



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

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Office of West Virginia  
Secretary Of State

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**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL  
RULE**

AGENCY: Insurance Commission

TITLE-SERIES: 114-101

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, W. Va. Code §23-1-1f, W.Va. Code §23-1-1g, W.  
Va. Code §33-2-9, W. Va. Code §33-2-21a, W. Va. Code §33-4A-3, and W.  
Va. Code §33-20E-7.

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

March 4, 2021

**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 114  
PROCEDURAL RULE  
INSURANCE COMMISSIONER**

**SERIES 101  
EXEMPT PURCHASING**

**§114-101-1. General.**

1.1. Scope. -- This rule contains the procedures of the West Virginia Insurance Commissioner 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 §23-1-1f, W.Va. Code §23-1-1g, W. Va. Code §33-2-9, W. Va. Code §33-2-21a, W. Va. Code §33-4A-3, and W. Va. Code §33-20E-7.

1.3. Filing Date. -- February 2, 2021.

1.4. Effective Date. -- March 4, 2021.

**§114-101-2. Definitions.**

2.1. "Award" means the written determination of the selection of a vendor to perform under a contract issued after encumbrance and final OIC approval.

2.2. "Best value procurement" means a procurement method used in awarding a contract based on evaluating and comparing all established quality criteria, and cost is not the sole determining factor in the award. This includes RFPs, RFIs, and EOIs.

2.3. "Bid" means an offer by a vendor in response to a procurement document to provide commodities or services in accordance with the specifications of the OIC issued procurement document and includes a proposal to an RFP.

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

2.5. "Chief financial officer" means the OIC employee designated as such who manages the OIC's Financial Accounting Department and is responsible for oversight and management of financial, investment, reporting, purchasing, and budgeting functions for the agency.

2.6. "Commodities" means goods, supplies, materials, equipment, or any other tangible item.

2.7. "Contract" means the binding agreement entered into between the OIC and a vendor to provide the commodities or services requested in the procurement and includes a purchase order.

2.8. "Cooperative contract" means a contract awarded by another entity, including but not limited to, another state of West Virginia agency, board, or commission, or another organization regularly involved in the procurement of commodities or services for which the process of procurement and award were determined by the OIC to be in accordance with reasonable procurement standards.

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

2.10. “Emergency procurement” means an acquisition method used when time is of the essence, unforeseen causes arise that include a threat to public health, welfare, safety, circumstances warrant immediate action to stabilize the situation, or safeguarding the state’s assets, and not because of poor planning, neglect, or lack of organization.

2.11. “Expression of interest” or “EOI” means a procurement method that seeks vendors to provide information and express an interest in a procurement.

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

2.13. “Life cycle costing” means a procurement method that takes into consideration the cost of the commodity and service being acquired over its expected life or usage and for which cost is considered but is not a determining factor.

2.14. “Master agreement” means a contract with specified terms and conditions except quantity, which is also known as an open-end contract.

2.15. “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.

2.16. “OIC” means the Offices of the West Virginia Insurance Commissioner.

2.17. “OIC Procurement” means the unit within the OIC’s Administrative Services Division with personnel who manage the functionality of OIC procurement.

2.18. “Procurement” means the process of contracting for, purchasing, renting, leasing, or otherwise acquiring, receiving, and maintaining commodities and services.

2.19. “Procurement document” means an RFP, RFI, EOI, and other document and all attachments related to the bidding or other means of acquiring commodities and services.

2.20. “Protest” means a formal written statement from a prospective or an actual vendor that declares the vendor’s dissent or disagreement as to a procurement document or process pertaining to an OIC procurement.

2.21. “Request for information” or “RFI” means a document that seeks information to aid in preparing specifications.

2.22. “Request for proposal” or “RFP” means a document issued by the OIC to obtain commodities and services for which cost is not the sole determining factor for award.

2.23. “Request for quotation” or “RFQ” means a document issued by the OIC to obtain a quotation or bid.

2.24. “Requisition” means a written or electronic request for the purchase of commodities and services.

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

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

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

2.28. “Specification” means a clear and accurate description of the physical, functional, or performance characteristics or nature of a commodity being acquired, and may include requirements for inspection, testing, and performance.

