



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

4/24/2020 4:01:46 PM

Office of West Virginia
Secretary Of State

NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE

AGENCY: Secretary Of State TITLE-SERIES: 153-10
RULE TYPE: Legislative Amendment to Existing Rule: Yes
RULE NAME: LOAN AND GRANT PROGRAMS UNDER THE
HELP AMERICA VOTE ACT (HAVA) FOR THE
PURCHASE OF VOTING EQUIPMENT,
ELECTION SYSTEMS, SOFTWARE, SERVICES
AND UPGRADES

CITE STATUTORY AUTHORITY FOR PROMULGATING EMERGENCY RULE:

W. Va. Code 3-1-48(I)

IF THE EMERGENCY RULE WAS PROMULGATED TO COMPLY WITH A TIME LIMIT ESTABLISHED BY CODE OR FEDERAL STATUTE OR REGULATION, CITE THE CODE PROVISION, FEDERAL STATUTE OR REGULATION AND TIME LIMIT ESTABLISHED THEREIN:

DATE EMERGENCY RULE WAS ORIGINALLY FILED: 03/24/2020

DATE(S) OF PREVIOUS EMERGENCY AMENDMENT(S)

PRIMARY CONTACT:

NAME: Donald Kersey
ADDRESS: State Capitol Bldg 1 Ste 157 K
Charleston, WV 25305
EMAIL: dkersey@wvsos.gov
PHONE NUMBER: 304-558-6000

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

On March 16, 2020, the Governor declared a State of Emergency in response to the COVID-19 epidemic. In subsequent Executive Orders, the Governor suspended various regulatory statutes and gave state agencies authority to issue emergency rules and procedures when necessary. On March 20, 2020, pursuant to the Secretary of State's authority set forth in W. Va. Code 3-1A-6(e)(1), an emergency rule was promulgated regarding various election processes and absentee eligibility. As a result of the State of Emergency, local election officials must pay for additional supplies, staff, equipment, and other materials necessary to hold the May 12, 2020 Primary Election in a safe and secure manner. The State of WV received federal funding under the Help America Vote Act, which funds are permitted for emergency purposes covered by HAVA and state law. However, the time constraints and procedural requirements imposed on local election officials by the current Rule to apply for and receive HAVA funds will delay or hinder local election officials' ability to safely and securely administer the Primary Election.

DOES THIS EMERGENCY RULE REPEAL A CURRENT RULE? No

HAS THE SAME OR SIMILAR EMERGENCY RULE PREVIOUSLY BEEN FILED AND EXPIRED? No

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2020 Increase/Decrease (use "-")	2021 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues			

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Donald Kersey -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 153
LEGISLATIVE RULE
SECRETARY OF STATE

SERIES 10
LOAN AND GRANT PROGRAMS UNDER THE HELP AMERICA VOTE ACT (HAVA) FOR
THE PURCHASE OF VOTING EQUIPMENT, ELECTION SYSTEMS, SOFTWARE,
SERVICES AND UPGRADES

§153-10-1. General.

1.1. Scope. -- This Rule establishes procedures for administration and eligibility of West Virginia counties to apply for and receive funding to improve the administration of elections for Federal office, including to enhance election technology and make election security improvements, payable from the County Assistance Voting Equipment Fund created by the Help America Vote Act (HAVA), 52 U.S.C. § 20101, *et seq.*

1.2. Authority. -- W. Va. Code §3-1-48(1).

1.3. Filing Date. -- ~~May 6, 2019.~~

1.4. Effective Date. -- ~~May 6, 2019.~~

1.5. Sunset Provision. -- This Rule shall terminate and have no further force or effect on ~~May 6, 2024~~ after five (5) years following the Effective Date in Section 1.4. of this Rule.

~~1.6. Repeal and Replace. -- This legislative rule repeals and replaces 153CSR10, "Loan Program for Purchase of Voting Equipment, Software and Services" effective May 9, 2006.~~

§153-10-2. Definitions.

2.1. For the purposes of this rule:

2.1.1. "Approved" means authorization granted by the State Election Commission or EAC.

2.1.2. "Clerk" means the Clerk of the County Commission or other official charged with the administration of elections.

2.1.3. "Election Assistance Commission" or "EAC" means the federal agency created by HAVA to provide programs for voting assistance to state and local governments.

2.1.4. "Election system" means any mechanical device, hardware, software or combination thereof designed to work or operate in conjunction with, secure, maintain or improve any part of the voting process or systems, including but not limited to accessible electronic voting systems and e-pollbooks.

