



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Economic Development WV Department of TITLE-SERIES: 145-17

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

RULE NAME: Purchasing Rule

CITE STATUTORY AUTHORITY: 5B-2-3

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 08/13/2021 4:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Jack Rife

ADDRESS: 1900 Kanawha Blvd. E., Building 3, Suite 800

Charleston, WV 25305

EMAIL: jack.m.rife@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 procedural rule establishes the processes and procedures to be used by the Department of Economic Development when purchasing commodities.

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

H.B. 2019 exempted the Department of Economic Development from the Department of Administration's Purchasing Division.

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		
	2021 Increase/Decrease (use "-")	2022 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):

The Department of Economic Development already has staff adequate to assume the additional purchasing duties.

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

Yes

Jack M Rife -- 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 145
PROCEDURAL RULE
DEPARTMENT OF ECONOMIC DEVELOPMENT

SERIES 17
PURCHASING RULE

§145-17-1. General.

1.1. Scope. -- This rule establishes the procedures for purchase of commodities and services by the Department of Economic Development pursuant to the purchasing exemption.

1.2. Authority. -- W. Va. Code §5B-2-3.

1.3. Filing Date. --

1.4. Effective Date. --

§145-17-2. Definitions.

2.1. “Agency Delivery Order” means a written order to the vendor against a master agreement authorizing quantities, commodities, and services be delivered in accordance with the terms, conditions, and prices stipulated in the original contract.

2.2. “Best Value Procurement” means a purchasing method used in awarding a contract based on evaluating and comparing all established quality criteria where cost is not the sole determining factor in the award.

2.3. “Bid” or “Bids” mean anything that a vendor submits in response to a solicitation that constitutes an offer to the State and includes, but is not limited to, documents submitted in response to a request for quotation, proposals submitted in response to a request for proposal, or proposals submitted in response to an expression of interest.

2.4. “Capital Improvements” means activities that are directed toward expanding the capacity of an asset or otherwise upgrading it to serve needs different from, or significantly greater than, its current use.

2.5. “Department” means the Department of Economic Development, including the Office of the Secretary and the Office of Energy.

2.6. “Direct Award” means a procurement method allowing for the non-competitive purchase of commodities or services when only one vendor can supply the needed commodity or service under the circumstances or no other vendor is willing or available to replace the existing vendor without a detrimental effect on the Department.

2.7. “Director” means the Secretary of the Department, Deputy Secretary of the Department, or any Director of any section or office within the Department.

2.8. “Division of Purchasing” or “Purchasing Division” means the central office within the Department of Administration providing purchasing and travel services to State agencies.

2.9. “F.O.B. destination” and “free on-board destination” mean the seller or vendor must transport or pay for the transportation of commodities and services to the point of destination specified in the contract.

2.10. “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.

2.11. “Maintenance and repairs” means activities directed toward keeping fixed assets in an acceptable condition. Activities include preventative and deferred maintenance; replacement of parts, systems or components; and other activities needed to preserve or maintain the asset.

2.12. “Non-responsive” means a bid that fails to conform to the solicitation in all material respects.

2.13. “Open End Contract” or “Master Agreement” mean a contract that covers a period of time in which all terms, conditions, and prices are specified for quantity.

2.14. “Procurement Officer” means the Procurement Officer of the Department or anyone the Procurement Officer has designated to perform specific tasks or functions.

2.15. “Purchasing Liaison” means an employee of the Department that is responsible for the procurement of goods and services for a particular section or office.

2.16. “Requisition” means a written or electronic request sent to the Procurement Office for the purchase of commodities and services.

2.17. “Secretary” or “Cabinet Secretary” means the Secretary of the Department.

2.18. “Section” or “Sections” means any section or office within the Department.

2.19. “Stringing” means issuing a series of requisitions or dividing or planning procurements to circumvent competitive bidding or spending thresholds.

2.20. “Working days” means Monday through Friday, excluding Saturday, Sunday, state holidays and days that government offices are closed due to declaration of an emergency.

2.21. All other terms shall have the same meaning prescribed in W. Va. Code §5A-1-1 and §5A-3-1 et seq.

§145-17-3. Applicability.

3.1. This procedural rule applies to the Department of Economic Development and all sections and offices within.

3.2. All purchases over \$25,000.01 must be approved by the Procurement Officer or his or her authorized designee.

3.3. The Procurement Officer may grant permission to approve purchases up to \$25,000 to the purchasing liaison for each respective section and office.

3.4. All automated systems prescribed by Procurement Office as statewide systems are mandatory for Department sections and offices.

§145-17-4. Duties of Procurement Officer.

4.1. Procurement Officer shall:

4.1.1. Ensure that purchases and contracts for commodities and services are based on competitive bids whenever possible.

4.1.2. Establish a list of commodities and services that are not possible to submit for competitive bid by the Department.

