology to set and enforce technology standards, not specifications, but standards. I want to make sure that purchasing rules don't restrict that authority. If we go through the due diligence and select a standard, we need to be able to bid that specific standard. For example we need to establish a SAN standard. Today we're buying every make and model known to man. As a result, we have no sharing of assets, little interoperability and limited disaster recovery capabilities. It is immaterial who we select as “vendors of choice” in particular areas of technology, but once the decision is made, that's what we need to procure from that point forward until we collectively agree to revisit and change the standard. We all saw the Governor of Louisiana on CNN during Katrina on TV with 7 mobile radios in front of her and made the comment, “I've got 7 mobile radios in front of me and I can't talk to anybody.” After that aired, Governor Manchin called me as well as Secretary Spears and asked, “Do we have that same level of interoperability issues in the State”? Unfortunately the answer is yes, if not worse. All vendors claim they have interoperability with other similar products, but usually that's only true on a limited instruction set. Setting a vendor specific standard does not mean competition is eliminated. Nearly all major vendors go through many resell channels.

7.5.1 – Additional conditions need to be added around sole source, such as:

- * The decision not to select a specific vendor will result in interoperability issues with existing or previously acquired state assets.
- * The decision not to select a specific vendor will result in significant conversion costs.

7.7.1 – I believe the agency should make the determination as to which evaluation method is used (RFP or RFQ). Purchasing should make recommendations, but the final decision should be the agency. The agency knows what they need and what criteria should be used to ensure “Best Value Procurement”. For example, we’ve had several debates over the past few months whether the Cellular Request should be a “P” or a “Q”. We contacted 14 states issuing cellular contracts over the past 12 months. All 14 issued RFPs. I respect Purchasing’s opinion; however, this should be the Office of Technology’s choice, as the subject matter expert in this area.

7.7.2 I see no merit in limiting the RFP process to services and contracts over \$500,000. Actually, I see this being detrimental to “Best Value Procurement”. When a piece of equipment has an embedded microchip or software installed on it, that piece of equipment has virtually millions of configuration options. These options could likely result in interoperability and compatibility issues. We need to fully assess these types of devices via the RFP process regardless of price. I’ve talked to many people in both the public and private sector. I can’t find anyone negotiating large scale server, phone system, PC, storage, etc... contracts based on an RFQ. There are just too many factors to consider.

Finally, we have been marketing Purchasing Reform to our customers over the past 12 months. I truly believe our customers have the expectation that the new legislation and purchasing rules will result in fewer restrictions and less controls, but I don’t see that being the case. I think it would be beneficial to have a 3rd party, such as John Kost from Gartner, who is an expert in state purchasing reform, review our legislation and purchasing rules and suggest modifications that will ensure adequate controls are in place, while meeting customer expectations. Additionally, I think we should word the rules in a “Customer Oriented” fashion and not give the appearance of command and control, for example:

148-1-4.

p. I think we should eliminate the comment concerning unannounced audits. This type of wording places us in an adversarial relationship with our customers. Unannounced is fine if there is a suspicion of wrongdoing, but to suggest that an agency will drop everything they are doing to have a routine audit by Purchasing will be perceived negatively.

From: Becky Jones <bjones@wvlottery.com>
To: "DLipscomb@wvadmin.gov" <DLipscomb@wvadmin.gov>
Date: 7/7/2006 2:30:05 PM
Subject: Comments on 148 CSR 1, Title 148

I have reviewed the new purchasing rules forwarded to me by Susie Teel and have the following suggestions:

148-1-4. Authority and Remedies, part (a) about 8 lines down—Capitalize d in Director

6.4.1. Question: How do you define "responsible"

7.7.1 Sentence not clear to me regarding price: "An RFP or EOI are awarded based on criteria specified in instructions to bidders, including price in RFP." (prices are only included in bids—RFP's are the specifications)

8.1.2.(b) change numbers to number

10.1 place a comma after rule in line 2

You probably have already found these things, but I just thought they need clarity.

Becky Jones
West Virginia Lottery
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(304) 558-0500 ext. 242
Cell: (304) 741-3468

From: "Charlyn Miller" <Charlyn.Miller@wvdrs.org>
To: <dlipscomb@wvadmin.gov>
Date: 7/6/2006 2:24:53 PM
Subject: Legislative Rule Comment 5A-3-4

Per the voice mail message left today, please let me know if email comments are acceptable, or if you prefer hard copy submission.

I have the following comments/questions for clarification:

3.2 - The rules prohibits additional responsibilities for the spending unit procurement manager. In DRS' case the Procurement Manager also manages our warehouse which purchases commodities from statewide contracts and distributes to our end users, supervises the Surplus Property designee, Records Management functions, Leasing duties, and BRIM insurance responsibilities for the agency. Would these additional duties, which are Purchasing related, except for BRIM, be prohibited?

3.3 - Please define or at least provide a few examples of what a "non-purchase" request might be. (Last sentence of this section.)

6.2.6 - Is the reference to 6.2(d) an error? Should it be 6.2.4?

6.6 - Is this discretionary on the part of the Purchasing Division Buyer? I was recently asked to write clarification letters to bidders on a bid being processed by Purchasing. If so, they may want to add, "unless requested by the Purchasing Division buyer" at the end of the last sentence.

7.1.3 - I thought all purchase orders processed by Purchasing were sent to Audit. Does this mean the spending unit will be responsible for sending copies of purchase orders to the Auditor's Office after award or with the first invoice?

7.3.2 - Will there be a minimum number of ads required? The rule has been changed from the minimum two ads to no number at all given.

7.4 - What method will be used to make spending units aware of open-end contracts done by other spending units that we will be required to use?

7.5.2 - How many times or for how long will the sole source transactions be advertised? Will the advertising appear in the Purchasing Bulletin?

7.11.2 & 7.11.3 - Will the negotiations allow changes to specifications, i.e., lower quantities or drop services requested in the original bid?

9.1 - Have there been other changes in law that precipitated the dropping of rules related to Late Payments? Are any new rules being formulated? Where should the agency direct Vendor inquiries re late payments?

Thank you for your consideration and any response to the above inquiries/comments for clarification.

CC: <kbyrd@wvadmin.gov>, "Michael Meadows" <Michael.Meadows@wvdrs.org>

From: "Donna Cox" <dcox@workforcewv.org>
To: "Donna Lipscomb" <DLipscomb@wvadmin.gov>
Date: 7/12/2006 11:15:15 AM
Subject: Re: Purchasing legislative rules

Donna,

Attached are some comments I have regarding the proposed Legislative Rules.

Please note new e-mailladdress.

Donna Cox
Chief of Procurement
WORKFORCE West Virginia
Bureau of Employment Programs
112 California Ave.
Charleston, WV 25305
dcox@workforcewv.org
Phone - (304)558-2634
FAX - (304)-558-3512

>>> "Donna Lipscomb" <DLipscomb@wvadmin.gov> 6/19/2006 9:26 AM >>>

The Department of Administration is proposing to modify their Legislative Rules in regard to Purchasing. The proposed modifications have been filed with the Secretary of State for a comment period. The comment period will end July 17, 2006, at 9:00 a.m. I am attaching a copy of the proposed rules hereto for your review. If you want to make any comments regarding the proposed rule modifications you need to submit them to me, in writing, via e-mail or hard copy at 1900 Kanawha Boulevard, East, Room E-119, Charleston, WV 25305 before the deadline. Any comments received after the deadline will not be considered. Any comments not received in writing will not be considered.

If you have any questions, please do not hesitate to contact me at 558-3392.

§148-1-3

3.2 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.

This will be giving the Director of Purchasing to choose who he wishes an agency to hire verses the head of an agency choosing their staff. Also, this would be giving the Director of Purchasing duties or review qualifications that belong to Division of Personnel. This may also lead to not permitting promotion of good staff that has on the job training.

Also, the last sentence states this person may not have any other responsibility within the spending unit. This can hurt a small agency where you may have a single staff member responsible for multi duties. Some agencies are so small they may not be able to afford or justify a position that just does procurement.

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 a 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.

Once again, this could hurt a small or remote agency that does not have a tech support staff to give them the proper connections. Also, there may be remote sites that do not have the proper technology available to them for proper connection. This would not be proper to penalize such agencies.

§148-1-4

(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

Outside professionals and the Auditor Office do not show up unannounced to review documents. Purchasing Division should not be given this privilege. Spending notice deserve to have proper notice so they may have the proper staff and documents on hand to provide the inspectors with the proper information and documents. On site storage is limited at most offices and a spending unit may need a few days to retrieve the proper documents from an off-site storage facility.

(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

Giving the Director of Purchasing the authority to suspend or reduce purchasing authority could keep the spending unit from completing their mission. This is giving too much power to the Director of Purchasing which could be easily abused.

If they find a spending unit is not properly complying with state approved purchasing regulations, this should be reported to a higher authority to take appropriate action.

§148-1-6

6.5 Specifications

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.

No one person can be considered an authority to write specifications for all commodities, services or printing needed by all spending units. For this reason, it should not be up to the Director of Purchasing to approve or disapprove bid specifications. These specifications usually come from the end user of the commodity, services or printing that is required. The end-user usually has the most knowledge of the commodity, services or printing they are asking for.

§148-1-7

7-9-7. Requests for Proposals and Expressions of Interest.

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.

Mandating a RFP have a value of \$500,000 is too high. This will eliminate the RFP process for most spending units. There are times where a spending unit may only have \$100,000 for a project they have in mind but do not know enough about the industry to write the necessary exact specs for an RFQ.

Also, when a spending unit is bidding for a specific service, the qualifications of the vendor responding should be taken into consideration. This may be accomplished via an RFP not an RFQ. Thus, there should be some language which would allow an RFP if the spending unit feels strongly vendor qualifications must be evaluated and considered.

From: "Tammy Cogar" <tcogar@workforcewv.org>
To: <DLipscomb@wvadmin.gov>
Date: 7/12/2006 3:28:20 PM
Subject: Fwd: Re: Purchasing legislative rules

The only other comment that I would add to what Donna Cox has already provided is as follows:

§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".

In some instances an "equal" product may not be "compatible" with other equipment. In some circumstances, a specific brand may be the only option. There should be some degree of flexibility built into this language to allow for that.

Tammy L. Cogar, Assistant Director
Workforce West Virginia
Administrative Support
112 California Avenue
Building 4, Room 618B
Charleston, WV 25305
304-558-2634
304-558-3512 (fax)
tcogar@workforcewv.org

>>> Donna Cox 7/12/2006 11:20 AM >>>

>>> Donna Cox 7/12/2006 11:13 AM >>>
Donna,

Attached are some comments I have regarding the proposed Legislative Rules.

Please note new e-mail address.