2.1.5. "Electronic pollbook" or "E-pollbook" means an approved electronic device containing voter registration information for the purpose of facilitating voting at the precinct.

2.1.6. “Electronic voting system” means one or more approved accessible integrated devices that utilize an electronic component for the following functions: ballot presentation, vote capture, vote recording or tabulation.

2.1.7. “Fund” means the County Assistance Voting Equipment Fund bearing the designation “1615” by the State.

2.1.8. “Grant” means a sum of money authorized for disbursement by the State Election Commission to a county from the Fund to improve the administration of elections for Federal office, including to enhance election technology and make election security improvements, including but not limited to electronic voting system upgrades, cybersecurity enhancements, physical security upgrades and e-pollbooks.

2.1.9. “HAVA” means the Help America Vote Act (2002), 52 U.S.C. § 20101, *et seq.*

2.1.10. “HAVA Grant Board” means a body authorized by W. Va. Code § 3-1-48(l) for the purpose of making recommendations to the State Election Commission to issue grants to West Virginia counties from the Fund consistent with this Rule. The HAVA Grant Board shall be comprised of members appointed by the Secretary from the following agencies and organizations:

2.1.10.a. The Director of the Elections Division of the Secretary of State’s Office who shall act as Chairperson of the Board;

2.1.10.b. A representative from a disability rights organization;

2.1.10.c. Two (2) Clerks of opposite political parties from the West Virginia Association of County Clerks; and

2.1.10.d. A representative from the Governor’s office.

2.1.11. “Loan” means a borrowed sum of money by a county from the County Assistance Voting Equipment Fund that is expected to be paid back to the State.

2.1.12. “Nonpayment of the loan installments” means a nonpayment of two consecutive monthly payments or nonpayment of an annual payment in excess of thirty (30) days beyond the scheduled payment date.

2.1.13. “Physical Security” means equipment and techniques employed to securely administer a federal election, protect hardware, software, networks and data from physical actions, tampering and events that could cause loss or damage to election systems due to burglary, theft, vandalism, terrorism, fire, flood and natural disaster, as well as necessary and reasonable additional resources and staff to meet to protect the integrity of a federal election, which resources include but are not limited to unanticipated increases in election materials and supplies, cleaning or sanitization supplies, temporary staff, and other allowable items or expenditures permitted by the U.S. Election Assistance Commission.

2.1.14. “Program” means the county loan and grant programs created to facilitate the improvement of the administration of elections for Federal office, including to enhance election technology and make election security improvements, including but not limited to electronic voting system upgrades, cybersecurity enhancements, physical security upgrades and e-pollbooks.

2.1.15. “Secretary” means the West Virginia Secretary of State.

§153-10-3. Eligibility for Grant Funding for Election Systems and Election System Upgrades.

3.1. Any county commission requesting a grant from the Fund shall file an application verified by their Clerk with the Secretary.

3.2. The application shall be on a form provided by the Secretary and shall contain the following information:

3.2.1. Name of county;

3.2.2. Amount of grant requested;

3.2.3. Proposed use of funds, including type of equipment, software and/or services and quantity, if applicable;

3.2.4. Statement that the county has matching funds available equal to at least fifteen percent (15%) of the cost of physical security upgrades or e-pollbooks; and/or fifty percent (50%) of the cost of electronic voting systems, software and/or service;

3.2.5. Statement that the county has the authority to purchase election systems, or election systems upgrades, through lawful purchasing procedures no later than one hundred twenty (120) days from receipt of the award;

3.2.6. Statement of the county indebtedness, arrearage or obligation to the State of West Virginia or its agencies;

3.2.7. A copy of the resolution passed by the county commission authorizing the county to purchase election systems or election systems upgrades pursuant to this program;

3.2.8. Such other information deemed necessary by the Secretary;

3.2.9. Signatures of a majority of the county's commissioners and Clerk;

3.2.10. Date of application.

3.3. To be eligible for a grant from the Fund, a county applicant must be eligible for the award at the time of application and at the time the award is received by meeting all criteria in place at the time of the application and award; and

3.3.1. Must be current in a repayment plan for outstanding indebtedness, arrearage or obligation to the State of West Virginia or its agencies;

3.3.2. Must possess the ability to meet any matching funds obligation; and

3.3.3. Must possess lawful authority to purchase election systems, or election systems upgrades, through lawful purchasing procedures no later than one hundred twenty (120) days from receipt of the award.