4.1.2.a. Sections and offices may purchase the commodities and services on the list directly from the vendor and are not required to solicit competitive bids for purchase of those items approved by the Procurement Officer. However, competitive bidding is always encouraged.

4.1.2.b. Section and office requests to add commodities or services to the list must be accompanied by written justification and an explanation of why competitive bids are not possible.

4.1.2.c. Nothing in this subsection supersedes or replaces the Attorney General's authority to approve contracts as to form.

4.1.3. Purchase or contract for, in the name of the Department, the commodities and services required by the Department's sections and offices.

4.1.4. Prescribe the manner in which commodities and services shall be purchased, delivered, stored, and distributed.

4.1.5. Review specifications and descriptions before soliciting bids to ensure specifications and descriptions do not favor a particular brand or vendor.

4.1.6. Accept or reject any and all bids in whole or in part.

4.1.7. Waive minor irregularities in bids or specifications when the Procurement Officer determines such action to be appropriate.

4.1.8. Apply and enforce standard specifications.

4.1.9. Prescribe the amount of deposit or bond to be submitted.

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

4.1.11. Prescribe the manner of inspection for all deliveries of commodities and services.

4.1.12. The Procurement Officer may authorize staff to review, audit, and approve section requests, purchases, and other transactions and performance that fall under the duties of the Procurement Office. Authorized staff shall have access at any and all times to personnel, records, reports, and other documents, as needed. Authorized staff may also provide relevant training for Department personnel.

§145-17-5. Remedies.

5.1. The Procurement Officer may require the Department sections attempt to resolve any issues that it may have with the vendor prior to pursuing a remedy contained herein. The Department sections must document any resolution efforts and provide copies of those documents to the Procurement Officer.

5.2. Contract Cancellation.

5.2.1. The Procurement Officer may cancel a purchase or contract immediately under any one of the following conditions including, but not limited to:

5.2.1.a. The vendor agrees to cancellation.

5.2.1.b. The vendor has obtained the contract by fraud, collusion, conspiracy, or is in conflict with any statutory or constitutional provision of the State of West Virginia.

5.2.1.c. Failure to honor any contractual term or condition or to honor standard commercial practices.

5.2.1.d. The existence of an organizational conflict of interest is identified.

5.2.1.e. Funds are not appropriated, or an appropriation is discontinued by the legislature for the acquisition.

5.2.1.f. Violation of any federal, state, or local law, regulation, or ordinance.

5.2.2. The Procurement Officer may cancel a purchase or contract for any reason or no reason, upon providing the vendor with 30 days' notice of the cancellation.

5.3. Opportunity to Cure.

5.3.1. 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 Procurement Officer may request the vendor remedy the contract breach or legal violation within a time frame the Procurement Officer deems appropriate.

5.3.2. If the vendor fails to remedy the contract breach or legal violation or the Procurement Officer determines, at his or her sole discretion, that such a request is unlikely to yield a satisfactory result, then he or she may cancel immediately without providing the vendor an opportunity to perform a remedy.

5.4. Re-Award. The Procurement Officer may award a cancelled contract to the next lowest bidder (or next highest scoring bidder if best value procurement) without a subsequent solicitation if the following conditions are met:

5.4.1. The next lowest responsible bidder (or next highest scoring bidder if best value procurement) is able to perform at the price contained in its original bid submission, and

5.4.2. The contract is an open-end contract, a one-time purchase contract, or a contract for work which has not yet commenced.

5.4.3. Award to the next lowest responsible bidder (or next highest scoring bidder if best value procurement) will not be an option if the vendor's failure has in any way increased or significantly changed the scope of the original contract. The vendor failing to honor contractual and legal obligations is responsible for any increase in cost the state incurs as a result of the re-award.

5.5. Non-responsible.

5.5.1. If the Procurement Officer believes that a vendor may be non-responsible, the Procurement Officer may request a vendor or Department section provide evidence 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.

5.5.2. If the Procurement Officer determines the vendor is non-responsible, the Procurement Officer shall reject the vendor's bid and shall not award the contract to that vendor.

5.5.3. 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.

5.5.4. A determination of non-responsibility will only extend to the contract for which the vendor has submitted a bid and does not operate as a bar against submitting future bids.

5.6. Suspension by the Department.

5.6.1. The Director may suspend, for a period not to exceed one year, the right of a vendor to bid on procurements issued by the Procurement Office if:

5.6.1.a. The vendor has exhibited a pattern of submitting bids and then requesting that its bid be withdrawn after bids have been publicly opened. For purposes of this provision, a pattern is two or more instances within a 12-month period.

