



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

7/9/2020 3:09:51 PM

Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Risk And Insurance Management

TITLE-SERIES: 115-09

RULE TYPE: Procedural Amendment to Existing Rule: No Repeal of existing rule: No

RULE NAME: Procurement

CITE STATUTORY AUTHORITY: W. Va. Code, §§ 5A-1-12, 29-12-5, and 29-12-8

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 08/08/2020 5 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Mary Jane Pickens, Director

ADDRESS: BRIM, 1124 Smith Street, Suite 4300

Charleston, WV 25301

EMAIL: maryjane.pickens@wv.gov

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This new rule explains and clarifies procedures for the agency's purchase of commodities, services, insurance products, and insurance services relating to insurance covering state properties, activities, and responsibilities in addition to purchases related to the State Privacy Office.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

This rule complies with HB 4042, passed during the 2019 Legislative Session which created W. Va. Code § 5A-1-12, requiring agencies exempt from some or all of state purchasing requirements to adopt procedural rules on or before September 1, 2020.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

None

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

None

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

None

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	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

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

This rule will have no economic impact.

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

Yes

Misty Peal -- 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 115
PROCEDURAL RULE
WEST VIRGINIA BOARD OF RISK AND INSURANCE MANAGEMENT

SERIES 9
PROCUREMENT

§115-9-1. General.

1.1. Scope. -- This procedural rule is an explanation and clarification of procedures for the purchase of commodities, services, and insurance products and insurance services relating to insurance on state properties, activities, and responsibilities, and purchases related to the State Privacy Office, by the West Virginia Board of Risk and Insurance Management.

1.2. Authority. – W. Va. Code, §§ 5A-1-12, 29-12-5, and 29-12-8.

1.3. Filing Date. – , 2020

1.4. Effective Date. – , 2020

§115-9-2. Definitions

2.1. “Agency” or “BRIM” means the West Virginia Board of Risk and Insurance Management.

2.2. “Bid” or “Bids” means documents that a vendor submits in response to a solicitation that constitutes an offer to the agency and includes, but is not limited to, documents submitted in response to a request for quotation and proposals submitted in response to a request for proposal.

2.3. “Chief Financial Officer” or “CFO” means the BRIM employee designated as such who manages the Agency’s Finance Department and is responsible for oversight and management of financial, investment, reporting, and budgeting functions for the agency.

2.4. “Director” means the Executive Director of BRIM or the BRIM employee designated by the Director to perform a specific task or function.

2.5. “Non-Responsible” means not having the capability to fully perform the contract requirements and lacking the integrity and reliability which will assure good-faith performance.

2.6. “Purchase of insurance products and insurance services” means procurement of or negotiation of contracts for insurance policies, insurance coverages, insurance adjusting services, engineering services, geotechnical services, insurance producer services, investment banking and trust services, financial management services, property and liability inspection or evaluation services, boiler and machinery insurance or inspection services, appraisal services, privacy or cyber liability incident management products or services, and any other products or services considered by the Director to be necessary or appropriate to the agency’s responsibilities relating to the State Privacy Office or to secure reasonably broad protection against loss, damage, or liability to property and on account of activities and responsibilities of the state or public entity program insured, through proper, adequate, available, and affordable insurance and through the employment of principles of loss control.

2.7. “Purchases of a routine nature” or “routine purchase” means procurement of typical items found in any state agency such as office supplies, furnishings, technology products and services including

hardware and software, and other items or services needed for the day-to-day administrative functioning of the agency.

2.8. "Requisition" means a written or electronic authorization signed by the Director or his or her designee to the Agency's Finance Department, or signed by the CFO, requesting the purchase of goods or services within the scope of this procedural rule.

2.9. "Solicitation" means a request for quotation (RFQ) or a request for proposal (RFP).

§115-9-3. Purchases of a Routine Nature.

3.1. All purchases above \$50.00, or such other value as determined by the Director in coordination with the CFO, must be approved by the Director or the CFO using the requisition form.

3.2. Purchases and contracts for commodities and services of a routine nature shall be based on competitive bid whenever possible, subject to the following:

3.2.1. Competitive bids may, but are not required to be obtained, when the value of the item or service is \$2,500 or less;

3.2.2. A minimum of three verbal bids is required, when possible, when the value of the item or service is between \$2,500.01 and \$10,000; and

3.2.3. A minimum of three written bids is required, when possible, when the value of the item or service is between \$10,000.01 and \$25,000.