Donna Cox
Chief of Procurement
WORKFORCE West Virginia
Bureau of Employment Programs
112 California Ave.
Charleston, WV 25305
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Phone - (304)558-2634

FAX - (304)-558-3512

>>> "Donna Lipscomb" <DLipscomb@wvadmin.gov> 6/19/2006 9:26 AM >>>

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If you have any questions, please do not hesitate to contact me at 558-3392.

CC: "Donna Cox" <dcox@workforcewv.org>

Ms Donna Lipscomb:

7-14-07

Several of my fellow State of WV IT employees advised me of some proposed changes in the procurement codes. Having read the proposed changes in code for Purchasing I must say I am very surprised. If it goes through in the manner proposed, I have great fear that our office will not be able to adequately perform our tasks, or perhaps only perform our tasks with diminished quality and with a lower level of support and efficiency. It is very important that we all understand if technology components, systems, software, Network Services, etc are to continue to be considered "commodities, services or printing" then these proposed changes are a huge step backwards. They will result in inferior services at higher costs

I am of the strong opinion that the OT approved/designed purchases should be exempted from being lumped into State's Department of Purchasing simply due to the facts that A: Purchasing almost without exception doesn't understand what we are trying to procure on behalf of the State Agencies & B: Attempting to convince them that "Standardization" and Best Value Approach" to purchasing products and services within the scope of the OT is in the best interest of the State seems to be beyond their grasp. I find it difficult to understand how DOT and Division of Banking have exemptions for certain "technical systems "they purchase, like a dump truck", but the State's attempt to acquire/procure services on a Next Generation Network, like the MPLS network I am working on now is to be treated like we are purchasing a pencil.

Assuming the OT will not be granted an exemption like DOT: I have the following comments on this particular proposed Purchasing reform.

At the bottom of page 6, and on page 8 under 6.5.2 (They are not qualified to perform this, as they don't understand what they are looking at; how it works; and how it interacts with other technological equipment and services.....6.5.3 the same thing,.....6.6.2 two weeks is often unrealistic for complicated RFP's, but that leads to another objection on page 4 earlier 6.2.1, I guess this assumes all bids are RFQ's.

7.1.2 Basically makes everything a low bid meet specification which is proven time and time again not to be the manner to purchase complex technological systems. and 6.5.1 says we are not allowed to influence any specifications. (This must mean in a manner that prohibits competition or unduly favors a vendor which should go without saying), however we write the specifications based upon research applied to the Agencies needs and how the purchase will fit into the larger picture of State Government as a whole, we by definition are going beyond merely influencing specifications... **7.1.2 will kill the initiatives to standardize and leverage existing investments. It was my understanding that the Governor is pushing to save dollars and standardize on best practices and procedures as well as technologies.** We had planned two new RFQ's to standardize State Agencies on Magic Quadrant (Gartner) IP Telephony platforms. Stating no brand names and must have "or equal" language is in direct conflict with said desire to gain economies of scale via standardization. IP Telephony platforms aren't brooms, pencils or printing.

7.2 We need to keep our purchasing records on file for purchases under \$25K for public review anytime said public desires. This seems rather intrusive. It seems the public has a right to know, but I believe they should have to schedule this through Purchasing, not drop in on our office anytime.

7.7.2 Eliminates RFP's from most all situations and prohibits acquisition of any equipment via an RFP.....This is simply not in the best interest of anybody as far as I can tell, especially the State's tax payers. This also eliminates the Governor's desire to save monies through Standardization. It is in direct conflict with the recommendations of Public Works as I understand some of them and is contradictory to the Procurement reform in nearly all our counterpart States.

7.1.3 This is limiting on large complicated Network RFPs.....if we can still do an RFP. It would be impossible to do a cellular RFQ, or State Voice Data and Video Network contract on an RFQ. I have confirmed both of these with the National Association of State Telecom Directors and Gartner.

This document does look like a method of increasing job security in Purchasing however.

Thanks for taking the time to review my concerns:

Marc Coleman, Director of Operations & Infrastructure, Office of Technology.

From: "Marc Coleman" <mcoleman@wvgot.org>
To: <dlipscomb@wvadmin.gov>
Date: 7/14/2006 1:13:23 PM
Subject: Purchasing Reform

Sorry the 1st attachment had a typo.

From: Donna Lipscomb
To: Coleman, Marc
Subject: Re: (Attachment Blocked by Guinevere) Donna

As usual, the state's computer system blocked the attachment so you will need to fax it to me at 558-2999.
Thanks.

>>> "Marc Coleman" <mcoleman@wvgot.org> 7/14/2006 1:10 PM >>>
I was advised by several IT counter parts to review the proposed changes to the Purchasing Code. I have attached my review and comments. Thank you in advance for taking the time to ask for and read our input. It is difficult to get the proper and prudent procurements through as it is. This document gives me and many others great cause for alarm.
=20
Thanks
=20
Marc Coleman
Office of Technology=20
304-558-3784=20

Message containing double extensions/CLSID exploit.
This message contained an attachment that was blocked by the Guinevere/F-Prot virus scanner running on an e-mail server at IS&C, part of the West Virginia Department of Administration.

The attachment was blocked because it was of a type that is often infected, such as an executable file (with an .exe extension). This does *not* mean that the attachment was necessarily infected.

If you must routinely send or receive this type of file for your work, please contact the IS&C Help Desk at (304) 558-1257 for more information.

Ms Donna Lipscomb:

7-14-07

Several of my fellow State of WV IT employees advised me of some proposed changes in the procurement codes. Having read the proposed changes in code for Purchasing I must say I am very surprised. If I go through in the remainder proposal, I have great fear that our office will not be able to adequately perform our tasks, or perhaps only perform our tasks with diminished quality and with a lower level of support and efficiency. It is very important that we all understand if technology components, systems, software, Network Services etc are to continue to be considered "commodities" services or pricing from these proposed changes are a huge step backwards. They will result in inferior services at higher costs.

I am of the strong opinion that the OT approved assigned purchases should be exempted from being lumped into State's Department of Purchasing simply due to the facts that A: Purchasing almost without exception doesn't understand what we are trying to procure on behalf of the State Agencies & B: Attempting to combine them that "Standardization" and Best Value Approach to purchasing products and services within the scope of the DT is in the best interest of the State seems to be beyond their grasp. I find it difficult to understand how DOT and Division of Banking have exemptions for certain "technical systems" they purchase. It's a dump truck, but the State's attempt to acquire/procure services on a Next Generation Network, like the MPLS network I am working on now is to be treated like we are purchasing a pencil.

Assuming the DT will not be granted an exemption like DOT, I want the following comments on their particular proposed Purchasing reform.

At the bottom of page 8, and on page 4 under 6.5.2 (They are not qualified to perform this, as they don't understand what they are looking at how it works; and how it interacts with other technological equipment) and section.....6.5.3 the same thing.....6.6.2 two weeks is often unrealistic for complicated RFP's, but that leads to another objection on page 4 earlier 6.2.1. I guess this assumes all bid are RFP's.

7.1.2 Basically matter over anything a low bid need specification which is proven time and time again not to be the manner to purchase complex technological systems; and 6.5.1 says we are not allowed to influence any specifications. (This must mean in a manner that prohibits competition or unduly favors a vendor which should go without saying) however we write the specifications based upon research supplied to the Agencies needs and how the purchase will fit into the larger picture of State Government as a whole, we by definition are going beyond merely influencing specifications.... 7.1.2 will kill the initiatives to standardize and leverage existing investments. It was my understanding that the Governor is pushing to save dollars and standardize on best practices and procedures as well as technologies. We had planned two new RFP's to standardize State Agencies on Magic Quadrant (Gartner) IP Telephony platforms. Staffing no hard names and most have "or equal" language it is direct conflict with said desire to gain economies of scale via standardization. IP Telephony platforms aren't uniform, vendors or pricing.

7.2 We need to keep our purchasing records on file for purchases under \$25K for public review anytime said public desires. This seems rather intrusive. It seems the public has a right to know, but I believe they should have to schedule this through Purchasing, not drop in on our office anytime.

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This document does look like a method of increasing job security in Purchasing however.

Thanks for taking the time to review my concerns:

Marc Coleman, Director of Operations & Infrastructure, Office of Technology.

558-2999

From: "Jim Hash" <jhash@dot.state.wv.us>
To: <DLipscomb@wvadmin.gov>
Date: 7/14/2006 2:28:11 PM
Subject: DOT Comments -- Proposed Purchasing Rules

Attached please find the subject comments from the Department of Transportation. These comments are from several different reviewers in our agency, including Legal staff, Procedures writer, Finance and Procurement staff. Thank you for the opportunity to submit comments on this important legislation, and thank you for the opportunity to represent my agency earlier on the Purchasing Reform Committee. We in the DOT agency, look forward to working with the Department of Administration and the Purchasing Division to implement procurement changes, and we are most anxious for E-Procurement implementation. The changes to delegated agency purchase authority were much appreciated. Improving the process for spending units and vendors while reducing overall expenses should be our collective goal. Thank you again and have a great weekend.

<<Prop. Purch. Rules - DOT Comments.doc>>

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

§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 ~~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^{JH}. 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^{JH} 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 for that spending unit, which may include a requirement that 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^{JH} 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 facsimileTH, 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 which changes must 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, with agency concurrence.

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 vender is suspended and requests a hearing, one will be scheduled with the Director. The vender 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^{JH} 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. 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**^{JH}. Any specification disapproved shall be returned to the spending unit for revision.

6.5.3 The Director^{JH} 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**^{JH} **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 with the assistance of spending unit personnel. Spending units shall perform any bid review and subsequent award recommendation within two weeks, or by such later time as is determined by the Director. 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~~ \$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 ~~\$40,000.~~ \$25,000

7.3.1. Purchases of ~~commodities and printing~~ commodities, services or printing estimated to be in excess of ~~\$40,000~~ \$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^{JH}. 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 recommend the use of a contract issued by another public organization or recommend that a spending unit make a purchase from contracts issued by other public agencies and entities. The Director may participate in cooperative purchases with other public agencies and entities. In all cases, these contracts or cooperative arrangements shall be from valid properly awarded contracts and considered by the Director and the spending unit 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 are 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^{JH} business, unless the Director determines based on submitted documentation from the spending unit that the difference is so great^{JH} 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^{JH} 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 may approve only those requests submitted with evidence that 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 and after concurrence with the spending unit. 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. Justification for any change in the maximum budgeted amount by a spending unit after the bid opening must be provided by the spending unit to the Director. No award may be made or contract entered if the spending unit certifies to the Director that award will have an adverse financial impact on the spending unit.

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 with concurrence of the spending unit. If the negotiation does not lead to the budget amount being met, the Director may negotiate a lower price with the next lowest bidder, with concurrence of the spending unit and continue negotiations with participating bidders after negotiations close with the preceding bidder. If agencies fail to provide^{JH} 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, with concurrence of the spending unit, 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, with concurrence of the spending unit 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^{JH} 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 propose, contract management procedures for all government contracts let by the Purchasing Division. 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, where approved by the spending unit, 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 or 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 or 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*.