5.6.1.b. The vendor has exhibited a pattern of poor performance in fulfilling his or her contractual obligations to the Department. Poor performance includes, but is not limited to, two or more instances of any of the following:

5.6.1.b.1. Violations of law, regulation, or ordinance;

5.6.1.b.2. Failure to deliver timely;

5.6.1.b.3. Failure to deliver quantities ordered;

5.6.1.b.4. Poor performance reports;

5.6.1.b.5. Failure to deliver commodities or services at the quality level required by the contract; and

5.6.1.b.6. The vendor has breached a contract issued by the Procurement Office or any section or office and refuses to remedy that breach.

5.6.1.c. The Director shall suspend from bidding on Department purchases up to one year, any vendor violating the West Virginia Code or rules adopted by the Procurement Office.

5.6.2. Vendor suspension for the reasons listed in subsection 5.6.1. of this rule shall occur as follows:

5.6.2.a. Upon a determination by the Director that a suspension is warranted, the Director will serve a notice of suspension to the vendor.

5.6.2.b. A notice of suspension must inform the vendor:

5.6.2.b.1. Of the grounds for the suspension;

5.6.2.b.2. Of the duration of the suspension;

5.6.2.b.3. Of the right to request a hearing contesting the suspension;

5.6.2.b.4. That a request for a hearing must be served on the Director no later than five working days of the vendor's receipt of the notice of suspension;

5.6.2.b.5. That when a vendor fails to request a hearing in accordance with paragraph 5.6.2.b.4. of this rule, that failure will be considered a waiver of the right to a hearing and will result in automatic enforcement of the suspension without further notice or opportunity to respond; and

5.6.2.b.6. That a request for a hearing must include an explanation of why the vendor believes the Director's asserted grounds for suspension do not apply and why the vendor should not be suspended.

5.6.2.c. A vendor's failure to request a hearing in accordance with paragraph 5.6.2.b.4. of this rule will be considered a waiver of the right to a hearing and will result in automatic enforcement of the suspension without further notice or opportunity to respond.

5.6.2.d. A vendor who files a timely request for a hearing but fails to provide an explanation of why the asserted grounds for suspension are inapplicable or should not result in suspension, may result in denial of the vendor's hearing request.

5.6.2.e. Within five working days of receiving the vendor's request for a hearing, the Director will serve the vendor with a notice of hearing that includes the date, time, and place of the hearing.

5.6.2.f. The hearing will be recorded, and an official record prepared. Within 10 working days of the conclusion of the hearing, the Director will issue and serve on the vendor a written decision either confirming or reversing the suspension.

5.6.3. A vendor may appeal a decision of the Director to the Cabinet Secretary. The appeal must be in writing and served on the Cabinet Secretary no later than five working days of receipt of the Director's decision.

5.6.4. A vendor whose right to bid on Department purchases has been suspended by the Director shall have the right to have the Director's actions reviewed by the Cabinet Secretary, who shall have the power and authority to set aside such suspension.

5.6.5. Any notice or service related to suspension actions or proceedings must be provided by certified mail, return receipt requested.

5.7. Vendor Debarment by the Department.

5.7.1. The Procurement Officer has primary responsibility for administering the debarment process. The Procurement Officer's duties include:

5.7.1.a. Obtaining lists of vendors declared ineligible under federal laws and regulations;

5.7.1.b. Notification of the Department sections and offices regarding disbarred vendors;

5.7.1.c. Compiling and maintaining a current, consolidated list of all vendors that have been disbarred or declared ineligible, the period of such debarment, and the reasons therefor; and

5.7.1.d. Investigating complaints about vendors from the Department and its sections and offices responsible for contracting with vendors for supplies and services.

5.7.2. The Director has primary responsibility for initiating and conducting debarment procedures.

5.7.2.a. The Director may debar a vendor if the vendor has been declared ineligible to participate in procurement related activities under federal law and regulation, when the vendor's name appears on the West Virginia Division of Purchasing or United States Excluded Parties List System, on the basis of any one or more grounds for debarment pursuant to W. Va. Code §5A-3-33d, or when any section or office requests debarment of a vendor and the Director finds probable cause for debarment exists.

5.7.2.b. Vendor debarment shall be conducted according to the following procedures:

5.7.2.b.1. The Director shall notify the vendor by certified mail, return receipt requested, of the following:

5.7.2.b.1.A. The reasons for the proposed debarment in sufficient detail to put the vendor on notice of the conduct or transactions upon which the proposed debarment is based;

5.7.2.b.1.B. The causes relied upon for the proposed debarment;

5.7.2.b.1.C. That within 10 working days after receipt of the notice, the vendor may submit in writing information and argument in opposition to the proposed debarment;

5.7.2.b.1.D. The procedures governing debarment decision-making; and

5.7.2.b.1.E. The potential effect of the proposed debarment.