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

2.30. “Total ownership or operational cost” means a procurement method that takes into consideration the costs of designing, bidding, implementing, operating, training, transitional costs, residual value, disposal, and processes for a commodity or service for which cost is not the determining factor in award.

2.31. “Vendor” means a person or entity considering or submitting a bid, a person or entity selected as the lowest responsible and responsive vendor in connection with a bid, or a person or entity that has been awarded the contract.

2.32. “wvOASIS” means the state’s accounting system managed by the Enterprise Resource Planning Board in conjunction with the West Virginia Department of Administration and the State Auditor’s Office.

**§114-101-3. General information.**

3.1. OIC procurements for commodities and services shall be centrally processed within the OIC to provide economical and efficient services at a reasonable cost, using fair and reasonable competition methods and providing equitable treatment of vendors.

3.2. Methods used to determine the appropriate commodities and services needed by the OIC may include:

3.2.1. Best value procurement;

3.2.2. Life cycle costing; and

3.2.3. Total ownership or operational costing.

3.3. The requirements or limitations in a procurement document shall be reasonable in consideration of OIC needs.

3.4. Documentation shall be maintained for all procurements and purchases by OIC Procurement to protect the processes.

3.5. The Chief Financial Officer shall audit OIC exempt procurement 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. In lieu thereof, the OIC may contract with a licensed public accounting firm to conduct this audit.

3.6. OIC 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.

3.7. Bids and direct award opportunities must be publicly solicited via wvOASIS.

3.8. There shall be a blackout period from the release of an RFQ, RFP or EOI by the OIC until award or cancellation during which the only contact with the OIC is through OIC Procurement.

3.9. Vendors shall be provided with instructions for submitting bids and may contact OIC Procurement as needed.

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

3.11. 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.

3.12. 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.

3.13. Bid openings must be witnessed by two OIC staff members, one of whom is with OIC Procurement. OIC Procurement personnel shall read aloud the names of the vendors submitting bids. For bids received pursuant to an RFP, OIC Procurement shall confirm that each original package contains a separately sealed cost proposal.

3.14. OIC Procurement shall provide timely written notice to the vendors that were unsuccessful in their bid not being awarded.

3.15. Bid evaluators shall have no financial, personal, or other conflict of interest relating to any vendor or vendor representative that has submitted a bid. Bid evaluators must sign a form certifying no conflicts of interest with respect to each bid.

3.16. 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.

3.17. The length of the term of a contract and any extensions shall be considered at the time the procurement documents are issued and then determined at the time the contract is issued. The OIC will use life cycle costing, total ownership or operational cost, or other reasonable methods to determine the appropriate length of a term and any extensions or renewals. A written justification must be in the file for any contract term longer than five years with renewals, as well as for extensions or renewals.

3.18. The OIC will evaluate existing contracts with terms exceeding five years every other year prior to termination using life cycle costing and total ownership or operation cost procurement methods to determine whether the commodities or services should be bid.

3.19. The OIC 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.

**§114-101-4. Purchasing requirements.**

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

4.2. All purchases of commodities and 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. As defined herein, the term contract includes purchase orders.

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

4.5. Prior to an award of a contract, vendors must be a registered vendor as required by the West Virginia State Purchasing Division, document any required license or insurance, and be in good standing with state and local entities, including but not limited to the OIC with respect to workers' compensation insurance and the West Virginia Secretary of State.

4.6. Vendors to be awarded a contract of \$1 million or more or a series of related contracts for which the cumulative total exceeds \$1 million shall submit to the OIC a fully completed Disclosure of Interested Parties form authorized by the West Virginia Ethics Commission.

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

4.8. All requests for commodities or services shall be submitted in a requisition to OIC Procurement via email, written memo, or other acceptable method. All requests require the approval of a division director or other person with the appropriate signature authority.

4.9. Upon receipt, a requisition shall be reviewed to determine the sourcing method for the procurement.

4.9.1. Sourcing methods to be considered shall include review of inventory from stockroom; state sources (e.g., correctional industries, sheltered workshops, surplus property); statewide or agency master agreements; cooperative contracts; or obtaining bids if required by the procurement method levels.

4.9.2. Any OIC contract usable by another state entity or a political subdivision shall declare such use.

4.10. Purchases and contracts for commodities and services shall be based on competitive bid whenever possible, subject to the following:

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

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

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

4.10.4. Purchases expected to exceed \$25,000 must be the subject of competitive bid solicitation unless otherwise allowed under subsection 4.11 of this rule.

