



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

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

AGENCY: Municipal Pensions Oversight Board TITLE-SERIES: 211-02
RULE TYPE: Legislative Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: 211-02 Exempt Purchasing

PRIMARY CONTACT

NAME: Blair Taylor
ADDRESS: 301 Eagle Mountain Road
Suite 251
Charleston, WV 25311
EMAIL: blair.m.taylor@wv.gov
PHONE NUMBER: 304-356-2422

CITE STATUTORY AUTHORITY: §8-22-18a(g) & §5A-1-12

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

The Municipal Pensions Oversight Board is granted the authority to propose rules in §8-22-18a(g) which states "The board shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code as necessary to implement the provisions of this article,..." Further, HB4042 passed in the 2020 Legislative Session requires agencies with exemptions from chapter five-a-3 of this code to file procedural rules for said exemptions. On advice of counsel, the Municipal Pensions Oversight Board filed both a Procedural Rule and a Legislative Rule. The Legislative Rule contemplates subjective processes of the procurement cycle for actuarial services and a reviewing actuary.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/26/2020

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/27/2020

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

NA

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

The Legislative Rule explains and clarifies operative procedures for the purchase of actuarial services and an independent reviewing actuary. These services are exempt from the WV Purchasing Division, §5A-3 et seq of the WV Code pursuant to W.Va. Code §8-22-18(a)(b)(6) and §8-22-20(a).

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

The passage of HB4042 requires agencies and boards that have exemptions from §5A-3 of the W.Va. Code to file procedural and/or Legislative Rules to clarify processes used to procure goods and services specifically exempt from the Division of Purchasing. On the advice of counsel, the Board filed both a procedural rule and a Legislative Rule. The Legislative Rule covers items that are subjective in nature while the procedural rule covers those actions that are objective in nature.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

No Impact

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

No Impact

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

No Impact

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):

No Impact

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

Yes

Blair M Taylor -- 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.

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TITLE 211

LEGISLATIVE RULE

MUNICIPAL PENSIONS OVERSIGHT BOARD

SERIES 2

EXEMPT PURCHASING

§211-2-1 General.

- 1.1. Scope. -- This Legislative Rule is an explanation and clarification of operative procedures for the purchase of actuarial services and an independent reviewing actuary exempt from the WV Purchasing Division, §5A-3 et seq of the W. Va. Code pursuant to W. Va. Code §8-22-18(a)(b)(6) and §8-22-20(a).
- 1.2. Authority. -- W. Va. Code §8-22-18a(g) and §5A-1-12
- 1.3. Filing Date. --
- 1.4. Effective Date. --
- 1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect upon the expiration of five years from its effective date.

§211-2-2 Definitions.

- 2.1. "Bid" means anything that a vendor submits in response to a solicitation that constitutes an offer to the Board and includes, but is not limited to, documents submitted in response to request for quotation, proposals submitted in response to a request for proposal or proposals submitted in response to an expression of interest.
- 2.2. "Board" means the Municipal Pensions Oversight Board.
- 2.3. "Competitive Bidding" means the process by which individuals or firms compete for an opportunity to supply specified commodities and services by submitting an offer in response to a solicitation.
- 2.4. "Direct Award" means procurement method that allows for the direct purchase of commodities or services when it is believe that only one vendor can supply the needed commodity or service under the circumstances.
- 2.5. "Emergency" means a purchase made when unforeseen circumstances arise, including delays by contractors, delays in transportation and unanticipated volume of work.
- 2.6. "Executive Director" means the Director of the Municipal Pensions Oversight Board.
- 2.7. "Municipal Pensions Oversight Board" refers to the body created in W. Va. Code §8-22-118a.

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- 2.8 "Request for Proposals (RFP)" means a best value procurement tool used to acquire professional and other services where the scope of work may not be well defined, and cost is not the sole factor in determining the award. All criteria by which the bidders will be evaluated must be contained within the bid document.
- 2.9 As used in this rule, the following terms have the same meaning as provided in West Virginia Code §5A-1-1 and 5A-3-1 et seq., and as follows:
- 2.10 "Contract" means an agreement between a state spending unit and a vendor relating to the procurement of commodities or services, or both.
- 2.11 "Request for quotations" means a solicitation for a bid where cost is the primary factor in determining the award.
- 2.12 "Responsible bidder" means a vendor who has the capability to fully perform the contract requirements, and the integrity and reliability which will assure good-faith performance.
- 2.13 "Vendor" means any person or entity that may, through contract or other means, supply the state or its subdivisions with commodities or services, and lessors of real property.
- 2.14 "wvOASIS" refers to the statewide accounting system which is used by vendors and the Board to procure goods and services.