3.4. A county commission must possess at least fifteen percent (15%) of the cost of equipment, software and/or services for e-pollbooks and may only obtain a grant from the Fund for up to eighty-five percent (85%) of the cost, to be determined on availability of funds by the HAVA Grant Board.

3.5. A county commission must possess at least fifty percent (50%) of the cost of the equipment, software and/or services for electronic voting systems and may only obtain a grant from the Fund for up to fifty percent (50%) of the cost, to be determined on availability of funds by the HAVA Grant Board.

3.6. A county commission must possess at least fifteen percent (15%) of the cost of equipment, software and/or services for physical security measures to protect election systems and may only obtain a grant from the Fund for up to eighty-five percent (85%) of the cost, to be determined on availability of funds by the HAVA Grant Board.

3.7. Grants may be approved by the State Election Commission, upon a recommendation by the HAVA Grant Board, only for the purpose of improving the administration of elections for Federal office by enhancing election technology and security, including but not limited to the purchase of election systems, election system upgrades, electronic voting systems, or physical security, and only if certified when necessary, or otherwise approved by the State Election Commission, under a purchase by the county pursuant to a lawful local procurement procedure.

§153-10-4. Eligibility for Loan Funding for Voting Systems, Software and Services.

4.1. Any county commission requesting a loan from the Fund shall file an application with the Secretary.

4.2. The application shall be on a form provided by the Secretary of State and shall contain the following information:

4.2.1. Name of county;

4.2.2. Amount of loan requested;

4.2.3. Proposed use of funds, including type of equipment, software and/or services and quantity, if applicable;

4.2.4. Statement that county has obtained at least fifty percent (50%) of the cost of the equipment, software and/or service;

4.2.5. Date of application;

4.2.6. Signature of a majority of the county's commissioners and Clerk;

4.2.7. Such other information deemed necessary by the Secretary of State.

4.3. In addition to the application, the county commission shall provide to the Secretary of State a copy of the resolution passed by the county commission authorizing the county to purchase or lease the voting equipment, software and/or services and to enter into the loan agreement.

4.4. A county commission must obtain at least fifty percent (50%) of the cost of the equipment, software and/or services and may only obtain a loan from the Fund for up to fifty percent (50%) of the cost.

4.5. The State Election Commission may waive a portion or all of the fifty percent (50%) matching funds if the county commission demonstrates to the satisfaction of the State Election Commission that the county commission has exercised due diligence to raise the matching funds; it is unable to obtain the matching funds; and that it has the ability to pay the installments on the loan when due.

4.6. A county commission may request a waiver of the matching funds by filing an application with the State Election Commission.

4.7. Loans may be approved by the State Election Commission only for the purpose of improving the administration of elections for Federal office by enhancing election technology and security, including but not limited to the purchase of election systems, election system upgrades, electronic voting systems, or physical security, and only if certified when necessary, or otherwise approved by the State Election Commission, under a purchase by the county pursuant to a lawful local procurement procedure.

§153-10-5. Application Review and Approval Process.

5.1. For the purpose of a county obtaining a Grant from this program:

5.1.1. The Secretary shall notify each Clerk of the availability to apply for an election system Grant from the Fund. The period to apply for a Grant shall remain open for thirty (30) days from the date of the notice given to the Clerk.

5.1.2. No later than ten (10) days after the close of the period to apply for a Grant, the HAVA Grant Board shall hold a public meeting at a location designated by the Secretary for the purpose of reviewing the properly submitted applications. The HAVA Grant Board shall vote on whether to approve or deny each application. In reaching its decision, the HAVA Grant Board should consider the following:

5.1.2.a. The amount requested by the applicant;

5.1.2.b. The total amount of all requests made by all applicants;

5.1.2.c. A pro rata fraction of funds available at the time of the request. The numerator of the fraction shall be the number of registered voters in that county, and the denominator shall be the total number of registered voters in the State as of the most recently passed federal presidential election.

5.1.3. No later than ten (10) days after the HAVA Grant Board meeting, the State Election Commission shall meet to consider the recommendations of the HAVA Grant Board. The State Election Commission shall review and decide upon the recommendations of the HAVA Grant Board. Unless the decision of the HAVA Grant Board is arbitrary and capricious, the recommendations should be adopted by the State Election Commission. *Provided*, that any Clerk whose application is denied by the HAVA Grant Board may appear and present good cause to the State Election Commission as to why their application should be granted.

