



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

1/11/2021 2:37:51 PM

Office of West Virginia  
Secretary Of State

**NOTICE OF PUBLIC COMMENT PERIOD**

AGENCY: Financial Institutions Division of TITLE-SERIES: 106-22  
RULE TYPE: Procedural Amendment to Existing Rule: No Repeal of existing rule: No  
RULE NAME: Exempt Purchasing  
CITE STATUTORY AUTHORITY: W.Va. Code 5A-1-12, 31A-8A-8, 31A-8D-7, 31A-8E-8, and 31A-8F-22

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 02/10/2021 5:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Kathy Lawson  
ADDRESS: 900 Pennsylvania Avenue, Suite 306  
Charleston, WV 25302  
EMAIL: klawson@wvdob.org

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:

The rule establishes a procedure to procure services in accordance with the referenced statutes as a procurement exempt from purchasing rules.

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

This rule is new to establish procedures for procuring services exempt from state purchasing rules. The rule became necessary in response to a new law passed during 2020 requiring agencies with exempt purchasing authority to publish procedural rules.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

The agency anticipates no economic impact on revenues of state government.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

The agency anticipates no economic impact on special revenue accounts.

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

The agency anticipates no economic impact on the state or its residents.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2021 Increase/Decrease (use "-" )	2022 Increase/Decrease (use "-" )	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>	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
<b>2. Estimated Total Revenues</b>	0	0	0

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

The statutes allowing the Division of Financial Institutions to procure examiner services from other bank supervisory agencies has been in effect since the late 1990s. To date, the Division has not taken advantage of the authority and has relied upon its own staff as well as information sharing and cooperative agreements with other jurisdictions to accomplish its regulatory mandate.

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

Yes

**Allen R Prunty -- 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 106**  
**PROCEDURAL RULE**  
**DIVISION OF FINANCIAL INSTITUTIONS**

**SERIES 22**  
**EXEMPT PURCHASING**

**§106-22-1. General.**

1.1. Scope. -- This rule contains the procedures of the West Virginia Division of Financial Institutions for procurements exempt from the requirements of the West Virginia State Purchasing Division in compliance with W. Va. Code §5A-1-12, under which agencies exempt from some or all of the requirements of Chapter 5A of the West Virginia Code are to adopt purchasing procedures.

1.2. Authority. -- W. Va. Code §5A-1-12, W. Va. Code §31A-8A-8, W.Va. Code §31A-8D-7, W. Va. Code §31A-8E-8, and W. Va. Code §31A-8F-22.

1.3. Filing Date. --

1.4. Effective Date. --

**§106-22-2. Definitions.**

2.1. “Agency” or “DFI” means the West Virginia Division of Financial Institutions.

2.2. “Award” means the written determination of the selection of a vendor to perform under a contract issued after encumbrance and final approval by the agency.

2.3. “Bid” means an offer by a vendor in response to a procurement document to provide services in accordance with the specifications of the agency-issued procurement document.

2.4. “Change order” means a written modification or amendment to an agency issued contract in the manner provided in the contract or upon the mutual consent of DFI and the vendor.

2.5. “Contract” means the binding agreement entered into between DFI and a vendor to provide the services requested in the procurement and includes a purchase order.

2.6. “Direct award” means the procurement method to award a contract to a vendor able to provide the services without competitive bidding when there is no known competition.

2.7. “FOIA” means the Freedom of Information Act found in W. Va. Code §29B-1-1 et seq.

2.8. “Non-disclosure agreement” means a contract between two or more parties to prohibit the release of information defined in the agreement as confidential, sensitive, or private in a manner that violates the non-disclosure agreement.

2.9. “Procurement” means the process of contracting for or otherwise acquiring, receiving, or maintaining services in accordance with this rule.

2.10. “Procurement document” means any document and all attachments related to acquiring services.

2.11. “Responsible vendor” means a vendor believed to have the capability to perform a contract and the integrity and reliability to assure good faith performance.

2.12. “Responsive vendor” means a vendor submitting a bid that conforms in all material respects to the requirements and specifications of a procurement document.

2.13. “Services” means intangible items, that include labor, time, expertise, maintenance, software, and service agreements.

2.14. “State” means the State of West Virginia.

2.15. “Vendor” means a person or entity considering or submitting a bid or a person or entity that has been awarded the contract.

### **§106-22-3. General information.**

3.1. DFI procurements for services shall be centrally processed at DFI to provide economical and efficient services at a reasonable cost.

3.2. The requirements or limitations in a procurement document shall be reasonable in consideration of DFI needs.

3.3. Documentation shall be maintained by the agency for all procurements and purchases to protect the processes.

3.4. DFI shall solicit an unrelated agency to audit exempt procurements and exempt purchasing processes and files every two years beginning in 2023 to cover the period of the effective date of this rule through December 31, 2022, and then every two years thereafter. When DFI does not utilize any exempt procurement, no audit shall be required.

3.5. DFI contracts shall comply with all applicable laws, rules, and regulations. Procurement documents must contain standard agency terms and conditions to aid in compliance with West Virginia law.

3.6. Every contract issued shall contain a clause that permits the agency to cancel the contract upon 30 days’ written notice to the vendor without penalty.

3.7. Bids shall not be altered and are considered public records available for review or copying after they are opened. After award, the entire file shall be public records and available for review or copying unless otherwise exempt by law.

3.8. Use of a purchasing card offered through the West Virginia State Auditor’s Office may be required in any procurement if use is determined appropriate.