From: Holbert, Rodney [RHolbert@burnip.com]
Sent: Friday, July 14, 2006 1:12 PM
To: Amy Clendenin (E-mail)
Subject: FW: Proposed Purchasing Legislative Rules

-----Original Message-----

From: Holbert, Rodney
Sent: Friday, July 14, 2006 2:09 PM
To: 'dlipscomb@wvadmin.gov'
Subject: Proposed Purchasing Legislative Rules

Ms. Lipscomb,

I appreciate the opportunity to comment on the proposed purchasing legislative rules.

I work for an engineering/architectural firm located in Parkersburg, West Virginia.

The proposed legislative rules add some confusion to the process of obtaining engineering and architectural services.

Section 7.7 contains language that seems to conflict with Chapter 5G of the WV Code. I ask that any conflicting language in the proposed rules be modified to avoid confusion. Also, language that may infer a process that would circumvent a Qualification Based Selection (QBS) process be revised within the final rules.

If you need additional information to consider my comments, please let me know. Also, ACEC/WV and WV QBS Council has additional information concerning Qualification Based Selection for engineering and architectural services if any needs additional information on the process.

Thank you,
Rodney Holbert
Burgess & Niple
(304) 485-8541



Note:

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Greg Belcher

From: Greg Belcher [gbelcher@chapttech.com]
Sent: Thursday, July 13, 2006 8:01 AM
To: dlipscomb@wvadmin.gov
Cc: info@wengineers.com
Subject: Purchasing Legislative Rules Comments

Donna,

The only comment I have at this time is more like a clarification, but I think it would be wise to include it to avoid confusion with respect to A/E services ad 5G of WV Code.

Section 7.7.2 has been modified to state RFP's can be utilized for contracts for services estimated to cost in excess of \$500,000. It continues stating that RFP's cannot be used to acquire 1) equipment; or 2) any combination of equipment AND services.

I am suggesting that this section also state that RFP's cannot be used to aquire A/E services.

If you have any questions, please contact me at your earliest convenience.

Thank you for your consideration of this matter.

Greg Belcher, PE
Chapman Technical Group

From: Mary Behling <behling@geosrv.wvnet.edu>
To: <dlipscomb@wvadmin.gov>
Date: 7/14/2006 4:07:14 PM
Subject: Comments re Draft Purchasing Rules

DATE: 14 July 2006
TO: Ms. Donna Lipscomb, Department of Administration
FROM: Mary Behling, Head, Computing
Services Program, West Virginia Geological and Economic Survey
RE: Comments Regarding Proposed
Modifications to Purchasing Rules

Summary: These draft rules place a lot of authority (too much authority??) for individual procurements and for the processes in general in the hands of the Director of Purchasing to make interpretations in individual situations. These interpretations and decisions seem to be geared more toward the favor of vendors than the needs or issues of agencies. Agencies should have more flexibility (within general Purchasing guidelines) to make decisions regarding their individual circumstances.

Specific Comments:

1.) Section 148-1-4/Authority and Remedies of Director: r (page 3): It should not be assumed by the Director of Purchasing that more than one purchase to a specific vendor in a fiscal year (e.g., in excess of \$25,000.) is an attempt to circumvent the rules. Despite their best efforts, agencies are not always able to predict their operational needs in advance, and occasionally unforeseen circumstances arise in situations between the summer at the beginning of the fiscal year and the following spring at the end of the fiscal year. These circumstances may be the result of agency services being more popular with the public than originally planned, unforeseen events (or "disasters") due to weather or utility disruptions, or the application for and award of contracts (federal or otherwise) not originally anticipated earlier in the fiscal year. The bottom line is that situations change and agencies need to be flexible to procure the necessary commodities or services to move forward, regardless of the cost of those commodities or services.

2.) Section 148-1-6/Registration, Bidding, and Award: 6.5.2/Specifications (page 8): This section assumes that the Director of Purchasing knows more about the specific needs of the agency and the technical specifications of a specific procurement than the agency does. This is a false assumption; this section should be deleted.

3.) Section 148-1-6/Registration, Bidding, and Award: 6.6.1/Bid Evaluation (page 8): Vendors occasionally have questions about specifications and the possibility of substitutions. To be fair to both the vendor (enabling a decent chance at a viable bid) and the agency (enabling the correct specifications to be offered), communication for the purposes of clarification should be allowed between the agency and the vendors during the solicitation period.

4.) Section 148-1-6/Registration, Bidding, and Award: 6.6.1/Bid Evaluation (page 8): While the Director of Purchasing may wish to evaluate the bids as to form, agencies are better able to evaluate the technical aspects of and differences in bids, in order to determine if the "OR EQUAL"s offered by the vendors really are . . . equal. Agencies should be directly involved in all bid evaluations.

5.) Section 148-1-7/Purchasing Methods: 7.4/Open End Contracts (page 9): Use of open-end statewide contracts should not be mandatory. Open-end contracts are not necessarily (and often just plain are NOT) the best value or the best level of service for the State. Better quality, better price, and better service are often obtainable elsewhere outside of these contracts. Certain statewide contract vendors have become complacent over their rank as contract-holders and provide poor service and significant hassles to agencies trying to do their business.

Agencies need better pricing (which is easily available) and occasionally better quality services, and Purchasing should try harder to accomplish that in the contracts if use of those contracts must be mandatory..

6.) Section 148-1-7/Purchasing Methods: 7.5.2/Sole Source Procurement (page 10): The public advertisement of sole source requests will cause unnecessary delays in procurements and may invite inadequate vendors to try to convince the Director of Purchasing that their product is "equal" when it does not provide the same complete functionality as the requested sole source item (thus wasting more time). This is especially true in the realm of specific types of applications software. This section should be deleted.

7.) Section 148-1-7/Purchasing Methods: 7.9.1/Purchases from contracts issued by other public agencies and entities (page 12): I disagree strongly with this section, since forcing agencies to pay more (even if not a "substantial" amount) on existing statewide

contracts adds up; the cumulative effect of individual \$500. differences/overcharges in pricing adds up significantly in the larger scheme of State government.

Also, it is not the responsibility of State government to ensure the viability of West Virginia vendors whose business is so narrow that they cannot survive without sales to State government agencies. Government does not exist to serve businesses (encourage – yes; wholesale support – no).

8.) Section 148-1-7/Purchasing

Methods: 7.11.1/Negotiation When All Bids Exceed Available Funds (page 12): It should be at the agency's discretion (not the Director of Purchasing) to decide if more funds can be allocated to a requisition.

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CC: "Tammie Means" <TMeans@wvgot.org>

From: "Harry Price" <harryprice@wvdnr.gov>
To: <dlipscomb@wvadmin.gov>
Date: 7/17/2006 8:41:25 AM
Subject: FW: Comments - Legislative Rules 148 CSR 1 - DOA - Purchasing Division

Attached please find the Division of Natural Resources comments to the proposed rules. Thank you for the opportunity to comment. Hard copies will follow.

CC: "Diane Holley" <DHolley@wvadmin.gov>

MEMORANDUM

TO: Donna M. Lipscomb, Executive Coordinator
Department of Administration

FROM: Frank Jezioro, Director
Division of Natural Resources

DATE: July 12, 2006

SUBJECT: Proposed Legislative Rules 148 CSR 1
Department of Administration
Purchasing Division

I would like to submit the following comments regarding the proposed Legislative Rules 148 CSR 1:

§148-1-3 (3.2). The head of the spending unit should be able to designate the person(s) who "shall take all purchasing training. . ." with the Director of Purchasing having the right to not approve for just cause only—not successfully completing purchasing training, etc. The spending unit head, not the Purchasing Director, should determine what additional responsibilities the designee(s) may have. The Director of the Division has a better understanding of the working operations of the spending unit and its employees' areas of assignment. A head of another agency should not be given the authority to choose the job assignment for other agencies' personnel.

§148-1-3 (3.3). The Purchasing Division should provide training and sufficient time for the purchase of equipment and statewide implementation by the spending units. A schedule for full implementation should be provided by the Director of Purchasing to the head of the spending units to allow time for planning and budgeting. Spending units not already trained and using TEAM should not be required to use the automated system until purchase of a new automated purchasing system. Agencies that were not brought on line with the current automated purchasing system should not be penalized by a fee.

§148-1-4 (a). "The director may establish a list of commodities or services that are not possible to bid . . . preapproved by the Purchasing Division . . . A contract or purchase order . . . is not required to be approved by the Purchasing Division." Is this regardless of dollar amount?

§148-1-4 (g). Are standard specifications being written and posted for

spending units to check prior to requisitioning or bidding at the agency level?

§148-1-4 (i). Is central storerooms being brought back in place of Office statewide contract?

§ 148-1-4 (n). Is this referring to Correctional Industries and Sheltered Workshops or others that might be added by WV Code? Will the Purchasing Division have the final say in whether the quality of printing or the cost of furniture, etc. from Correctional Industries or Sheltered Workshops is efficient and economical for the State agency? Will the agencies have input into what is acceptable quality and price? Does this affect the Governor's Committee for Sheltered Workshops?

§ 148-1-4 (r). Will the fees referenced in §148-1-3 (3.3) be assessed? Circumventing may be done using multiple vendors? Will this be addressed or only purchases made to one vendor in excess of \$25,000 per annual period? Is the \$25,000 limited to one vendor for the entire agency or per facility? Clarification is needed in this section of the Legislative Rule: "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. . ." The agencies need to know exactly what constitutes a violation in order to effectively implement the revised rules, especially the larger agencies with facilities located statewide.

§ 148-1-5 (b). What are the grounds for declaring a vendor non-responsible or non-responsive? (For example, vendors who do not respond to request for quotations (RFQ) or request for proposals (RFP) or clarification of bid, etc. within a certain time frame, but not limited to?) Will the spending unit be required to substantiate this in writing or the Director of Purchasing?

§ 148-1-6 (6.1.3). Do these eligible vendors have to complete a registration form or just pay the \$125 registration fee? Is there specific location where agencies may check for vendors "listed on any nationally recognized stock exchange", prior to sending them a vendor registration form?

§ 148-1-6 (6.1.4). Do vendors receiving payment via the purchasing card exceeding \$1,000 have to register and pay the \$125 fee? One of the main selling points of the Purchasing Card Program used by the Purchasing Division and the Auditor's Office at the time of implementation was that the agencies would not have to register vendors and the vendors would not have to pay the annual vendor registration fee since payment was being made to the card issuer. If the agency chooses to use the p-card for payment of services, the vendor must be listed in the Financial

Information Management System (FIMS) with a designation of a corporation, verified by a W-9, because of 1099 reportable service requirement by the Internal Revenue Service. No vendor should be added to FIMS unless they are first registered with the Purchasing Division.

§ 148-1-6 (6.1.6). This should be restated at the spending unit level of delegated purchasing.