4.11. OIC Procurement may authorize purchases directly from a vendor without competitive bidding under the following circumstances:

4.11.1. 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 OIC, in which case the OIC will document its due diligence in making this determination;

4.11.2. 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 OIC shall attempt to obtain three bids whenever possible. "Emergency" does not include circumstances caused by the OIC's neglect, poor planning, or lack of organization;

4.11.3. The commodity or service being sought is included on the "Impossible to Bid" list set forth in Section 9 of the West Virginia State Purchasing Division Procedures Handbook; or

4.11.4. Competitive bidding is not expressly required by statute.

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

4.11.4.a.1. Overall experience;

4.11.4.a.2. Professional certifications or designations;

4.11.4.a.3. Company specific experience;

4.11.4.a.4. Company type experience;

4.11.4.a.5. Knowledge of company or line of business;

4.11.4.a.6. Prior work for the OIC;

4.11.4.a.7. Professional reputation;

4.11.4.a.8. Availability and commitment to required timeframes;

4.11.4.a.9. Adequacy of staffing, including the ability of assigned staff members to complete the contract without substitution;

4.11.4.a.10. Quality of work;

4.11.4.a.11. Experience with National Association of Insurance Commissioners' accreditation review process and knowledge of the National Association of Insurance Commissioners' examination handbook and guidelines;

4.11.4.a.12. References from other insurance regulators or subject matter experts;

4.11.4.a.13. Projected costs;

4.11.4.a.14. Conflicts of interest;

4.11.4.a.15. Support services available to the vendor, including but not limited to information technology services and actuarial services; and

4.11.4.a.16. Any other guidelines or procedures the OIC considers appropriate.

4.12. Any required vendor terms and conditions must be submitted and approved before a contract is awarded. The OIC will obtain approval from the Attorney General as to contract form and conformity with applicable law when required by statute or when deemed necessary by OIC Procurement.

4.13. All procurement documents issued for a procurement shall include a specific date, time, and location for submission of bids.

4.13.1. Bids not submitted by the specified date and time to the specific location shall be rejected and not be considered.

4.13.2. OIC Procurement shall stamp bids with the date and time of actual receipt for bids physically received. Bids received through wvOASIS are stamped by the system.

4.13.3. Bids shall remain sealed until the specified date and time, at which time OIC Procurement will open the bids.

4.13.4. No bid received may be altered after opening.

4.13.5. A vendor submitting a bid may withdraw the bid at any time prior to bid opening.

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

4.15. Receiving reports shall be prepared and submitted in accordance with W. Va. Code §12-3-10f.

4.16. OIC Procurement 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.

#### **§114-101-5. Formal procurement documents and processes.**

##### **5.1. Request for Quotation (RFQ)**

5.1.1. An RFQ shall contain a detailed description of, or specification for, the item(s) being purchased, any required delivery date, quantities, bid price per unit, and information on how to complete and submit the RFQ bid and deadlines.

5.1.2. Bids shall be reviewed by OIC Procurement and the OIC division requesting the item(s) to verify each bid meets the requirements of the RFQ.

5.1.3. An award shall be made to the responsible and responsive vendor having the lowest bid.

## 5.2. Direct Awards

5.2.1. A direct award shall be a procurement method occurring only if:

5.2.1.a. The procurement file contains the following:

5.2.1.a.1. Written justification that the direct award is in the best interests of the state;

5.2.1.a.2. Documentation of efforts used to determine that there is no other source or that no other source would be willing or able to replace the existing source without a detrimental effect; and

5.2.1.a.3. No other vendor expresses an interest in providing the commodity or service in question.

5.2.1.b. A direct award may be used for procurements determined to be non-competitive, including the list of commodities and services in Section 9 of the West Virginia State Purchasing Division Procedures Handbook.

5.2.1.c. A direct award contract may be extended or renewed if the request is substantiated by a written justification of continuation of the contract.

## 5.3. Request for Proposal (RFP)

5.3.1. RFP documentation shall define the commodities and services desired to allow comparability of bids as submitted.

5.3.2. Procurements by RFP shall be advertised through media considered advisable and not cost prohibitive, including professional publications, wvOASIS, the OIC's website, and emails to potential vendors.