5.7.2.b.2. A vendor that has received notice of the proposed debarment by certified mail, return receipt requested, must respond to the proposed debarment within 10 working days after receipt of notice or the debarment will be instituted without further notice. A vendor is deemed to have received notice, notwithstanding the vendor's failure to accept the certified mail, if the letter is addressed to the vendor at its last known address. After considering the matter and reaching a decision, the Director shall notify the vendor of his or her decision by certified mail, return receipt requested.

5.7.2.b.3. In any debarment decision, the Director shall make a specific finding, based on the substantial record, whether the public interest requires that the debarment decision extend to all commodities and services of the vendor, or whether the public interest allows the debarment decision to be limited to specific commodities or services. Proof of grounds for debarment must be clear and convincing.

5.7.2.b.4. In any debarment decision, the Director shall specify the length of the debarment period. The debarment period must be for the period of time the Director finds necessary and proper to protect the public from an irresponsible vendor.

5.7.2.b.5. In the event a vendor wishes to contest the debarment decision, the Director shall decide the matter in accordance with the provisions of W. Va. Code §29A-5-1 et seq.

5.7.2.b.6. Any vendor, other than a vendor prohibited from participating in a federal procurement, undergoing debarment proceedings is permitted to continue participating in the Department's procurement process until a final debarment decision has been reached. Any contract that a debarred vendor obtains prior to a final debarment decision shall remain in effect for the current term but may not be extended or renewed. Notwithstanding the foregoing, the Director may cancel a contract held by a debarred vendor if the Director determines, in his or her sole discretion, that doing so is in the best interest of the Department. A vendor prohibited from participating in federal procurement will not be permitted to participate in the Department's procurement process during debarment proceedings.

5.7.2.b.7. If the Director's final debarment decision is that debarment is warranted and notice of the final debarment decision is mailed, the Procurement Office shall reject any bid submitted by the debarred vendor, including any bid submitted prior to the final debarment decision if that bid has not yet been accepted and a contract consummated.

5.7.3. Unless the Director determines in writing there is a compelling reason to do otherwise, the Department may not solicit offers from, award contracts to, nor consent to subcontract with a debarred vendor during the debarment period.

5.7.4. The Procurement Officer may not exercise an option to renew or otherwise extend a current contract with a debarred vendor, nor a contract which is being performed in any part by a debarred subcontractor, unless the Director approves the action in writing, based upon compelling evidence for exercise of the option or extension.

5.7.5. The Director may extend the debarment to include a related party of the vendor. The Director shall follow the same procedure, and afford the related party like notice, hearing and other rights, for extending the debarment to the affiliate as provided for under section 5.7. of this rule. For purposes of this subsection, a related party may include:

5.7.5.a. Spouses, parents, children, siblings, grandparents, or grandchildren of a debarred vendor or individual;

5.7.5.b. Any individual or entity that partially or completely owns, controls, or influences, or is partially or completely owned, controlled, or influenced by the actions of a debarred vendor or individual;

5.7.5.c. Entities that are related under common ownership or control with a debarred vendor; or

5.7.5.d. A business entity or individual that has contracted with or employed a debarred vendor or individual to perform work on one or more public contracts.

5.7.6. The Director may reduce the period or extent of debarment, upon the vendor's request supported by documentation, for the following reasons:

5.7.6.a. Newly discovered material evidence;

5.7.6.b. Reversal of the conviction or judgment upon which debarment was based;

5.7.6.c. Elimination of the causes for which the debarment was imposed; or

5.7.6.d. Other good cause shown, including evidence that the vendor has become responsible.

5.7.7. The Director may extend the debarment period for an additional period if he or she determines the extension is necessary to protect the interests of the Department. Upon the expiration of a debarment period, the Director shall extend the debarment period for any vendor who has not paid all current state obligations for at least the four most recent calendar quarters, exempting the current calendar quarter, and for any vendor who is in default on a repayment agreement with the Department, until such time as the cause for the extended debarment is removed. If the Director extends the debarment period he or she shall follow the same procedures, afford the vendor like notice, hearing, and other rights for extending the debarment as provided for debarment under this section of this rule.

5.7.8. A debarment under this rule may be waived by the Director with respect to a particular contract if he or she determines the debarment of the vendor would severely disrupt the operation of a governmental entity to the detriment of the general public or would not be in the public interest.

5.8. Damages.

5.8.1. A vendor who fails to perform as required under a contract shall be liable for actual damages and costs incurred by the state.

5.8.2. If any commodities delivered under a contract have been used or consumed by a section or office and on testing the commodities are found not to comply with specifications, no payment may be approved by the section or office for the merchandise until the amount of actual damages incurred has been determined.

5.8.3. The Department shall seek to collect damages by following the procedures established by the Office of the Attorney General for the collection of delinquent obligations.