§ 148-1-6 (6.2.4). Are scanned bids with signatures emailed as attachments acceptable? Will a special email box be set up for receipt of bids?

§ 148-1-6 (6.2.5). Scanning the bids and posting them on the Purchasing Division website for public inspection, which is currently being done, could result in cost increase when all bids have to be rejected. We would recommend that the bids be scanned and available via the intranet for agencies to access for evaluation purposes and only opened up to the general public after award of the contract.

§ 148-1-6.6 (6.6.2). Agency head should be given the opportunity to justify delay of evaluation when there is a scheduling conflict or other extenuating circumstances. The end user should be consulted prior to making an award when alternates have been quoted. Arbitrarily canceling the purchase request could result in increased cost for the state. Two weeks is not sufficient time to evaluate Requests for Proposals.

§ 148-1-7 (7.1.3). Are agency contracts between \$2,501 and \$25,000 "requiring more than six (6) months to fulfill" to be "filed with the State Auditor."?

§ 148-1-7 (7.5.1c). How will this section be implemented? Is the agency responsible for researching the open market?

§ 148-1 (7.5.2) What is the definition of "other interested parties"? Will cooperative agreements be subject to the same advertising requirements? This may keep the state from receiving Federal funds or benefiting from participation in cooperative efforts with multiple states. Will this be addressed under §148-1-4 (a)?

§ 148-1 (7.5.3). Clarification of under what circumstances this section would be implemented should be included? Will the agency be required to advertise the intent to award a sole source between \$2,501 and \$25,000?

§148-1 (7.8). Will "technical, professional, or other services" be addressed in another Section of the Legislative Rule. How will these services be procured? This Section is used for medical, educational, research,

entertainment services, legal services (approved by the Attorney General), level three grievance hearings examiners, and other miscellaneous services not routinely bid.

§ 148-1-7.7 (7.7.2) Sometimes it is in the best interest of the state to combine equipment and services into Requests for Proposals. The responsibility for the equipment to work as proposed in the environment which it is installed remains with the vendor who submitted the winning proposal. An exception on a case by case basis should be added.

§ 148-1-7.7 (7.7.3). Other best value methods should be included such as life-cycle costing. There should also be some type of best value permitted in Requests for Quotations (RFQ) whenever the criteria for award are specified in advance. For example, printing and advertising should not be based solely on cost—quality and reaching the intended market are a very important consideration.

§ 148-1-7.9 (7.9.1). Can cooperative agreement language be included in this Section? There is no existing contract until the cooperative agreement is entered into and is limited to the interested parties. (For example, disease testing and studies of Wildlife throughout the South East which benefits all states involved.)

§148-1-7.11 (7.11.2). Will the spending unit be permitted to participate in the negotiation? The end user may have expertise, or specific knowledge of the market, not available in the Purchasing Division.

§ 148-1-7.11 (7.11.3). The spending units need to participate in the negotiation process. Especially, if it is necessary to negotiate any thing other than cost or negotiation is done with other than the recommended vendor. Some projects are too important to award to a vendor that just barely meets the Minimum Acceptable Score established by the Director of Purchasing. Agencies should have input into how far down the list negotiations are conducted.

§ 148-1-7 (7.13.1(d)). Criteria should be established to determine when taking this action is merited. Arbitrarily requiring "third party contract manager, appointed by the Director or one hired by contract. . ." could be an unnecessary expense.

§ 148-1-7 (7.13.2). Guidelines must be established and an appeal process in place when there is a disagreement between the Director of Purchasing and the agency head. This could be so expensive that it would be detrimental to the operation of the agency.

§ 148-1-11 (11.1). Surplus Property should consider offering equipment

for sale on site at different agency locations using the Internet. Surplus Property does not pick up equipment in a timely manner, and the agencies cannot afford to transport it to Surplus Property. Equipment deteriorates, losing value, just sitting at the facilities waiting for pick up.

§ 148-1-11 (11.5). The cost of a third party vendor to coordinate Internet sales should not be passed on to the agencies required to dispose of all equipment through Surplus Property.

Thank you for the opportunity to comment on these proposed Legislative Rules.

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

§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. The head of the spending unit should be able to designate the person(s) who "shall take all purchasing training" with the Director of Purchasing disapproval only for just cause--not successfully completing purchasing

training, etc. The spending unit head, not the Purchasing Director, should determine what additional responsibilities the designee(s) may have.

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.

Purchasing division should provide training and sufficient time for purchase of equipment and statewide implementation by the spending unit. Spending units not already trained and using TEAM should not be required to use the automated system until replacement of TEAM. A schedule for full implementation should be provided by the Director to the head of the spending unit. Note: Purchasing stopped adding agencies to TEAM and the agencies should not be penalized.

§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. Regardless of dollar amount? This preapproval by the Purchasing Division does not supercede or replace approval as to form by the West Virginia Attorney General's Office. Is there a dollar threshold? 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; Are standard specifications being written and posted for spending units to check prior to requisitioning or bidding at the agency level?
- (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; Is central storeroom being brought back in place of Office statewide contract?
- (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 Is this referring to Correctional Industries and Sheltered Workshops or others that might be added by WV Code?

(o) Prescribe the manner of inspection for all deliveries ~~of~~ 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. Will applicable fees be assessed? Circumventing may be done using multiple vendors? Will this be addressed or only purchases made to one vendor in excess of \$25,000 per annual period. Is the \$25,000 limit per agency or facility? Inquiries are coming in from the State Auditor's Office applying the threshold agency wide. Please have this clarified some way so that what constitutes a violation may be passed on into field offices and agencies will know how they have to implement the revised rules.

§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 (Vendors who do not

respond to RFQs or RFPs at all or properly or clarification of bid within a certain time frame, etc. - not limited to?) 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. Do these eligible vendors have to complete a form?

6.1.4. Vendors receiving orders for goods or services exceeding \$1,000,

regardless of payment method. Do vendors receiving payments via the purchasing card have to register? This negates the advantage to the spending unit. Not having to register vendors and pay the annual fee was one of the main selling points of the Purchasing Card Program used by State Purchasing and the State Auditor's Office at the time of implementation. 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. This should be restated at the spending unit level. After checking all other sources, the first step before purchasing is verification of vendor registration 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. Are scanned bids with signatures emailed as attachments acceptable? Will a special email box be set up for receipt?

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. When all bids have to be rejected and the project rebid, this could result in cost increase.

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 net-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. Agency head should be given the opportunity to justify delay of evaluation when there is a scheduling conflict or other extenuating circumstances.

§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 ~~\$40,000~~ \$25,000 or less.

Spending units may make purchases ~~(of no more than) \$40,000 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 ~~\$40,000.~~ \$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.

7.40-8. 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.

One person cannot be an expert in all areas. Most of the time, the end user or customer at the agency level is the expert in the commodities, services, or printing being purchased. Arbitrarily requiring third-party contract managers, appointed by the Director of Purchasing or one hired by contract could be an unnecessary expense. Some criteria should be established to determine when taking this action is merited.

7.13.2 All expenses related to contract management shall be paid by the spending unit. This could be so expensive that it would be detrimental to the operation of the agency. Guidelines must be established and an appeal process in place when there is a disagreement between the Director and the agency head.

§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 or 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 telling 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 or 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.

From: "Harry Price" <harryprice@wvdnr.gov>
To: <dlipscomb@wvadmin.gov>
Date: 7/17/2006 8:43:08 AM
Subject: FW: Purchasing legislative rules

Wildlife offered these additional comments.

Wildlife's comments/concerns are as follows:

Section 148 - 7.5.1(r) - suspends or reduces purchasing authority for any spending unit that fails to report multiple contract awards that are deemed by the Director to circumvent the \$25,000 threshold within a 12 month period... we are wanting clarification on this about whether this applies to DNR as a whole or just Wildlife... if it is the entire DNR, then they (Purchasing) needs to come up with a way to track this, because we can't track things that Parks or other sections are doing.

Section 148-1-4 (m) - We need clarification on when we should use shelter workshops and if we need bids to do this.

Section 148-1-5-7.5.3- Is the procedure of getting a letter claiming sole source for purchased from \$2500-\$5000 going to remain the same?

CC: "Diane Holley" <DHolley@wvadmin.gov>

148 CSR 1
TITLE 148

DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION

SERIES 1

PURCHASING

§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 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 or 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*.

From: "Harry Price" <harryprice@wvdnr.gov>
To: <dlipscomb@wvadmin.gov>
Date: 7/17/2006 8:41:25 AM
Subject: FW: Comments - Legislative Rules 148 CSR 1 - DOA - Purchasing Division

Attached please find the Division of Natural Resources comments to the proposed rules. Thank you for the opportunity to comment. Hard copies will follow.

CC: "Diane Holley" <DHolley@wvadmin.gov>

MEMORANDUM

TO: Donna M. Lipscomb, Executive Coordinator
Department of Administration

FROM: Frank Jezioro, Director
Division of Natural Resources

DATE: July 12, 2006

SUBJECT: Proposed Legislative Rules 148 CSR 1
Department of Administration
Purchasing Division

I would like to submit the following comments regarding the proposed Legislative Rules 148 CSR 1:

§148-1-3 (3.2). The head of the spending unit should be able to designate the person(s) who "shall take all purchasing training. . ." with the Director of Purchasing having the right to not approve for just cause only—not successfully completing purchasing training, etc. The spending unit head, not the Purchasing Director, should determine what additional responsibilities the designee(s) may have. The Director of the Division has a better understanding of the working operations of the spending unit and its employees' areas of assignment. A head of another agency should not be given the authority to choose the job assignment for other agencies' personnel.

§148-1-3 (3.3). The Purchasing Division should provide training and sufficient time for the purchase of equipment and statewide implementation by the spending units. A schedule for full implementation should be provided by the Director of Purchasing to the head of the spending units to allow time for planning and budgeting. Spending units not already trained and using TEAM should not be required to use the automated system until purchase of a new automated purchasing system. Agencies that were not brought on line with the current automated purchasing system should not be penalized by a fee.

§148-1-4 (a). "The director may establish a list of commodities or services that are not possible to bid . . . preapproved by the Purchasing Division . . . A contract or purchase order . . . is not required to be approved by the Purchasing Division." Is this regardless of dollar amount?

§148-1-4 (g). Are standard specifications being written and posted for

spending units to check prior to requisitioning or bidding at the agency level?

§148-1-4 (i). Is central storerooms being brought back in place of Office statewide contract?

§ 148-1-4 (n). Is this referring to Correctional Industries and Sheltered Workshops or others that might be added by WV Code? Will the Purchasing Division have the final say in whether the quality of printing or the cost of furniture, etc. from Correctional Industries or Sheltered Workshops is efficient and economical for the State agency? Will the agencies have input into what is acceptable quality and price? Does this affect the Governor's Committee for Sheltered Workshops?