5.1.4. The decision of the State Election Commission shall be full and final.

5.1.5. Upon approval, the county and State Election Commission shall execute any and all necessary documents required by each and perform accordingly.

5.2. For the purpose of a county obtaining a Loan from this program:

5.2.1. Upon receipt of a completed application for a loan, the State Election Commission shall review and approve the application, deny the application or request additional information within forty-five (45) days. Any denial shall include a letter setting forth the reason(s) for the denial. Any county commission receiving a denial has thirty (30) days to amend its original application in order to comply with any necessary changes required by the State Election Commission.

5.2.2. Once a county commission has met all of the requirements of this rule, the State Election Commission shall approve the loan if funds are available.

5.2.3. Upon approval, the county commission and the State Election Commission shall enter into a contract for the repayment of the loan by equal monthly or annual payments for the length of the contract, not to exceed five (5) years to obtain the equipment, software and/or services.

5.2.4. Upon written request by the county commission, the State Election Commission may extend the repayment of the loan on a year-to-year basis for a period not to exceed five (5) additional years. Nothing in this section should be construed to allow a loan to continue for more than ten (10) years from the date of the signing of the agreement.

5.2.5. Unanimous approval shall be required by the State Election Commission when a county commission applies for a subsequent loan from the Fund while such county commission currently has an outstanding loan from the fund.

§153-10-6. Repayment of Loans.

6.1. The county commission shall promptly enter into a contract with the State Election Commission for a no-interest repayment of the loan over a period not to exceed five (5) years or the length of the contract to obtain the equipment, software, or services, whichever is less, notwithstanding any subsequent agreement granting an extension pursuant to subsection 5.2.4 of this Rule.

6.2. No county commission may apply for and receive a loan if that county commission currently has an outstanding loan from this fund which is in default.

6.3. Upon nonpayment of the loan installments by the county commission or other breach of the loan agreement, the Secretary may institute a civil action, mandamus or other judicial or administrative proceeding to compel performance by the county commission.

6.4. The Secretary of State will cease any legal action upon full payment of the default amount by the county. The defaulting county commission is liable for any legal costs incurred by the Secretary in order to obtain compliance.

§153-10-7. Ownership.

7.1. All equipment, software and services acquired through the Grant program described in section 3 of this Rule shall be purchased by the county and shall be the county's exclusive property. The equipment shall be solely owned by the county.

7.2. All equipment, software and services acquired through the Loan program described in section 4 of this Rule shall be purchased by the Secretary from the vendor under a contract and shall be immediately turned over to the county. The equipment shall be solely owned by the county.

§ 153-10-8. Special Provisions During a State of Emergency.

8.1. In the event that there is insufficient time for the timelines and procedures set forth in this Rule to be followed due to time constraints, emergency needs, to meet federal guidance or requirements, or to respond to an epidemic, pandemic, health crisis, or other crisis as determined by the Secretary of State or Governor, the provisions of this Rule that may delay any necessary action in responding to and preparing for a federal election shall not apply.

8.2. Provisions of this Rule that may delay any necessary action in responding to and preparing for an election during a State of Emergency include but are not limited to the following:

8.2.1. The timelines set forth in § 153-10-5. *Provided*, that the Secretary of State shall issue uniform guidance for the grant application and review process;

8.2.2. The pro rata allocation formula set forth in § 153-10-5.1.2.c. and any other provision of this Rule;

8.2.3. The application review and approval timelines, including the time period requirements for the HAVA Grant Board public meeting to review grant applications under § 153-10-5 *et seq.*

8.2.4. At the discretion of the Secretary of State, any other provision of this Rule that may delay any necessary action in responding to and preparing for an election during a State of Emergency within his authority set forth by law.

8.3. Upon the occurrence of any event described in Section 8.1. of this Rule, the Secretary of State may initiate the grant process at his discretion, including calling necessary meetings of the State Election Commission and HAVA Grant Board, to consider grant applications submitted by counties for purposes permitted under the provisions of this Rule, state and federal law, and guidance from the U.S. Congress or the U.S. Elections Assistance Commission.

8.4. Any county grant applications seeking grant monies for items, purposes, supplies or materials not expressly provided in this Rule may be approved if permitted by federal law or under written guidance issued by the U.S. Election Assistance Commission.

8.5. All federal requirements for sub-recipient counties receiving grants under this Rule, including those relating to reporting, inventory, and proper expenditures, shall apply.