§145-17-6. Registration, Advertising, Bidding, and Award.

6.1. Registration of Vendors.

6.1.1. All vendors must register through the Vendor Self-Service portal with the Purchasing Division prior to being awarded a contract by the Department. W. Va. Code §5A-3-12 requires the Disclosures of Information, such as ownership, all names under which a vendor is doing business, their physical address and its corporate offices.

6.1.2. Purchasing Division Fee Payment.

6.1.2.a. All vendors shall pay the Purchasing Division annual registration fee or be exempt from the payment requirement pursuant to W. Va. Code of State Rules, Series 148 Title 1, Purchasing, prior to being awarded a contract by the Department, except that the Procurement Officer may exempt the following categories of vendors from this requirement.

6.1.2.a.1. Vendors providing a good or service under a direct award solicitation are not required to pay the registration fee. The fee is considered waived by the Procurement Officer for all direct award providers.

6.1.2.a.2. Any vendor can be exempted from paying the registration fee if the Procurement Officer determines that waiving the registration fee would be in the best interest of the Department.

6.1.3. Other registrations, Licenses, etc.

6.1.3.a. The vendor must be licensed and in good standing in accordance with any and 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 State Tax Department, West Virginia Office of the Insurance Commissioner, the West Virginia State Auditor, the West Virginia State Treasurer, or other state agencies or political subdivisions prior to being awarded a contract. The vendor must provide all necessary releases to obtain information necessary to verify that the vendor is licensed and in good standing with the above entities.

6.1.4. Failure to Register.

6.1.4.a. The Procurement Officer is prohibited from awarding any contract to any vendor not properly registered with the Purchasing Division. If a vendor is eligible to be awarded or has been awarded a contract and it is determined that the vendor has failed to comply with the requirements of Section 6. of this rule, the vendor will be given a period of time that the Procurement Officer deems sufficient to cure the failure. If after that period, vendor has not cured the failure, the Procurement Officer may cancel the contract.

6.2. Advertising.

6.2.1. Solicitations that exceed \$25,000.01 must be advertised using available media such as wvOasis, newspapers, trade journals, or any other media the Procurement Officer considers advisable.

6.2.2. The type and duration of advertising completed is at the Procurement Officer's discretion.

6.2.3. This provision shall not apply to expressions of interest procured by the sections or offices pursuant to W. Va. Code §5G-1-4 or other solicitations governed by law that mandates certain advertising requirements be met.

6.3. Bidding.

6.3.1. The Procurement Office must receive bids from vendors prior to the date and time of the bid closing listed on the solicitation forms provided by the Procurement Office.

6.3.2. The Procurement Officer must reject bids received after the designated time and date. Each vendor is solely responsible for delivering its bid to the Procurement Office.

6.3.3. An authorized representative of the vendor must sign all bids submitted to the Procurement Office. A corporate or other business entity signature without an individual name is not an acceptable signature.

6.3.4. The Procurement Officer may allow bids by electronic transmission as defined in W. Va. Code §5A-1-1(6). Bids by electronic transmission must be received by the Procurement Office prior to the bid closing date and time. A bid will not be considered received until after transmission is completed.

6.3.5. A vendor choosing to submit a bid or a written change to a bid by electronic transmission accepts full responsibility for transmission and receipt of the bid or written change to a bid. The Department accepts no responsibility for the unsuccessful and/or incomplete transmission of bids or changes to bids by electronic transmission. Bids submitted via electronic transmission may not be sealed until received by the Procurement Office. The Procurement Office makes no guarantee of confidentiality when vendors utilize electronic transmission.

6.3.6. Copies of bids may be open for public inspection in the office of the Procurement Office at any time after the completion of the public bid opening. No original bid may be removed from the presence of a Procurement Office representative. The Procurement Officer may prescribe policies to include scanning, copying, or other methods of assuring public access. The files of the Procurement Office are open for public inspection after the award has been made.

6.3.7. A bidder may make a change to a sealed bid before the bid closing. A bidder must submit changes in writing or by electronic transmission to the Procurement Office. To be effective, any change must be received by the Procurement Office prior to the date and time of the bid closing.

6.3.8. The Procurement Officer may reject a bid a vendor declares erroneous after the bid opening, but otherwise appears to be responsive, if all of the following conditions exist:

6.3.8.a. An error was made;

6.3.8.b. The error materially affected the bid;

6.3.8.c. Rejection of the bid would not cause a hardship on the sections or offices involved other than losing an opportunity to receive commodities and services at a reduced cost;

6.3.8.d. Enforcement of the part of the bid in error would be unconscionable; and

6.3.8.e. In order for the Procurement Officer to reject a bid under this subsection, the public file must contain documented evidence that all of the conditions set forth in this subsection exist.