§ 148-1-4 (r). Will the fees referenced in §148-1-3 (3.3) be assessed? Circumventing may be done using multiple vendors? Will this be addressed or only purchases made to one vendor in excess of \$25,000 per annual period? Is the \$25,000 limited to one vendor for the entire agency or per facility? Clarification is needed in this section of the Legislative Rule: "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. . ." The agencies need to know exactly what constitutes a violation in order to effectively implement the revised rules, especially the larger agencies with facilities located statewide.

§ 148-1-5 (b). What are the grounds for declaring a vendor non-responsible or non-responsive? (For example, vendors who do not respond to request for quotations (RFQ) or request for proposals (RFP) or clarification of bid, etc. within a certain time frame, but not limited to?) Will the spending unit be required to substantiate this in writing or the Director of Purchasing?

§ 148-1-6 (6.1.3). Do these eligible vendors have to complete a registration form or just pay the \$125 registration fee? Is there specific location where agencies may check for vendors "listed on any nationally recognized stock exchange", prior to sending them a vendor registration form?

§ 148-1-6 (6.1.4). Do vendors receiving payment via the purchasing card exceeding \$1,000 have to register and pay the \$125 fee? One of the main selling points of the Purchasing Card Program used by the Purchasing Division and the Auditor's Office at the time of implementation was that the agencies would not have to register vendors and the vendors would not have to pay the annual vendor registration fee since payment was being made to the card issuer. If the agency chooses to use the p-card for payment of services, the vendor must be listed in the Financial

Information Management System (FIMS) with a designation of a corporation, verified by a W-9, because of 1099 reportable service requirement by the Internal Revenue Service. No vendor should be added to FIMS unless they are first registered with the Purchasing Division.

§ 148-1-6 (6.1.6). This should be restated at the spending unit level of delegated purchasing.

§ 148-1-6 (6.2.4). Are scanned bids with signatures emailed as attachments acceptable? Will a special email box be set up for receipt of bids?

§ 148-1-6 (6.2.5). Scanning the bids and posting them on the Purchasing Division website for public inspection, which is currently being done, could result in cost increase when all bids have to be rejected. We would recommend that the bids be scanned and available via the intranet for agencies to access for evaluation purposes and only opened up to the general public after award of the contract.

§ 148-1-6.6 (6.6.2). Agency head should be given the opportunity to justify delay of evaluation when there is a scheduling conflict or other extenuating circumstances. The end user should be consulted prior to making an award when alternates have been quoted. Arbitrarily canceling the purchase request could result in increased cost for the state. Two weeks is not sufficient time to evaluate Requests for Proposals.

§ 148-1-7 (7.1.3). Are agency contracts between \$2,501 and \$25,000 "requiring more than six (6) months to fulfill" to be "filed with the State Auditor."?

§ 148-1-7 (7.5.1c). How will this section be implemented? Is the agency responsible for researching the open market?

§ 148-1 (7.5.2) What is the definition of "other interested parties"? Will cooperative agreements be subject to the same advertising requirements? This may keep the state from receiving Federal funds or benefiting from participation in cooperative efforts with multiple states. Will this be addressed under §148-1-4 (a)?

§ 148-1 (7.5.3). Clarification of under what circumstances this section would be implemented should be included? Will the agency be required to advertise the intent to award a sole source between \$2,501 and \$25,000?

§148-1 (7.8). Will "technical, professional, or other services" be addressed in another Section of the Legislative Rule. How will these services be procured? This Section is used for medical, educational, research,

entertainment services, legal services (approved by the Attorney General), level three grievance hearings examiners, and other miscellaneous services not routinely bid.

§ 148-1-7.7 (7.7.2) Sometimes it is in the best interest of the state to combine equipment and services into Requests for Proposals. The responsibility for the equipment to work as proposed in the environment which it is installed remains with the vendor who submitted the winning proposal. An exception on a case by case basis should be added.

§ 148-1-7.7 (7.7.3). Other best value methods should be included such as life-cycle costing. There should also be some type of best value permitted in Requests for Quotations (RFQ) whenever the criteria for award are specified in advance. For example, printing and advertising should not be based solely on cost—quality and reaching the intended market are a very important consideration.

§ 148-1-7.9 (7.9.1). Can cooperative agreement language be included in this Section? There is no existing contract until the cooperative agreement is entered into and is limited to the interested parties. (For example, disease testing and studies of Wildlife throughout the South East which benefits all states involved.)

§148-1-7.11 (7.11.2). Will the spending unit be permitted to participate in the negotiation? The end user may have expertise, or specific knowledge of the market, not available in the Purchasing Division.

§ 148-1-7.11 (7.11.3). The spending units need to participate in the negotiation process. Especially, if it is necessary to negotiate any thing other than cost or negotiation is done with other than the recommended vendor. Some projects are too important to award to a vendor that just barely meets the Minimum Acceptable Score established by the Director of Purchasing. Agencies should have input into how far down the list negotiations are conducted.

§ 148-1-7 (7.13.1(d)). Criteria should be established to determine when taking this action is merited. Arbitrarily requiring "third party contract manager, appointed by the Director or one hired by contract. . ." could be an unnecessary expense.

§ 148-1-7 (7.13.2). Guidelines must be established and an appeal process in place when there is a disagreement between the Director of Purchasing and the agency head. This could be so expensive that it would be detrimental to the operation of the agency.

§ 148-1-11 (11.1). Surplus Property should consider offering equipment

for sale on site at different agency locations using the Internet. Surplus Property does not pick up equipment in a timely manner, and the agencies cannot afford to transport it to Surplus Property. Equipment deteriorates, losing value, just sitting at the facilities waiting for pick up.

§ 148-1-11 (11.5). The cost of a third party vendor to coordinate Internet sales should not be passed on to the agencies required to dispose of all equipment through Surplus Property.

Thank you for the opportunity to comment on these proposed Legislative Rules.

10:

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148 CSR 1

TITLE 148
DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION
SERIES 1
PURCHASING

§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.

Comment: This method requires a great deal of ethics. Director can override an evaluation committee's decision and require a new evaluation committee to make a more favorable decision.

Question: How many best value procurement evaluation committees have been overruled?

Comment:

§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.

Comment: The Department of Administration Purchasing Director does not have the authority to subordinate the authority of another agency in the selection and assignment of procurement duties. This legislative rule is applicable to the Department of Administration, Purchasing Division only.

Comment: This appears to be a political position.

Question: Does the Department of Administration Purchasing Director desire to manage or restrict the flow of communication on procurement issues? Purchasing Director has intimated so many spending units that there will probably be no comments received for fear of retaliation by the Purchasing Division Director.

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.

Question: What is the intention of this rule? Since you propose to have the Director approve the job duties of other state spending unit, it is entirely feasible to allow the DIRECTOR request authorization to extract more revenue for his office.

Question: Where is the section that requires the spending units to pay the Purchasing Division for services that are already being funded by the general revenue?

Comment: This is an open ended rule for which the Dept of Administration, Purchasing Division Director can augment his general funding needs from agencies that are required to use his offices services.

Comment: About three years ago, the Department of Health and Human Resources and Workers Compensation entered into agreements with DOA to provide procurement services – the same duties and responsibilities required by the State Code. What did the agencies receive from the Purchasing Division? The Purchasing Division personnel laughed – because they did not provide anything

above the standard services of their offices.

§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.

Comment: §148-1-4. Authority and Remedies of Director and the second sentence begins with "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."

Comment: This is not a Rule but an individual boasting that he is the Dictator.

Comments: Why doesn't the rule require the Dept of Administration, Purchasing Division Director make this list available for public review and post the list?

Comment: Why doesn't the rule require the Dept of Administration make an annual report of the agencies and vendors transacting on the exempt list?

Comment: WV Code does not mention commodities and services not possible to bid.

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.

Comment: Rules 7.5.1 and 7.5.2 is a repeat of the above - except it is in reverse order. There may be commodities that are sole source and you must provide all justification for the sole source procurement and the Director will require that you publicly advertise and bid the commodity.

Comment: Is there any organization to the procurement process?

- (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.

Comment: Since this is an exempt purchase, the Purchasing Director should provide a complete list of goods and services from the sheltered workshops.

- (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.

Comment: This is another superficial position. He knows that procurement transactions should be checked but he will not do so.

Comment: Several years ago, the current Dept of Administration, Purchasing Division Director was responsible for supervision of the Purchasing Inspectors and he did not allow them to perform their services – but instead directed that

they be "Public Relation personnel for the Purchasing Division."

Comment: The current Purchasing Director threatened to take administrative action against one inspector because the inspector sent a list of procurement deficiencies to a spending unit.

Comment: During Arch Moore's administration, there was one inspector assigned to the Purchasing Division payroll and the inspector was only seen once – then only after the Lead Inspector scheduled a meeting of all inspectors. He never provided an inspection report – but was paid well.

(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.

Comment: This is an additional burden upon the state agencies and taxpayers for the benefit of the Purchasing Division Director. While the vendors may complain about the vendor registration fee, they just increase the cost of goods that they sell to the spending units.

Comment: Originally, the vendor registration fee was to be used to cover the cost of materials/postage in the distribution of request for quotations. Electronic notification has reduced or eliminated the costs of administrative, supply and postage cost. However, the vendor registration fee has increased 277% from the previous year. The Turnpike fees did not increase that great of percentage.

(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).

Question: If an electronic transmission is received in the Purchasing Division and is not delivered to the bid opening room, is that bid rejected?

Question: If the electronic transmission is received in the Purchasing Division and is not delivered to the bid opening room and is accepted – after the actual bid opening time and date, is there a public record of the Purchasing Division's decision to accept? Are all bidders informed of the bid being accepted after the bid opening?

Question: Are electronic signatures acceptable? Are original pen and ink signatures required?

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.

Comment: The Purchasing Division does scan bids that are available for public viewing at website <http://www.state.wv.us/admin/purchase/Bids/default.html>

Comment: Bid specifications are not available for public viewing -- but the Director claims this to be public advertising.

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.

Question: What is the official time clock for electronic transmission?

Question: Are the bid quotation, time stamped when received?

~~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.

Question: If the vendor uses a different unit of measure instead of the unit of measure in the request for quotation, and it is easily recognized in the evaluation of bids, and the vendor confirms the total pricing, why reject a vendor's bid?

Question: If the vendor fails to include a description of the item, or the delivery date, the vendor is contacted – but the bid is not rejected. Why not reject the vendor's bid?

~~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.

Question: What if the vendor fails to include any changes, why not reject the vendor's bid because the specification shall prevail?

Comment: The Director assumes and the spending unit pays for his failure to confirm the procurement specification.

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.

Comment: The public is not included. Is this because there is no public advertising or access to bid specification?

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.~~

Comment: There is no need for changes to 6.4.1. I would recommend that there be a definition for "lowest responsible vendor" that is consistent with good procurement practices.

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.

Comment: Is there a public list of the Dept of Administration, Purchasing Division Director rejections?