3.2.4. Purchases of a routine nature expected to exceed \$25,000 must be the subject of competitive bid solicitation unless otherwise allowed under this rule.

§115-9-4. Purchases of Insurance Products and Insurance Services.

4.1. Insurance products and insurance services relating to properties, activities, and responsibilities of the state or public entity program insured will be based on competitive bid whenever feasible and in the best interest of the state and the insurance programs administered or provided by the agency.

4.2. The Director shall determine the circumstances under which competitive bids for such insurance products and insurance services are feasible and in the best interest of the state and the insurance programs administered or provided by the agency. In making this determination, consideration will be given to the nature, complexity, uniqueness, cost, urgency, availability, or suitability for addressing a new or emerging risk, of the needed products or services. Such determinations shall also take into consideration financial costs, the scope of operational, staffing, or budget changes needed within the agency, and potential impact on constitutional immunity or statutory or common law relating to replacement of existing programs or services.

4.3. Rather than soliciting bids directly for insurance products and insurance services, the agency may solicit bids for the services of individual insurance producers, insurance agencies or business entities licensed as insurance producers by the West Virginia Insurance Commissioner, or surplus lines licensees as authorized by Chapter 33 of the West Virginia Code. The services to be provided under contracts resulting from such solicitations may include a market search for the insurance products and insurance services needed, recommendations, assistance with completion of the procurement, and general support during the duration of the contract for the insurance products and insurance services.

§115-9-5. Director's Purchasing Role.

5.1. The Director's role in connection with agency purchases includes the following:

5.1.1. Review specifications and descriptions before soliciting bids to ensure that specifications and descriptions do not favor a particular "brand" or vendor unless such specifications are necessary to perform the objectives for which the routine purchase, or the insurance product or insurance service, is purchased. If specifications include a "brand" name, the Director will ensure that it is clear that equivalent products or services set forth in this subsection will be considered;

5.1.2. Accept or reject any or all bids in whole or in part;

5.1.3. Request from vendors all necessary information to verify that the vendor is licensed and in good standing with appropriate state or federal agencies;

5.1.4. Waive minor irregularities in bids or specifications when the Director determines such action to be appropriate;

5.1.5. Prescribe in each contract provisions for liquidated damages, remedies or other damage provisions in the event of vendor default;

5.1.6. Prescribe the manner of review or inspection for determining compliance with specifications for all routine purchases and purchases of insurance products or insurance services;

5.1.7. Ensure that bid evaluators have no financial, personal, or other conflict of interest relating to any vendor or vendor representative that has submitted a bid and to ensure that bid evaluators sign a form certifying no conflicts of interest;

5.1.8. Ensure that no agency employees communicate with vendors about the solicitation from the time the solicitation is advertised and until an award is made;

5.1.9. Review and approve or reject any change orders submitted by the vendor;

5.1.10. Renegotiate terms for renewal of expiring contracts for insurance products or insurance services if it is determined that rebidding the contracts is not feasible, or in the best interests of the state and the state insurance program, taking into consideration the factors set forth in section 4.1 of this rule;

5.1.11. Ensure, through periodic audits, compliance with the provisions of this rule; and

5.1.12. Any other act reasonably related to ensuring the integrity of the agency's procurement process.

§115-9-6. Process in event of dispute.

6.1. In the event of a dispute with a vendor, the agency will attempt to resolve any issues with the vendor prior to pursuing available remedies.

6.2. The agency may cancel a purchase or contract immediately if the vendor has obtained the contract by fraud, collusion, conspiracy; an organizational conflict of interest is identified; funds are not appropriated for the acquisition; the contract was awarded in error; if the contract is in conflict with any

statutory or constitutional provision; or if the vendor has failed to honor any contractual term or standard commercial practice.

6.3. In the event that a vendor fails to honor any contractual term or condition, or violates any provision of federal, state, or local law, regulation, or ordinance, the agency shall provide the vendor with notice of cancellation and may request that the vendor remedy the contract breach or legal violation within a reasonable time frame given the nature of the breach or violation. If the vendor fails to remedy the contract breach or legal violation within the stated time frame, the contract may be canceled immediately.