6.3.9. The Procurement Officer must reject a bid that is found to be non-responsive.

6.3.10. If there is a conflict between the extension price and the unit price in the bid, the unit price prevails.

6.3.11. Vendor must disclose any instance where the vendor's bid fails to comply with the requirements of the solicitation, which includes but is not limited to, failure to comply with a mandatory requirement or goods or services not meeting the required specifications. If changes are not stated, the Procurement Officer may assume that items offered meet specifications.

6.3.12. Vendors are responsible for the accuracy of the information on and in the bid envelopes.

6.3.13. Vendors may contact the Procurement Office to obtain official bid forms.

6.3.14. All sales to the State of West Virginia are exempt from Consumer Sales Tax or Excise Tax by blanket state exemption and blanket federal exemption.

6.4. Awards.

6.4.1. Any award made by the Procurement Officer will be in accordance with the law governing the type of procurement being awarded. The Procurement Officer may make multiple or split awards when it is in the best interest of the Department.

6.4.2. The Procurement Officer may accept or reject, in whole or in part, any bid when the Procurement Officer feels it to be in the best interest of the Department. If any bid is rejected, the Procurement Officer shall place a written explanation in the purchase order file.

6.4.3. When tie bids are received, the Procurement Officer shall break the tie by the flip of a coin, draw of the cards, or any other impartial method considered prudent by the Procurement Officer.

6.4.4. Vendor Preference.

6.4.4.a. Reciprocal Preference. Reciprocal preference as described in W. Va. Code §5A-3-37(b) applies to commodities. For purposes of application of reciprocal preference, the term commodity will include any contract that involves a commodity being provided to the Department, even if the majority of the contract relates to services. This rule does not apply to construction let to bid under W. Va. Code §5-22-1. Any vendor that desires to receive the reciprocal preference contained in W. Va. Code §5A-3-37(b) must request the preference in writing at the time of bid submission and provide all documentation necessary to prove its status as a resident of West Virginia, as that term is defined in W. Va. Code §5A-3-37(a), at the time of bid submission. That required documentation must include:

6.4.4.a.1. A Certificate of Good Standing from the West Virginia Tax Department;

6.4.4.a.2. Documentation filed with the Secretary of State showing the state of incorporation, the address of all officers, the corporate headquarters, the address of the principal place

of business, and other pertinent information. Entities not required to file with the Secretary of State may provide an affidavit confirming that the headquarters or principal place of business is in West Virginia, along with a copy of a utility bill in the name of the business entity;

6.4.4.a.3. A copy of the most recent personal property tax ticket showing taxes have been paid; and

6.4.4.a.4. An affidavit confirming that the business entity has paid all applicable business taxes imposed by Chapter 11 of the West Virginia Code.

6.4.4.b. Preference for Motor Vehicles and Construction and Maintenance Equipment and Machinery. Any vendor providing the Department with motor vehicles or construction and maintenance equipment and machinery used in highway and other infrastructure projects that desires to receive the preference contained in W. Va. Code §5A-3-37(c) must request the preference in writing at the time of bid submission and provide all documentation necessary to prove its entitlement to the preference requested at the time of bid submission. Required documentation will vary depending on the preference requested, but acceptable forms of documentation are described below.

6.4.4.b.1. Resident Vendor Documentation. A vendor's status as a West Virginia resident can be proven with the documentation listed in subdivision 6.4.4.a. of this section.

6.4.4.b.2. Continuous Residency. Continuous residency of business entities can be established by providing the documentation required in subdivision 6.4.4.a. of this rule for the requisite number of years. Continuous residency for employees can be established by including the number of years of residency in West Virginia for each employee included in the list described in paragraph 6.4.4.b.3. of this subdivision.

6.4.4.b.3. Employment. Employment numbers and employment percentages can be verified by submitting a list of employees by first initial and last name and including each employee's city and state of residence with a sworn statement that the list is complete and accurate.

6.4.4.b.4. Ownership. Ownership requirements can be verified by the vendor submitting an affidavit listing each owner and that owner's ownership share as a percentage of the whole entity.

6.4.4.b.5. Veteran Status. Veteran status can be verified by including applicable federal forms that designate the vendor as a veteran.

6.4.5. Requirements for bonds and deposits.

6.4.5.a. The Procurement Officer shall determine the applicability and amount of bonds or deposit required of a vendor at any time, if it is judged the security is necessary to safeguard the Department from undue risk.

6.4.5.b. The Procurement Officer may require the vendor to submit a performance bond, litigation bond or other security acceptable to the Procurement Officer, payable to the State of West Virginia. Neither personal checks nor company checks are acceptable.