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.

Comment: Impartial expenditure of the taxpayers money?

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.

Comment: This rule does not include veteran vendor preference that is to become effective July 17, 2006.

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.

Comment: The WV State Code has a better description.

Comment: The overall purpose of a specification is to provide a basis for obtaining a good or service that will satisfy a particular need at an economical cost and to invite maximum reasonable competition. To this end, specifications may not be unduly restrictive. By definition, a specification sets limits and thereby eliminates, or potentially eliminates, items that are outside the boundaries drawn. However, a specification should be written to encourage, not discourage, competition consistent with seeking overall economy for the purpose intended. A good specification should do four things: (1) Identify minimum requirements, (2) allow for a competitive bid, (3) list reproducible test methods to be used in testing for compliance with specifications, and (4) provide for an equitable award at the lowest possible cost.

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.

Question: The Director seldom provides written procedures or responses. Is the Director required to explain the failure of the specification?

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.

Question: Why does Purchasing Division Director require that the evaluators must certify as to conflict of interest, when the Dept of Administration, Purchasing Division Director and his personnel do not sign a non-conflict of interest statement?

Comment: This Non-Conflict of Interest certification is apparently required because of the statewide maintenance insurance program of Porkchop and G A McClung. While Purchasing Division was reportedly unaware of any collusion, it is odd coincidence that Dept of Administration, Purchasing Division was represented by GA McClung at the kick off luncheon and presentation held at the Embassy Suite Hotel. Of course, the Purchasing Division and the Governor's office required the usage of this statewide contract.

Comment: When the Purchasing Division Director directs the Buyer to make an award to other than the lowest responsible vendor and the Director will not provide a written explanation – then who is responsible for the award? What is the intent of the Director? Who monitors the Director's decisions? Why doe the Director not provide any written communications – he is total irresponsible and can always blame another.

Comment: The Purchasing Division Director requested spending unit's evaluation committee members to provide information beyond the evaluation task which has been completed. Why is the Director communicating with a specific vendor prior to the award? Is this information to be used for his financial benefit? Or, does he want to cancel the evaluation because his vendor was not successful? Or, is he seeking to extort or influence others?

Comment: Why does the Dept of Administration, Purchasing Division not include their own correspondence in the Purchasing Divisions' file for each procurement?

No spending unit personnel shall have any communication with any vendors during the solicitation, bid, evaluation or award periods.

Comment: The Dept of Administration, Purchasing Division Director is responsible for the evaluation and award of a requisition, yet Dept of Administration, Purchasing Division Director requires all bid evaluations be performed by the spending units who are not allowed to communicate with the vendors. This can be a time consuming process because of incomplete bid documents or missing attachments, and occasionally, the spending unit is requested by Purchasing to obtain specific information from the vendor.

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.

Comment: The Department of Administration Purchasing Director does not have the authority to subordinate the authority of another agency in the selection and assignment of procurement duties. This legislative rule is applicable to the Department of Administration, Purchasing Division only.

Comment: This Rule allows the Director to extort and threaten spending units by denying his approval of their procurement.

Comment: Some spending units are paying as much as \$90,000 a year for the Director to provide the services of his office which the State Code requires and for which general funds are being paid.

Comment: Does the State Code state the Director can extort funds from the public?

Comment: Many spending units will not provide comments on this rule for fear that the Director will retaliate by harassing their personnel in the processing of procurement documents or perhaps, having the new inspectors make daily inspections of their offices.

Comment: The Rule taxpayers have paid for this service and the Director is extorting additional funds from the spending unit.

Comment: This Rule reflects the limited response to the Spending units are already being extorted by the Director and the spending units do not complain because they fear retaliation by the Purchasing Director.

§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.

Comment: "Brand name or equal" is not a specification of a commodity. Brand name may be used to reflect the quality level only. Problems occur when the specifications do not indicate the performance features and functions required to meet the needs of the spending unit.

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".

Comment: This is too ridiculous to place in the State Code of Rules. There is too much repetition. In the above 7.1.1, the rule is "Specifications are written to maximize and encourage competition. In certain cases, a "brand name or equal" is used as a specification." In 7.1.2, "All brand name specifications shall be followed by the phrase "or equal" to promote and encourage competition."

Comment: There are Brand Name commodities for which there is no other product available that can provide the same quality, value, service, safety, or assurance of performance. There may or may not be multiple sources for the commodity – but only one manufacturer who produces a required commodity.

Comment: The Director is so inconsistent in the procurement process that the spending units cannot follow. Spending unit really enjoy obtaining a firm quote for a sole source procurement that has occurred for several years – only to be rejected.

Comment: This Rule appears as a lesson learned by the Purchasing Director who ignored competitive specifications and used the Brand Name "Toyota" to purchase only "Toyota".

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

Question: What procurements are not 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.

Comment: While this rule is intended to demonstrate that the purchasing process is open for public viewing, it is not. The Public is not informed of upcoming bid requests and the Public does not access to procurement documents – unless they somehow obtain a requisition or purchase order number from a government worker and then contact the Purchasing Division. It is not uncommon for a vendor to inquire about a specific agency's commodity purchase – but not knowing the requisition number.

Comment: The vendors registered with the Purchasing Division have the ability to use the internet to electronically review the current request for quotation; download the bid quotation documents; submit an electronic bid quotation; and review the bids received by the Purchasing Division.

Comment: The taxpayers of West Virginia are paying for the services and the Purchasing Director has denied public access to the information that he provides to the vendors.

Comment: If the registered vendors have paid for the right to receive electronic notification, then why does the Purchasing Division accept bids from non-registered vendors who have not paid to receive the Purchasing Bulletin? (Spending units will provide a list of potential vendors and there are some bid reporting services that will notify potential vendors who may not be registered.)

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.

Comment: "Price agreement" is replaced "spending unit contract"?

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.

Comment: This can be a futile effort because the Purchasing Division can simply refuse the spending units written documentation. (See 7.5.2) There are many legacy projects that were either originally competitive bid or through time have become a sole source procurement that Purchasing Director will ignore the entire history of the services and require a bid. There will be only one bid.

(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.

Comment: This rule 7.5.2 overrides rule 7.5.1 - When the rule states "All sole source requests made to the Director shall be publicly advertised and made available for review by registered bidders," the Director cannot approve any sole source purchase. I fail to see the need for 7.5.1.

Comment: While this rule is intended to demonstrate that the Director is being open and fair in the purchasing process, it is not open to the public. The phrase – "shall be publicly advertised and made available for review by registered bidders" refers to the Purchasing Bulletin only and it is not available for public access.

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.

Comment: This rule is same as a sole source procurement in 7.5.2 except the Director shall not publicly advertised and made available for review by registered.

Comment: There should be a public listing of all of the Director's approvals with a description of the commodity, price, vendor and spending unit.

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.

Comment: There is no need for the rule changes.

Comment: The rule changes are appropriate if you change "Emergency" to "Disaster Procurement". Because if the spending unit has to provide a written request for an emergency procurement for the Director to approve, you have disaster.

Comment: An emergency situation is “an unforeseen combination of circumstances or the resulting state that calls for immediate action.” It is not a scheduled action that is approved by the Purchasing Director.

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.

Question: The Purchasing Division Director and the spending unit can agree to award a contract to a specific contractor of another governmental body for any reason, then the Dept of Administration, Purchasing Division Director can do so without the public advertising and without public bidding. Is this a correct assumption?

Question: Who approves the action of the Purchasing Division Director? Why is there no public advertising and bidding?

Comment: Didn't the Purchasing Director attempt to make a sole source procurement of this type for a data storage service from a federal government contractor that the spending unit did not want -- but the political party wanted to favor their vendor?

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.

Comment: Is there a definition for "extensive hardship".

Question: Why is there no public advertisement or notification of the Director's action?

Question: What checks and balances are built in to assure the public that there is no collusion?

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.

Comment: Where is the public file located and how is it accessed by the public?

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.

Comment: The Director of Purchasing is taking the position that the agency must not exceed a maximum budgeted amount. If the funds are available, the Director is overriding the spending unit.

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.

Comment: In 7.11.3, the best value procurement is used instead of RFP.

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.

Comment: Why is advertising not required when this being treated as a formal bid? How are the vendors and the public to know of the best and final offers?

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.

Comment: The Department of Administration Purchasing Director does not have the authority to subordinate the authority of another agency in the selection and assignment of procurement duties nor to obligate funding for services not publicly bid by the spending unit. This legislative rule is applicable to the Department of Administration, Purchasing Division only.

§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*.



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

MEMORANDUM

DATE: July 17, 2006
TO: Donna Lipscomb
FROM: Alberta Kincaid
Office of DHHR Purchasing
SUBJECT: Proposed Rule Comments

Please find attached suggested changes and subsequent comments from various units within the DHHR to be considered.

We would like to reiterate that we are looking forward to working together with the Purchasing Division in streamlining the process and improving the services we provide to the citizens of West Virginia.

Please do not hesitate to call on us should we be able to provide further cooperation.

Operations
Office of DHHR Purchasing
State Capitol Complex, Building 3 Room 216
Charleston, West Virginia 25305
Telephone: (304) 558-0953 Fax: (304) 558-2892

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

§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. How granular will this get, i.e. Will there be new

training requirements for all the folks already involved in the procurement process? What about smaller groups, etc where purchasing/accounting function could be done by same person? Will this apply to the DHHR and/or other Agency's Purchasing Directors already in positions? Any others? Bureau personnel? Facility personnel? If it is determined that a separation of duties must be complied with, will there be additional State funds allocated for the position within the Bureaus?

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. Since this will be automated, will any paperwork be sent to Charleston? Or will it be kept by agencies and faxed? More detail needed.....How does this cascade down to use of various software products in the course of business related to procurement activities? What costs will be associated and charged back to the agencies for converting or using one central system as is alluded to here? Will agencies have any input into the development/deployment of such statewide system—they should as they will be helping to pay for it?

§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. Does this address true sole source items? Does this refer to items that spending units know they will need but that they have never been able to receive a competitive bid for? 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. Will this list be made available for public review and posted?
- (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; This is a good provision in that in it would prevent us from having to re-bid due to minor irregularities ... to ensure consistency in identifying what those irregularities are, ~~these~~ list of examples should be defined internally and shared with the spending units. Waiving Irregularity A for Vendor 1, but not waiving the same irregularity for Vendor 2 would be controversial.
- (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; To what extent? There isn't a state central supply depot. These items should be managed by the spending unit with oversight, as applicable, by the agency's purchasing director. This item probably needs to be deleted.

(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. Does this position already exist? There used to be Inspectors who were supposed to perform these duties—will agencies have to pay for the audits?

(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 (define other... procurement related, etc) 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. Does this represent new hires? Is this a new responsibility of DOA? Weren't these positions previously eliminated and deemed unnecessary?