5.3.3. RFPs 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. Technical proposals must be opened first and fully evaluated prior to cost proposals being opened. Vendors shall be notified of the date and time of opening the cost portion. The highest scoring vendor will be awarded the contract.

5.3.4. At the date, time, and location of the bid opening, the bids received shall be opened and the names of the vendors submitting a bid read aloud and documented. OIC Procurement shall verify that the technical and cost portions of the bids are separate, and the cost portion is sealed.

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

#### 5.4. Emergency Procurements

5.4.1. In the event the Governor, OIC, or other authorized official declares an emergency exists, OIC Procurement shall determine to what extent the procedures set forth in this section will apply to procurements and authorize emergency procurements.

5.4.2. An emergency procurement shall use the procurement methods in this rule to the extent practicable.

5.4.3. OIC Procurement shall assist in obtaining bids, preparing documentation, verifying any required vendor registration and licensing, and issue any contracts necessary.

#### **§114-101-6. Information technology.**

6.1. A procurement of information technology (IT) may include many types of IT, such as software, hardware, services and support, and maintenance. The procurement of IT carries a high level of risk because of the importance, requirements, rapid industry changes, security, sophistication, and privacy issues associated with IT.

6.2. Software procurement requires consideration of whether the software meets the needs of the OIC, type of license, any available alternative software, costs, how the software is hosted, security, legal requirements, effects of a breach, compatibility with current systems, frequency of updates, any associated changes that will be needed over time, and ongoing support and maintenance.

6.3. A license term of use must be flexible, as well as associated services, support and maintenance. If OIC determines services, support and maintenance are needed beyond the current term of the contract, the contract may be extended or renewed at the discretion of OIC and the vendor.

6.4. If a current contract provides for future support and maintenance at the fees set by the vendor or as negotiated, the vendor shall provide a quotation of the fees and the period covered by those fees. The parties shall negotiate in good faith. Once OIC finds the quotation acceptable, then a change order to the current contract shall be issued with the quotation attached. A new contract is not needed.

6.5. If OIC believes only one vendor may reasonably provide specific commodities and services, including support and maintenance, the procurement may be handled as a direct procurement.

6.6. If the OIC, the vendor, or the law requires changes to a current contract, the parties shall negotiate in good faith to reach agreement. If an agreement is reached and put into writing signed by both parties, OIC Procurement shall issue a change order to the current contract containing the agreed language.

6.7. At least one year before an IT contract in the amount of \$2,500 or more and with a term longer than one year for software, hardware, or IT system terminates, including all available extensions, and the OIC desires to extend or renew the contract, OIC will evaluate and justify the extension or renewal using life cycle costing, total ownership or operational cost, or any other methods considered appropriate by the OIC. Additional factors to consider include current and anticipated work environment needs, compliance issues, current performance, availability of alternate sources, and costs. If the OIC determines the contract should not be rebid, it will determine the length of term for the renewal.

6.8. The OIC shall obtain approval from the West Virginia Office of Technology regarding the purchasing of computer software, hardware, services, support and maintenance.

**§114-101-7. Vendor complaints and protests.**

7.1. Complaints – A vendor may verbally or in writing complain about a procurement or purchase to OIC Procurement. OIC Procurement will provide a written response to the complaint.

7.2. Protests

7.2.1. Types of Protests

7.2.1.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 the OIC no later than five business days prior to the specified bid opening date and time. Protests received after that date shall not be considered.

7.2.1.b. Protests of Award – After selection of the apparent successful vendor in a procurement using an RFP, OIC Procurement will send a written notice of intent to award to each vendor submitting a bid stating the name of the apparent successful vendor and the date and time for a protest to be received by OIC Procurement. Protests received after the stated date and time shall not be considered.

7.2.1.c. 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.

7.2.2. 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 OIC in reaching a decision on the matter. The OIC must receive the letter of protest by the established deadline to be considered.

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

**§114-101-8. Public records.**

8.1. A bid shall be available to the public after opening.

8.2. Procurement documents shall inform vendors that the entire OIC 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.

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

8.4. If a vendor requests the OIC execute a non-disclosure agreement to protect portions of its bid from disclosure for an RFP procurement, it must make the request to OIC Procurement 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.

**§114-101-9. Violations.**

9.1. 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 OIC 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.

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