6.4.5.c. Vendors can request that bonds or other security be returned after the purpose for which the bond was provided has been fulfilled. Upon confirmation from the sections, offices, or other

relevant party that the bond or security in question has fully served its purpose, the Procurement Officer may return the bond or security.

6.5. Specification.

6.5.1. Specifications must be written to encourage competition to the fullest extent possible. No person may write specifications, or attempt to influence the drafter of specifications, to limit competition or favor or disfavor a particular brand or vendor. Sections and offices may not use brand or vendor names to restrict competition. If, however, brand names are used to adequately describe a needed commodity or service, the brand or vendor name must be followed by the phrase "or equal" to promote and encourage competition.

6.5.1.a. Examples of limiting competition or favoring a brand or vendor include, but are not limited to:

6.5.1.a.1. Drafting specifications to match a vendor's description of its commodity or service to the exclusion of others;

6.5.1.a.2. Listing a brand name in specifications without noting that equivalent products will be considered; and

6.5.1.a.3. Drafting specifications that are so restrictive that only one desired vendor can meet the requirements without adequate justification for the restrictions.

6.5.1.b. Nothing contained in this section will be construed to prevent sections or offices from drafting specifications with restrictions and mandatory requirements that are necessary to perform the objectives for which the commodity or service is purchased.

6.5.1.c. Reduced need for training, maintaining consistency in inventory, staff familiarity, and similar other objectives will not be sufficient to justify restrictions in specifications.

6.5.1.d. Sections and offices that use a brand or vendor name to describe a needed commodity or service must also list in the specifications the mandatory components of that commodity or service that the reference to a brand or vendor name is intended to capture.

6.5.1.e. A vendor's equality with the brand or vendor name will be evaluated on the basis of the mandatory components only. If a vendor bids a commodity or service that is equal to the brand or vendor name with regard to all identified mandatory components, the Procurement Officer shall not disqualify the vendor's bid due to inequality on non-mandatory components.

6.5.1.f. Any section or office request to disqualify a vendor on the grounds that the vendor has bid an unequal product must be accompanied by written justification listing the mandatory component that is unequal and explaining how the product bid is unequal.

6.5.2. The Procurement Officer may develop standard specifications that will form the basis of Agency contracts used by sections and offices. Standard specifications shall include information relating to the cost of maintenance and expected life of the commodities and services when the Procurement Officer determines there are applicable nationally accepted standards.

6.5.3. The Procurement Office has final approval over specifications and may require the sections or offices modify specifications. In the event the sections or offices refuse to make the required changes, the Procurement Officer is prohibited from issuing a solicitation until the sections or offices provide the Procurement Officer with a written explanation for the refusal that the Procurement Officer deems satisfactory.

6.6. Bid Evaluation.

6.6.1. Evaluators of bids must certify that no financial, personal, or other conflict of interest exists relating to any vendor or vendor representative that has submitted a bid. The Procurement Office may develop a form that evaluators can sign for certification purposes of this subsection.

6.6.2. From the time a requisition is submitted to the Procurement Office for public advertisement until an award is made, evaluators and section and office personnel are not permitted to communicate with vendors about the solicitation or any component thereof without prior approval from the Procurement Office.

6.6.2.a. All communications regarding the solicitation must be directed to the Procurement Office until an award has been made.

6.6.2.b. Nothing in this subsection, however, shall prevent the evaluators and section and office personnel from communicating with a vendor about existing contracts or other matters unrelated to the solicitation in question.

6.7. Deliveries.

6.7.1. Sections and offices are responsible for:

6.7.1.a. The inspection of commodities and services upon delivery to ensure purchases meet contractual requirements.

6.7.1.b. Maintaining records of receipt.

6.8. Change Orders.

6.8.1. The Procurement Officer has the duty and responsibility to review and approve change orders just as he or she has the duty and responsibility for review and approval of the original contract.

6.8.2. Change order submission.

6.8.2.a. Sections and offices desiring to make a change to a contract must submit a request for the contract change to the Procurement Office.

6.8.2.b. Any change order request submitted to the Procurement Office that requires vendor agreement must include the vendor's agreement in writing.

6.8.3. The Procurement Officer may ask for, and the section and offices must provide, any documentation or further explanation that the Procurement Officer deems necessary to aid in reviewing a change order request.

6.8.4. Rejection.

6.8.4.a. The Procurement Officer shall reject the change order if upon review he or she determines that:

6.8.4.a.1. It has not been properly justified.

6.8.4.a.2. Fails to include necessary documentation.

6.8.4.a.3. Is or could be construed as an attempt to circumvent the bidding process.

6.8.4.a.4. Or is otherwise unfit to be approved.

6.8.5. Change orders must be approved by the Attorney General's office, as to form, just as the original contract is approved as to form by that office.

