

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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THE SECRETARY OF STATE
THIS DATE July 1, 1989
ADMINISTRATIVE LAW DIVISION

NOTICE OF AN EMERGENCY RULE

Purchasing Division
AGENCY: Department of Finance & Administration TITLE NUMBER: 148

CITE AUTHORITY: West Virginia Code §5A-3-4

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 1

TITLE OF RULE BEING AMENDED: Legislative Rules, West Virginia
Department of Finance and Administration, Series 2,

Purchasing Division
IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: _____

TITLE OF RULE BEING FILED AS AN EMERGENCY: _____

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

SEE ATTACHED

Use Additional Sheets If Necessary.

C. L. P. H.

FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY

An emergency amendment to the Legislative Rules of the Purchasing Division of the Department of Finance and Administration, Series 2, is needed as the stated Legislative Rules become effective on July 1, 1989. The emergency amendment incorporates the previously omitted requirements of West Virginia Code §5A-3-4(a)(7) whereby the Director of the Purchasing Division of the Department of Finance Administration is required to prescribe a system to provide notice to vendors of bid solicitations for commodities upon payment of an annual fee.

The Governor's Reorganization Implementation Project Team has highly recommended collection of the annual fee from vendors in order to facilitate computerization of the Purchasing Division with the proceeds of the collected fees. Only computerization of the Division will permit vendors to receive notice of bid solicitations, as contemplated by West Virginia Code §5A-3-4(a)(7), and, therefore, increase competition among vendors.

Increased competition by vendors will undoubtedly decrease costs of procurements by State spending units and encourage better utilization of public funds, thereby preventing substantial harm to the public interest.

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FINANCE AND ADMINISTRATION
LEGISLATIVE RULES

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(1988)

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LEGISLATIVE RULES
WEST VIRGINIA DEPARTMENT OF FINANCE AND ADMINISTRATION
PURCHASING DIVISION

Section 1. General.

1.1 Scope -- These Legislative Rules are an explanation and clarification of operative procedures of the Purchasing Division, promulgated in accordance with State Law.

1.2 Authority. -- See West Virginia Code §5A-3-4

1.3 Filing Date. --

1.4 Effective Date. --

1.5 Repeal of Former Rules --

These rules repeal and replace the former Legislative Rules, West Virginia Department of Finance and Administration, Series 1, Purchasing Division, effective December 29, 1982.

Section 2. Applicable Departments.

These Legislative rules shall apply to all departments of state government except those statutorily exempted. Exempted agencies may elect to follow these regulations.

Section 3. Authority of Director of Purchasing.

3.1 Director's Duties

The director shall have the power and duty to:

(a) Purchase or contract for, in the name of the State, the commodities and printing required by the departments of the state government;

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

(c) Review specifications and descriptions before soliciting bids to assure that the specifications and descriptions do not favor a particular brand, product or vendor;

(d) Apply and enforce standard specifications;

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

(f) Award, in certain instances, without competitive bidding, contracts for commodities and printing to qualified West Virginia Sheltered Workshops; provided that such commodities and services are comparable in price and quality;

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

(h) Establish an annual fee to be paid by all vendors registering or already registered. Fees collected shall be utilized to establish a system whereby the Director shall give notice to vendors paying the annual fee of all bid solicitations for commodities and/or printing of the type with respect to which such vendor specified notice was to be given. The Director may waive the annual fee at any time when, in the discretion of the Director, waiver of the fee would be in the best interest of the State of West Virginia.

(i) Recommend to the Commissioner of the Department of Finance and Administration that the right and privilege of a person to bid on state purchases be suspended when the Director has evidence that such person has violated any of the provisions of the purchasing law or the regulations of the Director.

3.2. Director's Remedies

The Director may implement the following remedies when appropriate circumstances arise:

(a) In the event that a vendor does not honor all contractual terms and conditions, the Director reserves the right to award the purchase order to the next lowest bidder. The vendor may be held responsible for all differences in cost.

(b) The Director may declare a vendor non-responsible or non-responsive and refuse to award a purchase order. All such instances shall be substantiated in writing. Such documentation shall be considered a public document and shall be available for inspection at all reasonable times.