(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. To avoid the appearance of "playing favorites", should this define how waiving an annual fee for a vendor is "in the best interest" of the state? There has been concern expressed that this fee increase could impose a hardship upon small in-state vendors. ~~I understand that this fee is begin increased~~ in order to finance a new e-procurement system, but has anyone thought about proposing a lifetime vendor registration fee or one that would span a number of years? This could lead to an increase in immediate revenue to support the purchase of the new system, while providing smaller vendors with the choice of avoiding the increase.

(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 (for that spending unit) which may include (a requirement that) all spending unit purchases, regardless of amount, be made by the Purchasing Division. Is this going to be applicable to exempt spending units? We do business with a number of vendors from which we purchase more than \$25,000 in combined purchases of products or services without a contract, especially when considering BHHR in the aggregate. We may buy \$30,000 of products from a vendor, but there may be multiple items involved. How would this be determined? Should a dedicated person be assigned to work on DHHR-wide commodities? This is a DHHR question to answer primarily and provide guidance. Short answer is yes, DHHR purchasing personnel need to work with spending units to develop such types of contracts to satisfy competitive bid requirements as well as streamlining the process and develop strategic price agreements and historical data to aid in successive years of obtaining various products.

§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 (why would this be a maximum of one year? Shouldn't that be the minimum?), 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. Is this determined through vendor complaints? Should a standard number of complaints be defined prior to automatic suspension? Should the severity of a complaint be described?
 - (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 (does the Director have a time frame established to comply with this). 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. We likely will have vendors we purchase items from via PCard that would not have made an annual fee payment or may not be a registered vendor with the state. How can we ensure this is done....whose responsibility to enforce? the agency? DOA will need to do a fair share of "PR" and working with the vendor community to explain the rule and ROI on the required/increased fee esp. those that have not previously registered but do business with state government through acceptance of the Pcard as the increased fee is for the benefit of DOA's duties/focus. 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. Why? Is this because the sole source providers could, and probably would, refuse to pay because they know we don't have an alternative source? This item could be covered under item 148-1-4.q?? all vendors should have to pay the same fee irregardless

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. Why do we still specify a time? Shouldn't this time be uniform for all bids and correspond with the end of the business day? That way, all bids received by a certain date would be acceptable. Placing a time of 10:00 am or 2:00 pm on different bids is at least inconsistent. We should be trying to reduce restrictions as much as possible. 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. How will this work with electronic signatures, transmissions, etc?

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). Does the term "transmission completed" apply to emails? If a bid was submitted via email prior to the date and time specified, would it be acceptable even if the email might not have been opened timely by the DOA Buyer? 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 (considered) 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 which changes must be and be received by the Purchasing Division ~~and State Auditor~~ prior to the date and time (should be standard for all bids) 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) (this is 6.2.2, isn't it) 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 ~~and no attempt to correct the error is made by the bidder after notification of the error~~; (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 (cost has to be a factor – not being able to receive a product at a reduced cost in a timely manner can be a significant hardship and a threshold should be set to determine when clarification can be obtained from a bidder to correct for an error that would result awarding another bid at a higher cost to the state); 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, with spending unit concurrence.

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. How does the official time clock apply to bids received electronically? Again, if an email arrived in the in-box of the Buyer (or other appropriate person) by the date and time required, how does the official time clock come into play?

~~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. Why is there no remedy for clarification to ensure that the spending units are afforded the opportunity to identify the best price available? Why not allow for an avenue to remove the guess work? Not sure why this question is here....this item seems pretty straightforward

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) business days after receipt of order. This can be considered restrictive. This apparently applies to ALL types of "commodities, services or printing". Some may not be able to be delivered within 10 days.

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. If this is the lowest cost bid, the bidder and the spending unit should be notified as to why it was rejected with an explanation of how clarification was sought. There should not be just a written explanation placed in the file without communicating with the spending unit and bidder.

6.4.3. When tie bids are received, the award is made by allowing the tied vendors to make a "last and final offer," initially, then if a tie bid still exists, it may be determined by flip of a coin, draw of the cards, or any other impartial method considered prudent by the Director. Are vendors present at the coin flip or the draw of the cards? This could lead vendors to question how partial the award really is. ~~It does not seem modern, practical or professional.~~ The "last and final offer" should be the initial method of selection. If a tie persists, other criteria, such as history as being a state vendor, etc. should be used prior to flipping of coins, etc.

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; Is this verified by DOA?
- (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. Will the DOA Staff be required to also certify as to conflict of interest statements?

6.6.2. The Director shall evaluate bids received for purchases with the assistance of the spending unit personnel. ~~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. Due to the length of time required to compile a committee and to review detailed RFP responses, failure to comply with this request within two weeks should not be grounds for cancellation. Depending on the complexity of the solicitation and evaluation, per article 6.6.1 above, if the spending unit is not to have contact with the vendors and all communication is to be funneled through DOA, perhaps additional time should be considered on a case-by-case basis when the solicitation is highly technical and encompassing a major business process.

§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". How would this apply when, in order to purchase a component of a larger product, the spending unit would be required to buy a specific part, the cost of which may normally require a competitive bid?

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~~. Should you further clarify that this does not include purchases made from open-end/blanket contracts? Otherwise, the literal verbiage here would lend itself that all of these \$ purchases could be required to be processed through DOA.

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. When would it be in the best interest of the state NOT to advertise? Is there not going to be a defined time frame in order to advertise now?

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 as 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 to be used for hardship resulting from neglect, poor planning, or lack of organization by the spending unit. Competitive bids ~~are~~ should be obtained if possible. This should include a provision that would allow for emergency purchases in the event of a regulatory agency issuing citations and requiring timely action. This should include a provision that would allow for emergency purchases in order to avoid fines or penalties

~~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 of 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. We have to request in writing to utilize an RFP instead of an RFQ for services we would anticipate costing less than \$500K?

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 ~~recommend~~ recommend the use of a contract issued by another public organization or recommend that 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 and spending unit 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. "Substantially lower" needs to be defined by % or \$ amounts, or both. 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. Why is this idea in here? How is "best interest" defined? "Most cost effective" should be in the best interest of the taxpayers.

(3) Does not cause extensive hardship to any spending unit offered preference under the West Virginia Code. Will there be examples of this or will it be subjective?

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 may only approve those requests with submitted with evidence that convincingly justifies use of such contracts. Any request that is not supportable shall be returned by the Director to the spending unit. This is too subjective and important whereas all contracts not approved should be reviewed by the Secretary of Administration, a committee or a board to determine if it is in the best interest of the taxpayers of WV.

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 and after concurrence with the spending unit. 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 or is deemed in the best interest of the state, the Director shall place a written explanation into the public file and the explanation should be communicated in writing to all bidders. 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. Why not include this language in solicitations where you know that by having multiple awards is advantageous. This is basically how DOA issues SWCs for copiers, etc. There really isn't a difference so long as the specifications are written to inform potential bidders/vendors of the intent and willingness to consider more than one vendor. This could be applicable for commodities, services or printing.

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. Justification for any change in maximum budgeted amount by a spending unit after the bid opening must be provided by the spending unit to the Director. No award may be made or contract entered into if the

spending unit certifies to the Director that award will have an adverse financial impact on the spending unit. This budgeted amount shall not be changed after the bid opening. Sometimes there is not a maximum budgeted amount set; services have to be paid regardless due to legislative mandates, etc. Would it be acceptable to provide guidelines as to what the previous years' expenses were?

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 with concurrence of the spending unit. If the negotiation does not lead to the budget amount being met, the Director may negotiate a lower price with the next lowest bidder with concurrence of the spending unit 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. If negotiation is not permitted, does this mean that the contract will be awarded to the lowest bidder? Or not awarded at all? It does not explain. 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 with concurrence of the spending unit 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 with concurrence of the spending unit, 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. Does this apply to those cases where we have a "tie" or would otherwise "flip a coin"?

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 propose ~~present~~ contract management procedures for ~~all~~ government contracts bid through the DOA Purchasing Division. 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; Who would see to it that these meetings take place?

- (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. Who would hire this third party? DOA or the spending unit? Shouldn't the spending unit have a say in this and approve such associated costs?

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. Shouldn't this address electronic submissions or protests, as electronic submission of bids were addressed? This does not distinguish between a "submitted" date and a "received" date. Is it okay if it is submitted within five days or received within five days? Should be inconsistent with how bids are received.

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 or 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 any vendor from bidding on State purchases up to one year, [REDACTED] for violating the West Virginia Code, this rule, or any policy or procedure adopted by the Purchasing Division. Why not make this a minimum of one year, as opposed to one year being the maximum? 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.

From: "Robin Brumfield" <robin.brumfield@wvsao.gov>
To: <DLIPSCOMB@WVADMIN.GOV>
Date: 7/10/2006 12:00:11 PM
Subject: Proposed Legislative Rules for Purchasing Reform

Hi Donna,

I have been reviewing the referenced document and I see where the purchasing division is going to be implementing "Best Value Procurement". What exactly is "Best Value Procurement"? Is it more akin to a Request for Quotation (RFQ) or is it more in tune with a Request for Proposal (RFP). According to what I understand, the proposed rules would strictly limit RFPs to procurements in excess of \$500,000 and can only be used for services (Section 7.7.2).

In terms of technology the termination of utilization of an RFP for procurements is a huge step backwards. If one must gather ALL of the specifications for a technology project and issue an RFQ for the procurement which would include equipment and installation services, this is next to impossible to do. The amount of parts necessary for some of the complex projects is overwhelming at best.

Please advise if my understanding of what is contained in the proposed rules is correct or not.

Thanks.

Robin Brumfield
Chief Information Officer
WV State Auditor's Office

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This will serve as the West Virginia State Auditor's Office comments to the proposed changes to rule § 148 CSR 1 *et seq.*:

§148-1-2(d)

The first and most significant issue with the rule is the ambiguity of the term "best value procurement". The rule states that it is a method of procurement which evaluates all criteria; however, that is a very generic definition. It is unclear how it differs from the request for proposal procedure.

Some sources which have attempted to more definitively address the concept of "best value procurement" have described it as a negotiated competitive process where the government may select a vendor which does not necessarily provide the best price but may offer the best service or product for the price quoted.

It is unclear whether this rule contemplates a similar negotiated process and, if so, how that would be accomplished.

§ 148-1-3.2

The person(s) named shall... be approved or disapproved by the director...

The proposed rule change divests the agency from the final responsibility for choosing its own purchasing personnel. This concept wrests authority from the agency management best qualified for making such decisions and is unworkable.

... This person(s) shall not have additional responsibilities as a spending unit program manager, spending unit director or supervisor of other spending unit programs.

The rule also requires that the purchasing function be divorced from other job duties. Essentially it divests the agency of authority for managing its personnel and administrative operations which is inefficient and unworkable.

§148-1-3.3

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

This requirement is extremely broad and could be construed as providing the Director authority to dictate technological requirements to all branches of state government regardless of agency status or budget.