6.4. If the contract was the subject of competitive bids, the agency may award the canceled contract to the next lowest responsible bidder that met specifications without a subsequent solicitation if that bidder is able to perform at the price contained in its original bid submission and the contract has not yet commenced. If the contract was the subject of competitive bids and the vendor's failure has increased or significantly changed the scope of the original contract, the contract may not be re-awarded without competitive bids.

6.5. The agency may cancel any purchase or contract for any reason upon providing the vendor with 30 days' notice of the cancellation.

§115-9-7. Processes Relating to Bidding and Award.

7.1. A request for proposal, or RFP, published by the agency must contain provisions for a two-part evaluation, the first part being technical aspects of the proposal and the second part being cost to the state. The two components will be evaluated, scored, and combined to form a total score. The highest scoring vendor will be awarded the contract.

7.1.1. Bids submitted in response to RFPs must be received from vendors prior to the bid due date and time established on the solicitation forms provided by the agency. The agency must reject bids received after the designated time and date. Each vendor is solely responsible for delivering its bid to the agency. All bids must be signed by an authorized representative of the vendor.

7.1.2. A bidder may make a change to a sealed bid submitted in response to an RFP by submitting the change in the same manner that the bid was submitted. The change must be received by the agency before the date and time the bid is due.

7.1.3. If, during the solicitation process, it becomes necessary to alter the solicitation document, a written addendum will be issued by the agency. An addendum will be used to add, delete or change specifications or attachments; provide a copy of a pre-bid attendee list; answer technical questions or requests for clarification; extend or alter the bid schedule; or for any other material change to the solicitation. The addendum will be published on the agency's website and provided directly to prospective bidders as determined by the agency.

7.1.4. If there is more than one bidder responding to the RFP, the agency may negotiate a lower price with the highest ranked bidder. If the contract is not awarded to the highest scoring bidder, the agency 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 agency will only extend an offer after it is offered to all prior bidders in order of rank.

7.2. A request for quotation, or RFQ, will be used for procurements of tangible property such as supplies or equipment.

7.2.1. The solicitation will include a detailed description of, or specifications for, the item being purchased; a delivery date, if required; quantities of all items; and any other requirement necessary to describe the agency's need.

7.2.2. The solicitation will establish the date and time for the submission of the bid, after which bids will no longer be accepted. The Director will obtain a minimum of three bids, when possible.

7.2.3. After the date and time established for bid submission, bids will be opened and examined by the agency to ensure compliance with all specifications and determination of the lowest responsible bidder meeting the bid specifications. The contract will be awarded to the lowest bidder meeting specifications.

7.3. Bids will be opened at the date and time specified in the solicitation documents. All bids will be and remain sealed until the bid opening time and date.

7.4. All solicitations will be advertised using advertising media such as newspapers, trade journals, publication on the agency's web site, or any other media or method of notification to potential bidders that the Director considers advisable taking into consideration the nature and type of the solicitation. Notice of solicitations may also be published in the vendor self-service section of wvOasis at www.wvoasis.gov. The type and duration of advertising is at the Director's discretion. This subsection does not prevent any solicitation from being advertised using any of these methods as determined by the Director.

7.5. Unless specifically allowed by the terms of the solicitation, bids may not be submitted by electronic transmission. If allowed, bids by electronic transmission must be received by the agency prior to the bid opening date and time. A bid will not be considered received until after transmission is completed.

7.6. If competitive bidding results in a tie in any solicitation, the agency may allow the tied vendors to make a final offer or may start the solicitation process over, at the Director's discretion.

7.7. The Director may authorize purchases directly from a vendor without competitive bidding under the following circumstances:

7.7.1. It is determined that a direct award is appropriate because there is no other source for the product or service, or that no other source would be willing or able to replace the existing source without a detrimental effect on the agency, in which case the agency will document its due diligence in making this determination; or

7.7.2. In the event of an emergency, including but not limited to unforeseen events or circumstances, delays by contractors, delays in transportation, or an unanticipated volume of work, as well as procurements related to an official declaration of emergency by the Governor or federal officials. Notwithstanding the existence of an emergency as described in this subdivision, the agency will attempt to obtain three bids whenever possible. "Emergency" does not include circumstances caused by the agency's neglect, poor planning, or lack of organization.