(c) The Director may recommend to the Commissioner of the Department of Finance and Administration the suspension, for a period not to exceed one (1) year, the right of a person or business to bid on state purchases when there is reason to believe that such person has violated any of the provisions of this rule. Additionally, the following shall be considered adequate grounds for suspension:

(1) A vendor has exhibited a pattern of poor performance in fulfilling his contractual obligations to the state. Poor performance may include a vendor providing or furnishing commodities, materials, or services late, or at a quantity or quality level below that which is specified in the contract. The essence of this reason for suspension is continued or repeated instances of poor performance.

(2) The vendor has willfully breached any contract entered into pursuant to the provisions of Article 3, Chapter 5A of the West Virginia Code or this rule.

(3) A vendor has been convicted of any federal, state or local law punishable as a felony, directly related to the performance of a contract entered into pursuant to Article 3, Chapter 5A of the West Virginia Code or these Legislative Rules.

(d) Suspension hearings - If a vendor has been recommended for suspension, and requests a hearing, one will be scheduled with the Commissioner of Finance and Administration and appropriate parties. 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 shall be prepared. The final decision of the hearing will be stated in writing.

(e) Failure to meet the delivery date stated on the purchase order will be sufficient cause for cancellation.

Section 4. Registration, Bidding and Award Regulations.

4.1. Registration of Vendors

(a) All vendors desiring to bid on commodities and/or printing to the State of West Virginia shall be registered with the Purchasing Division.

(b) Vendors shall register by filing the requested information with payment of the annual fee specified by the Director to the Purchasing Division. A form will be provided by the Purchasing Division and shall be completed according to its instructions.

(c) Any company or subsidiary of a 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 upon payment of the annual fee specified by the Director.

(d) The Director may waive the registration requirements in the case of any vendor that is a sole source provider. Further, the Director may waive the fee of any vendor if, in his discretion, he deems waiver to be in the best interest of the State of West Virginia.

(e) Bids will be rejected from any vendor that is not properly registered with the Purchasing Division prior to issuance of a purchase order.

4.2. Request for Quotation-Bidding

(a) All bids shall be F.O.B. destination unless otherwise clearly indicated by the vendor in the bid.

(b) Bids shall be submitted prior to the date and time of the bid opening on the Request for Quotation forms provided to the bidder. Substitutions may be made for the Request for Quotation form only if the terms, conditions and provisions are substantially equivalent to those on the form supplied by the Purchasing Division.

(c) Of the bids received in compliance with Section 4.2 (b) of this rule, at least one must contain a signature by an individual authorized to bind the person or corporation submitting the bid. Acceptable signatures include those in ink, pencil, computer, rubber stamp, facsimile, photo copy and carbon copy. The bids must be otherwise identical, as specified in West Virginia Code Section 5A-3-14. The signed copy shall reside in the Purchasing Division. A corporate signature without an individual name shall not be construed as an acceptable signature.

(d) A written change of a sealed bid is permitted before the bid opening. Written changes, which may include mailgram, telex, etc., must be submitted prior to the date and time of the bid opening. The vendor should verify the change by letter and deliver the verification to both the Auditor's Office and the Purchasing Division within two (2) working days.

(e) 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 agency involved other than losing an opportunity to receive commodities and/or printing at a reduced cost; and (4) Enforcement of the part of the bid in error would be unconscionable. In order to reject a bid, the public file must contain documented evidence that all of the above conditions exist.

(f) No price adjustment shall be allowed on any purchase order unless specific provisions for price adjustment have been incorporated in the Request for Quotation and the purchase order. All such requests for price adjustment shall be made in accordance with the specific terms and conditions of the individual purchase order.

4.3. Vendor's Rights and Duties

(a) It shall be the bidder's responsibility to deliver one (1) copy of his quotation (and any subsequent changes) to the Purchasing Division and an exact or duplicate copy to the office of the State Auditor. The method of delivery is the sole responsibility of the vendor. In accordance with Section 5A-3-14 of the West Virginia Code, any deviation between the Auditor's and the Purchasing Division's copies of the bid relating to quantity, quality, specifications, price, date of delivery or performance shall cause the bid to be rejected. Both of these copies must be received at the respective offices prior to the specified date and time of the bid opening.