3.9. Negotiation may be used to finalize a contract and when needing a change order to amend or modify a current contract. Negotiation of a change in scope is permitted when circumstances dictate. A justification for a negotiated change order must be included in the file.

3.10. The agency shall abide by the West Virginia Ethics Act and the associated promulgated rules and shall not make a purchase from a conflicted vendor or a vendor with a significant financial interest as prohibited under the West Virginia Ethics Act.

**§106-22-4. Purchasing requirements.**

4.1. Documentation associated with all procurements shall be maintained in files in accordance with DFI record retention policy.

4.2. All purchases of services shall be subject to expenditure approval.

4.3. Contracts shall be issued for all procurements regardless of dollar amounts to assist with tracking and ensure proper internal controls.

4.4. Vendors shall be responsible for submitting a correct and accurate bid to the agency by the specified bid opening time, date, and location and in accordance with the procurement documents.

4.5. A vendor shall not commence work on any procurement without receipt of the awarded contract and any required notice to proceed. The agency shall not be responsible for any work by a vendor prior to and not in accordance with the contract awarded.

4.6. Commissioner approval is required to obtain any services using an exempt procurement pursuant to this rule.

4.7. DFI will utilize the Direct Award method of procurement because the service and vendor to be sought pursuant to the identified statutory authority is on the "Impossible to Bid" list set forth in Section 9 of the West Virginia State Purchasing Division Procedures Handbook.

4.8. When competitive bidding is not expressly required by statute and not used for a direct award, DFI will evaluate vendors based upon the following criteria, where applicable, and will document its evaluation:

4.8.1. Overall experience;

4.8.2. Professional certifications or designations;

4.8.3. Company specific experience;

4.8.4. Company type experience;

4.8.5. Knowledge of company or line of business;

4.8.6. Prior work for the agency;

4.8.7. Professional reputation;

4.8.8. Availability and commitment to required timeframes;

4.8.9. Adequacy of staffing, including the ability of assigned staff members to complete the contract without substitution;

4.8.10. Quality of work;

4.8.11. Experience with Conference of State Bank Supervisors' accreditation review process and knowledge of federal agency examination guidelines;

4.8.12. References from other state bank regulators or subject matter experts;

4.8.13. Projected costs;

4.8.14. Conflicts of interest;

4.8.15. Support services available to the vendor, including but not limited to information technology services; and

4.8.16. Any other guidelines or procedures DFI considers appropriate.

4.9. Any required vendor terms and conditions must be submitted and approved before a contract is awarded. DFI will obtain approval from the Attorney General as to contract form and conformity with applicable law when required by statute.

4.10. All procurements over \$2,500 will use a purchase order.

4.11. Aggregate procurements in excess of \$25,000 shall not circumvent the formal procurement requirements in any 12-month rolling period.

4.12. Non-responsive bids shall be rejected. A non-responsive bid is one that fails to conform to the solicitation in all material respects.

**§106-22-5. Vendor complaints and protests.**

5.1. Complaints – A vendor may verbally or in writing complain about a procurement or purchase to the agency. The agency will provide a written response to the complaint.

5.2. Protests

5.2.1. Types of Protests

5.2.1.a. Protests of Requirements, Specifications or Terms – Any protest relating to a procurement document, including any requirement, specification, or term, or any combination thereof, must be filed in writing with DFI no later than five business days prior to the specified bid opening date and time. Protests received after that date shall not be considered.

5.2.1.b. Direct Awards – Any vendor desiring to protest the specifications of a planned direct award may do so prior to five working days before the direct award process opening date. Any vendor desiring to protest a direct award may do so within five working days of the direct award.

5.2.2. Written Letter of Protest – A letter of protest must be submitted in writing and contain the name and address of the protesting vendor, the procurement document number, a statement explaining why the protest has been filed, the relief sought, and any other information that may assist the agency in reaching

a decision on the matter. The agency must receive the letter of protest by the established deadline to be considered.

5.2.3. Review of Protest and Issuing Decision – The agency shall review the letter of protest and issue a written decision. The agency may contact the protesting vendor or any other entity or perform such research or investigation it considers necessary to reach a decision. Evaluation or award of the contract may be delayed as considered appropriate by the agency.

**§106-22-6. Public records.**

6.1. A bid shall be available to the public after opening unless otherwise exempt by law.

6.2. Procurement documents shall inform vendors that the entire agency file for that procurement and any resulting contract will be considered public documents after award. As public documents, procurement documents may be disclosed to the public following the award of a contract in accordance with FOIA. Any bid or other document in a procurement file may be disclosed pursuant to a FOIA request even if the bid or other document contains statements or labels attempting to prevent disclosure, such as confidential, trade secret, private, or any other claim.

6.3. The agency shall not be liable for any disclosure of a procurement document pursuant to this rule.

6.4. If a vendor requests the agency execute a non-disclosure agreement to protect portions of its bid from disclosure, it must make the request at least one week prior to the date of the bid opening. A non-disclosure agreement may be executed at any time to prospectively protect any procurement documents, contracts, or information.

**§106-22-7. Violations.**

7.1. Any person who authorizes or approves a purchase or contract in violation of federal or state law, this rule, or any policy or procedure adopted by the agency may be held personally liable for the cost of the procurement or contract. Procurements and contracts violating federal or state law or this rule are void and of no effect.

7.2. The agency will follow vendor suspensions and debarments by the federal government or the West Virginia State Purchasing Division.