§ 148-1-4(p)

... Inspectors shall have access at any and all times to personnel, records, reports, and other documents as needed.

This grant of authority is too broad. It would be sufficient to say that inspectors will have access upon request, within a reasonable time period, or some other similar qualifier.

7.2

... The spending unit shall keep on file these records of the purchases and make them available for public inspection during the normal office hours of the spending unit.

This requirement is too broad. It does not provide a time limitation for recordkeeping and may conflict with other policies or procedures regarding record retention.

7.5

Another significant problem with the rule is the limitation placed on sole source procurement of services.

The rule states that it applies to commodities, services, and printing, however, the limitations placed on sole source are primarily applicable to commodities. For example, the rule consistently addresses items, however, services do not fall in the category of "items" and the provisions regarding sole source items do not necessarily apply to services.

7.5.2

...sole source requests made to the Director shall be publicly advertised and made available for review by registered bidders....

This requirement is not feasible to the procurement of some services. For example, where the state wishes to procure legal services, advertising that fact may have adverse impact on the outcome of the case or controversy in question.

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.

There is no legitimate reason to differ the authority level for agency sole source purchases from other purchases.

7.7

The same general objections made to best value procurement are applicable to this section. This whole section is unclear. There is no rationale for

a cap on RFP's set at \$500,000. Nor are there any reasons why RFP's should not be used for equipment. The section states that "best value procurement" may be used but does not state what procurement method will be used if "best value procurement is not used.



DIVISION OF NATURAL RESOURCES

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Joe Manchin III
Governor

Frank Jezloro
Director

MEMORANDUM

TO: Donna M. Lipscomb, Executive Coordinator
Department of Administration

FROM: Frank Jezloro, Director
Division of Natural Resources

DATE: July 12, 2006

SUBJECT: Proposed Legislative Rules 148 CSR 1
Department of Administration
Purchasing Division

*Frank Jezloro by
Harry Hince*

I would like to submit the following comments regarding the proposed Legislative Rules 148 CSR 1:

§148-1-3 (3.2). The head of the spending unit should be able to designate the person(s) who "shall take all purchasing training. . ." with the Director of Purchasing having the right to not approve for just cause only—not successfully completing purchasing training, etc. The spending unit head, not the Purchasing Director, should determine what additional responsibilities the designee(s) may have. The Director of the Division has a better understanding of the working operations of the spending unit and its employees' areas of assignment. A head of another agency should not be given the authority to choose the job assignment for other agencies' personnel.

§148-1-3 (3.3). The Purchasing Division should provide training and sufficient time for the purchase of equipment and statewide implementation by the spending units. A schedule for full implementation should be provided by the Director of Purchasing to the head of the spending units to allow time for planning and budgeting. Spending units

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not already trained and using TEAM should not be required to use the automated system until purchase of a new automated purchasing system. Agencies that were not brought on line with the current automated purchasing system should not be penalized by a fee.

§148-1-4 (a). "The director may establish a list of commodities or services that are not possible to bid . . . preapproved by the Purchasing Division . . . A contract or purchase order . . . is not required to be approved by the Purchasing Division." Is this regardless of dollar amount?

§148-1-4 (g). Are standard specifications being written and posted for spending units to check prior to requisitioning or bidding at the agency level?

§148-1-4 (i). Is central storerooms being brought back in place of Office statewide contract?

§ 148-1-4 (n). Is this referring to Correctional Industries and Sheltered Workshops or others that might be added by WV Code? Will the Purchasing Division have the final say in whether the quality of printing or the cost of furniture, etc. from Correctional Industries or Sheltered Workshops is efficient and economical for the State agency? Will the agencies have input into what is acceptable quality and price? Does this affect the Governor's Committee for Sheltered Workshops?

§ 148-1-4 (r). Will the fees referenced in §148-1-3 (3.3) be assessed? Circumventing may be done using multiple vendors? Will this be addressed or only purchases made to one vendor in excess of \$25,000 per annual period? Is the \$25,000 limited to one vendor for the entire agency or per facility? Clarification is needed in this section of the Legislative Rule: "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. . ." The agencies need to know exactly what constitutes a violation in order to effectively implement the revised rules, especially the larger agencies with facilities located statewide.

§ 148-1-5 (b). What are the grounds for declaring a vendor non-responsible or non-responsive? (For example, vendors who do not respond to request for quotations (RFQ) or request for proposals (RFP) or clarification of bid, etc. within a certain time frame, but not limited to?) Will

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the spending unit be required to substantiate this in writing or the Director of Purchasing?

§ 148-1-6 (6.1.3). Do these eligible vendors have to complete a registration form or just pay the \$125 registration fee? Is there specific location where agencies may check for vendors "listed on any nationally recognized stock exchange", prior to sending them a vendor registration form?

§ 148-1-6 (6.1.4). Do vendors receiving payment via the purchasing card exceeding \$1,000 have to register and pay the \$125 fee? One of the main selling points of the Purchasing Card Program used by the Purchasing Division and the Auditor's Office at the time of implementation was that the agencies would not have to register vendors and the vendors would not have to pay the annual vendor registration fee since payment was being made to the card issuer. If the agency chooses to use the p-card for payment of services, the vendor must be listed in the Financial Information Management System (FIMS) with a designation of a corporation, verified by a W-9, because of 1099 reportable service requirement by the Internal Revenue Service. No vendor should be added to FIMS unless they are first registered with the Purchasing Division.

§ 148-1-6 (6.1.6). This should be restated at the spending unit level of delegated purchasing.

§ 148-1-6 (6.2.4). Are scanned bids with signatures emailed as attachments acceptable? Will a special email box be set up for receipt of bids?

§ 148-1-6 (6.2.5). Scanning the bids and posting them on the Purchasing Division website for public inspection, which is currently being done, could result in cost increase when all bids have to be rejected. We would recommend that the bids be scanned and available via the intranet for agencies to access for evaluation purposes and only opened up to the general public after award of the contract.

§ 148-1-6.6 (6.6.2). Agency head should be given the opportunity to justify delay of evaluation when there is a scheduling conflict or other extenuating circumstances. The end user should be consulted prior to making an award when alternates have been quoted. Arbitrarily canceling

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the purchase request could result in increased cost for the state. Two weeks is not sufficient time to evaluate Requests for Proposals.

§ 148-1-7 (7.1.3). Are agency contracts between \$2,501 and \$25,000 "requiring more than six (6) months to fulfill" to be "filed with the State Auditor."?

§ 148-1-7 (7.5.1c). How will this section be implemented? Is the agency responsible for researching the open market?

§ 148-1 (7.5.2) What is the definition of "other interested parties"? Will cooperative agreements be subject to the same advertising requirements? This may keep the state from receiving Federal funds or benefiting from participation in cooperative efforts with multiple states. Will this be addressed under §148-1-4 (a)?

§ 148-1 (7.5.3). Clarification of under what circumstances this section would be implemented should be included? Will the agency be required to advertise the intent to award a sole source between \$2,501 and \$25,000?

§148-1 (7.8). Will "technical, professional, or other services" be addressed in another Section of the Legislative Rule. How will these services be procured? This Section is used for medical, educational, research, entertainment services, legal services (approved by the Attorney General), level three grievance hearings examiners, and other miscellaneous services not routinely bid.

§ 148-1-7.7 (7.7.2) Sometimes it is in the best interest of the state to combine equipment and services into Requests for Proposals. The responsibility for the equipment to work as proposed in the environment which it is installed remains with the vendor who submitted the winning proposal. An exception on a case by case basis should be added.

§ 148-1-7.7 (7.7.3). Other best value methods should be included such as life-cycle costing. There should also be some type of best value permitted in Requests for Quotations (RFQ) whenever the criteria for award are specified in advance. For example, printing and advertising should not be based solely on cost—quality and reaching the intended market are a very important consideration.

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§ 148-1-7.9 (7.9.1). Can cooperative agreement language be included in this Section? There is no existing contract until the cooperative agreement is entered into and is limited to the interested parties. (For example, disease testing and studies of Wildlife throughout the South East which benefits all states involved.)

§148-1-7.11 (7.11.2). Will the spending unit be permitted to participate in the negotiation? The end user may have expertise, or specific knowledge of the market, not available in the Purchasing Division.

§ 148-1-7.11 (7.11.3). The spending units need to participate in the negotiation process. Especially, if it is necessary to negotiate any thing other than cost or negotiation is done with other than the recommended vendor. Some projects are too important to award to a vendor that just barely meets the Minimum Acceptable Score established by the Director of Purchasing. Agencies should have input into how far down the list negotiations are conducted.

§ 148-1-7 (7.13.1(d)). Criteria should be established to determine when taking this action is merited. Arbitrarily requiring "third party contract manager, appointed by the Director or one hired by contract. . ." could be an unnecessary expense.

§ 148-1-7 (7.13.2). Guidelines must be established and an appeal process in place when there is a disagreement between the Director of Purchasing and the agency head. This could be so expensive that it would be detrimental to the operation of the agency.

§ 148-1-11 (11.1). Surplus Property should consider offering equipment for sale on site at different agency locations using the Internet. Surplus Property does not pick up equipment in a timely manner, and the agencies cannot afford to transport it to Surplus Property. Equipment deteriorates, losing value, just sitting at the facilities waiting for pick up.

§ 148-1-11 (11.5). The cost of a third party vendor to coordinate Internet sales should not be passed on to the agencies required to dispose of all equipment through Surplus Property.

Thank you for the opportunity to comment on these proposed Legislative Rules.

From: "Cindy K. Butler" <ckbutler@dot.state.wv.us>
To: <DLipscomb@wvadmin.gov>
Date: 7/15/2006 10:07:56 AM
Subject: Comments on Proposed Purchasing Rules

Ms. Lipscomb

Please disregard the detailed message concerning the deadline for the comment period. I did not realize comments could be sent electronically.

I will be out of the office Monday, July 17 with a family sickness. However, I can be reached by cell phone if any changes or clarification need to be made to this comment.

Thank you, <<Comment on Proposed Purchasing Rules.doc>>

Cindy Butler, Acting Director/Comptroller
120 Water Plant Drive
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COMMENT ON:
148 CSR 1
TITLE 148
DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION
SERIES 1
PURCHASING

Section 7.5.4 is in conflict with State Code section §29-18-6-11(B) which allows the WV State Rail Authority flexibility to purchase used rolling stock and equipment with a value less than \$100,000. Legislative Rule Title 172 Series 2 was proposed and filed with the Secretary of State's Office 7/25/01 to address the changes to the above mentioned State Code. These changes occurred as a result of H. B. 3015, which was passed April 14, 2001.

I request that changes be made to Section 7.5.4 of these proposed rules so as not to conflict with the current approved purchasing rules specific to the WV State Rail Authority.

Lucinda K. Butler, Acting Executive Director
WV State Rail Authority