(b) The official time clock of the Purchasing Division, for the purpose of receipt of bids, will be displayed in the offices of the Purchasing Division.

(c) Vendors failing to return quotation forms may be removed from the bidding list.

(d) If there is a conflict between the extension price and the unit price, the unit price shall prevail.

(e) 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, delivery may be required within ten (10) days after receipt of order.

(f) Any changes made by the vendor in the specifications must be clearly stated. If changes are not stated, it will be assumed that items offered meet the specifications.

(g) Vendors are responsible for the accuracy of the information on the bid envelopes.

(h) Vendors may write, visit, or telephone the Purchasing Division to obtain official bid forms.

(i) All sales to the State of West Virginia are exempt from Consumer's Sales Tax or Excise Tax by blanket state exemption and blanket federal exemption.

4.4 Award Regulations

(a) Award will be made to the lowest responsible bidder meeting all specifications.

(b) The Purchasing Director reserves the right to accept or reject, in part or in whole, any bid when the Director feels it to be in the best interest of the state. If any bid is rejected, a written explanation must be placed in the purchase order file.

(c) Tie bids.--When tie bids are received, the award will be based on the following criteria listed in order of importance:

(1) In-state vendors --if all items on a bid are equal with one vendor being a resident of West Virginia as defined in Section 5A-3-44 of the West Virginia Code and the other(s) being out-of-state, the award will be made to the West Virginia resident vendor.

(2) Quality - If there is a difference in quality, the award will be made to the vendor who offers the highest quality.

(3) Delivery - The award will be made to the bidder quoting the earliest delivery date.

(4) Discounts - Prompt payment discounts will be evaluated if it is likely the state will earn the discount.

(5) If it is not possible to break the tie bid based on the four above criteria, then any other criteria deemed to be acceptable to the Director of Purchasing may be considered.

(6) Flip of a coin - A fair and impartial method such as the flip of a coin may be utilized in making the award. Any interested party shall be allowed to witness the awarding of a tie bid. Tie bids under \$5,000.00 may be broken in the buyer's office. Tie bids over \$5,000.00 or for open-end contracts will be broken in the Director's office.

(d) Resident Vendor Preference

In accordance with Section 5A-3-44 of the West Virginia Code, a resident vendor will receive award of a purchase order in preference to a non-resident vendor: Provided, That:

(1) The purchase order is based on competitive bids;

(2) The bid of the resident vendor does not exceed that of a non-resident vendor by more than two percent (2%); and

(3) Claim for such preference is made in writing at the time the bid is submitted.

(c) Uniform Vendor Reciprocity

Vendors resident in the State of West Virginia are to be granted the same preference over vendors resident in another state in the same manner, on the same basis and to the same extent that preference is granted in awarding bids for the same type of work by such other state to vendors resident therein over vendors resident in the State of West Virginia.

(f) Requirements for bonds and deposits

When a contract is to be awarded, the Director may require the contractor or vendor to submit a certified check, certificate of deposit, performance bond, or any other security acceptable to the Director, payable to the State of West Virginia. Personal checks and/or company checks are not acceptable. Provision for such requirements should normally be incorporated into the Request for Quotation and purchase order. The Director of Purchasing, however, may require bonds or securities at any time if, in his judgement, such security is necessary to safeguard the state from undue risk.

When any contract has been satisfactorily completed on which a surety bond or other deposit has been previously submitted, the spending agency shall certify the completion in writing to the Purchasing Division. The Purchasing Division, upon receipt of the notification, may then return the check or deposit to the vendor.

Section 5. Procurement Methods

5.1. Special Authorization

The Director of Purchasing is granted authority by Section 5A-3-4(1) of the West Virginia Code to establish a list of commodities and/or printing that may be purchased directly by state agencies. The primary intent of this delegation of purchasing authority known as Special Authorization is to provide for purchases by state agencies, when centralized purchasing may not be as efficient to the state.