7.8. The agency may reject a bid that a vendor declares to be erroneous after the bid opening, but otherwise appears to be responsive, 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 agency; and (4) Enforcement of the part of the bid in error would be unconscionable. The agency will document the existence of these conditions in the contract file in the event that a bid is rejected under this subsection.

7.9. If the Director believes that a vendor may be non-responsible, the Director may request that a vendor or spending unit provide evidence that the vendor either does or does not have the capability to fully perform the contract requirements, and the integrity and reliability necessary to assure good faith performance. If the Director determines that the vendor is non-responsible, the vendor's bid shall be rejected, and the contract may not be awarded to that vendor. A determination of non-responsibility must be evaluated on a case-by-case basis and can only be made after the vendor in question has submitted a bid.

7.10. The agency must reject a bid that is found to be non-responsive. A non-responsive bid is one that fails to conform to the solicitation in all material respects.

7.11. Prior to the award of a contract, the successful vendor must register with the Purchasing Division and pay any related fees prior to being awarded a contract, unless otherwise exempted by statute or rule. Vendors must be prepared to show that they are licensed and in good standing in accordance with 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 other state agencies or political subdivisions prior to being awarded a contract.

7.12. The agency may hold a post award conference with the successful vendor as part of the RFP process to ensure a clear and mutual understanding of all contract terms and conditions, and the respective responsibilities of all parties. The agency will prepare an agenda for the conference that will include discussion of the scope and specifications of the contract, the contract terms and conditions, any technical or reporting requirements of the contract, any contract administration procedures including contract monitoring and progress measurement using designated metrics or milestones, any potential contract problem areas and possible solutions, and invoicing requirements and payment procedures with particular attention to whether payment will be made according to milestones achieved by the vendor. The agency may also develop and discuss with the successful vendor a comprehensive and objective monitoring checklist that measures compliance with contract requirements and assesses contractor performance.

7.13. After the contract is awarded, the agency will provide written notice to all unsuccessful bidders that the contract has been awarded.

7.14. Copies of bids will be open for public inspection in the agency's office at any time after the bid opening. The agency may prescribe policies to include scanning, copying or other methods of assuring public access. The contract file will be open for public inspection after the award has been made.

§115-9-8. Vendor challenges to contracts.

8.1. Should any vendor desire to challenge an award of a contract, the vendor must submit to the Director no later than 5 business days after the award a written protest including the name and address of the protestor; the solicitation number or contract number; a thorough statement of the grounds upon which the protest is made; any relevant supporting documentation; and the resolution or relief sought. Failure to submit this information shall be grounds for rejection of the protest by the Director.

8.2. The Director or his/her designee shall review the matter of protest and issue a written decision. The decision shall be mailed to the vendor by certified mail, return receipt requested. The vendor may, within 10 business days of receipt of the Director's written decision, request a hearing. If requested by the vendor, a hearing will be scheduled and notice of the time, date, and location of the hearing will be provided in writing to the vendor at least 10 days before the hearing date. The hearing notice shall be given by depositing it in the United States mail, postage prepaid in an envelope addressed to the vendor at its last-known address. Proof of the giving of notice shall be made by certificate of service attached to the notice

and maintained in the agency's file. Continuation or delay of the contract award is at the discretion of the Director.

8.3. The hearing shall be conducted by a hearing officer appointed by the Director. The hearing officer has the power to subpoena witnesses, papers, records, documents, and other data and things in connection with the hearing and to administer oaths or affirmations in the hearing. At the hearing, the agency and the vendor shall be afforded an opportunity to review the evidence, cross-examine witnesses, and present testimony and enter evidence.

8.4. Upon conclusion of the hearing, the hearing officer shall provide a recommended decision of findings of fact and conclusions of law to the Director. The Director shall review the record of the hearing and the recommended decision. The Director may adopt, modify, or reject the recommended decision, or may remand the recommended decision for further action. The Director shall issue a final order setting forth findings of fact and conclusions of law in support of the decision. The final order shall be mailed to the vendor by certified mail, return receipt requested.

8.5. The vendor may appeal the Director's final order within thirty days of receipt of the order in accordance with the provisions of W. Va. Code § 29A-5-4. If the vendor does not appeal the Director's final order within thirty days of receipt, the order is final.

—

—