§211-2-3 Bid Evaluation.

- 3.1. From the time a requisition is submitted via wvOASIS for public advertisement until an award is made, evaluators are not permitted to communicate with vendors about the solicitation or any component thereof without prior approval of the Chairperson or Executive Director of the MPOB.
- 3.2. When the Request for Quotation process is used, competitive bids are received, properly evaluated and an award is made to the lowest responsible bidder meeting specifications.
- 3.3. After a proper evaluation, if an award is made to a responsible bidder other than the lowest responsible bidder, a thorough written justification signed by the evaluator(s) must be inserted into the file and retained for public record and inspection.
- 3.4. When the Request for Proposal process is used, the technical aspect of the bid will be subjectively evaluated by the RFP committee using knowledge and experience. The cost portion of the bid will only be opened if the vendor scores at least 70% of possible points on the technical portion of the bid. The cost portion will be evaluated objectively, similarly to the process for evaluating an RFQ.
- 3.5. Occasionally two or more bids of equal terms and dollar amount are received in response to a solicitation, thus, resulting in a tie bid. If multiple awards are not made, then the tie bid(s) must be resolved. When tie bids are received, the Chair of the RFQ committee shall break the tie by

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allowing the tied vendors to make a best and final offer, flip of a coin, draw of the cards or any other impartial method considered prudent by the Chair.

- 3.6. If an error is discovered by the vendor or the MPOB, the burden of proof and timely action for request of relief is the vendor's responsibility. The request for relief must be made in writing by the vendor and received by the Chair of the RFQ/RFP committee within five business days from the bid opening date.
- 3.7. If there is a conflict between the extension (total) price and the unit price in the bid, the unit price prevails.

§211-2-4 Rejection of Bids.

- 4.1. The RFP/RFQ committee has the authority to reject a bid after opening according to the following criteria:
 - 4.1.1. The bid is received after the designated date and time;
 - 4.1.2. The bid is non-responsive; fails to conform to the solicitation in all material respects;
 - 4.1.3. An error was made;
 - 4.1.4. The error materially affected the bid;
 - 4.1.5. Rejection of the bid would not cause a hardship on the MPOB other than losing an opportunity to receive goods or services at a reduced cost;
 - 4.1.6. Enforcement of the part of the bid in error would be unconscionable.

§211-2-5 Protests.

- 5.1. Protest based on bid specification must be submitted no later than 5 working days prior to bid opening. Protest of a purchase order or contract awards must be submitted no later than 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 Chair of the RFP/RFQ committee.
- 5.2. All protest must be submitted in writing to the MPOB and contain the following information:
 - 5.2.1. The name and address of the protestor;
 - 5.2.2. The requisition, solicitation, purchase order or contract numbers;
 - 5.2.3. A statement of the grounds of protest;
 - 5.2.4. Supporting documentation, if necessary; and
 - 5.2.5. The resolution or relief sought.

- 5.3. Failure to submit this information shall be grounds for rejection of the protest by the Chair.

§211-2-6 Protest Review.

- 6.1. All protests are to be filed with the Executive Director of the MPOB. Responsibility to deliver protest remains with the vendor.
- 6.2. The Chair and the Executive Director or his/her designee shall, with the advice of legal counsel, review the matter of protest and issue a written decision.

§211-2-7 Remedies.

- 7.1. If a vendor fails to honor any contractual term or condition, the Executive 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.

§211-2-8 Soul Source Procurement.

- 8.1. The Executive Director may approve the purchase of actuarial services and/or actuarial audit services directly from a vendor without competitive bidding, if any of the following conditions exist:
- 8.1.1. The item cannot be obtained through ordinary purchasing procedures;
- 8.1.2. The item is unique and not available from any other source; or
- 8.1.3. 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.
- 8.2. The intent for a sole source award will 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 Executive Director may:
- 8.2.1. reject the sole source and move forward with a formal bidding;
- 8.2.2. approve the sole source; or
- 8.2.3. take other action as necessary.

§211-2-9 Emergency Awards.

- 9.1. The Executive Director or an appointed designee shall issue a purchase order for emergency purchases. An "Emergency Situation" requiring a purchase of 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

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used for hardship resulting from neglect, poor planning, or lack of organization by the spending unit. Competitive bids shall be obtained if possible.