(a) State agencies shall not purchase commodities and/or printing under the terms of Special Authorization if the commodity and/or printing is not on the established list without written approval from the Purchasing Director.

(b) Special Authorization does not dispense with the requirement that competition be obtained whenever possible. Each agency shall make every effort to obtain competitive bids from at least three (3) vendors known to provide that particular commodity or printing and a file of all such bids shall be maintained by the agency. The agency bid file shall be available for public inspection during the normal office hours of the agency.

(c) Any agency violating the regulations concerning Special Authorization or procuring commodities and/or printing not authorized by the Purchasing Director may be subject to suspension of the use of Special Authorization privileges. Furthermore, any commodity or printing purchased contrary to these regulations may not be approved for payment.

5.2. Bids Attached Procurement

The Director may establish a procedure to allow for the procurement of non-recurring commodities and/or printing as prescribed by law. This procedure requires the agency to obtain written bids for a commodity or printing from at least three (3) vendors (if possible) known to provide the needed product. Those bids are then forwarded to the Purchasing Division for final evaluation and award.

5.3. Standard Procurement

The most common procedure used to obtain commodities and/or printing is the standard procurement. Requisitions are developed by the agency and submitted to Purchasing for competitive bidding.

5.4. Open End Contracts

The State of West Virginia may secure open end contracts to obtain commodities and/or printing to supply the repetitive needs of the State agencies.

5.5. Non-Competitive Procurement

The Director of Purchasing may approve the purchase of commodities and/or printing directly from a vendor without competitive bidding if any of the following conditions exist: 1) The item cannot be obtained through ordinary purchasing procedures; 2) The item is of a unique nature and not available from any other source, 3) The item is available from a state sheltered workshop at a comparable price and quality level.

5.6. Emergency Procurement

The Purchasing Director may authorize a spending agency to purchase in the open market specific commodities and/or printing to meet bona fide emergencies. An "Emergency Situation" must be the result of unforeseen events or circumstances which may include delays by contractors, delays in transportation, or an unanticipated volume of work. Emergency purchases shall not be used for hardships resulting from neglect, poor planning or lack of organization by the spending agency.

5.7. Scheduled Procurement

The Director may establish a scheduled procurement by combining needs of one or more agencies for a definite quantity of a particular commodity.

5.8. 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. This may be delegated to the agency at the discretion of the Director.

5.9. Request for Proposals

The Director may establish Requests for Proposals (RFP) to allow for procurement of certain commodities and/or printing. This procurement is based upon predefined and established criteria.

Section 6. Purchasing Division Sections

6.1. Buying

The Buying Section is established to procure commodities and/or printing required by State agencies. The Director may assign specific commodities and/or printing classifications to each buyer.

6.2. Inspection

The Inspection Section is established to visit State Agencies and perform the following primary duties: 1) Insure that the commodities and/or printing supplied to state agencies are in accordance with specifications; 2) Verify that proper Purchasing regulations are followed by the agencies for Special Authorization and other agency delegated procurement methods; and 3) Assist agency personnel with procurement matters as needed.

6.3. Standards and Specifications

The Standards and Specifications section is established to develop suitable standards and specifications for commodities and/or printing used by state agencies. The specification section shall have the responsibility for administration of the standards and specifications set forth by the Purchasing Director.

6.4. Sheltered Workshops

In compliance with Section 5A-3-12 of the West Virginia Code, a sheltered workshop coordinator will be employed in the Purchasing Division under the direction of the Purchasing Director. The primary responsibilities of this individual shall be to: 1) Identify commodities and/or printing available for purchase by the State of West Virginia from West Virginia sheltered workshops and; 2) To make the workshops aware of potential opportunities to provide needed commodities and/or printing to State Agencies.

6.5. Record and Distribution

The Records and Distribution Section shall maintain the official records for all procurement described in Section 5.2. through 5.9. of this Rule. This section shall make available to the public, during regular working hours, all documents processed by the Purchasing Division.