6.8.6. Timing of Work.

6.8.6.a. Sections and offices must not permit vendors to perform work that the sections or offices anticipate will be added to a contract through a change order until such time as the change order has been:

6.8.6.a.1. Formally approved by the Procurement Office and the Attorney General's Office;

6.8.6.a.2. Encumbered by the Procurement Office; and

6.8.6.a.3. Mailed to the vendor.

6.8.6.b. This subsection related to timing of work does not apply to government construction contracts executed pursuant to W. Va. Code §5-22-1 et seq.

§145-17-7. Purchasing Methods.

7.1. Purchases of \$25,000 or less.

7.1.1. Sections and offices may make purchases of \$25,000 or less per transaction for commodities and services without processing the purchase as a formal solicitation through the Procurement Office, provided the sections and offices adhere to the most current Procurement Office purchasing rule established by the Department.

7.1.2. Sections and offices must keep records of these purchases on file and make them available for public inspection during the normal office hours of the sections and offices.

7.1.3. Sections and offices shall not issue a series of requisitions or divide or plan procurements to circumvent competitive bidding or spending thresholds, otherwise known as stringing.

7.1.4. If a section or office fails to comply with the rule established for purchases of \$25,000 or less, the Procurement Officer has the ability to recommend to the Director for approval the following corrective actions:

7.1.4.a. Suspend or reduce purchasing permission for that section or office.

7.1.4.b. Require the section or office to provide additional reports and documentation relating to purchases of \$25,000 or less for Procurement Office review.

7.1.4.c. Require the section or office to submit to additional oversight that the Procurement Officer deems appropriate.

7.1.4.d. Require the section or office personnel responsible for purchases of \$25,000 or less participate in remedial training as approved by the Procurement Office.

7.2. Purchases in excess of \$25,000.01.

7.2.1. Purchases of commodities and services that exceed \$25,000.01 shall be made by the Procurement Office.

7.2.2. The use of a purchase order is required for purchases over \$25,000.01 and the agency shall continue to submit contracts to the Attorney General's office for approval.

7.3. Open End Contracts and Statewide Contracts.

7.3.1. The Department may secure open end contracts to obtain commodities and services to supply the repetitive needs of the sections and offices in the form of statewide contracts, blanket orders, or section and office contracts.

7.3.2. If the Procurement Officer establishes a Department open end contract or Statewide contract, any section or office covered by the contract is required to use it unless not using the contract would result in a lower purchase price for a comparable commodity.

7.3.2.a. The Procurement Officer may grant sections and offices a waiver that permits the section or office to purchase from a source other than the open-end contract.

7.3.3. If the Procurement Officer establishes a Department contract, all sections and offices are required to use it.

7.3.3.a. The Procurement Officer may grant sections or offices a waiver that permits the section or office to purchase from a source other than the Department contract.

7.3.4. Granting of a waiver from an open end, Statewide or Department contract will be considered on a case-by-case basis and will only be granted if the Procurement Officer determines the waiver is in the best interest of the Department. A waiver will only be granted if the section or office can show that any one of the following conditions exist:

7.3.4.a. The vendor is unable to deliver the commodity or service by the required delivery date, assuming the section or office is not imposing an unreasonable delivery deadline.

7.3.4.b. The vendor is unresponsive to ordering requests.

7.3.4.c. The vendor has refused to perform.

7.4. Direct Award Procurement.

7.4.1. The Procurement Officer may approve the purchase of commodities and services directly from a vendor as a direct award procurement without competitive bidding if:

7.4.1.a. The section or office can acquire the good or services from only one source.

7.4.1.b. The section or office provides written documentation to the Procurement Officer setting forth the basis for the direct award procurement and the specific efforts made to determine the availability of other sources.

7.4.2. Sections and offices are encouraged to solicit competition rather than process a direct award request. The Procurement Officer may reject direct award requests whenever competition is believed to be available.

7.4.3. All direct award requests exceeding \$25,000 made to the Procurement Officer shall be publicly advertised and made available for review by vendors registered with the Purchasing Division. Should this advertisement cause inquiry and concern or requests to bid by prospective bidders or other interested parties, the Procurement Officer may:

7.4.3.a. Reject the direct award request and require the section or office to submit a requisition for public advertisement and formal bidding.

7.4.3.b. Accept the direct award request and approve the direct award contract.

7.4.3.c. Take other action as necessary.

7.4.4. The Procurement Officer may require potential direct award requests at any dollar level above \$25,000.01 to be subject to review, approval, and processing in the same manner as described in this rule.

7.4.5. The Procurement Officer must issue prior approval or disapproval for the purchase of used equipment directly from the vendor without competitive bids.

7.4.5.a. If disapproved, the Procurement Officer must return the request to the section or office and direct another method of purchasing.

7.4.5.b. Notwithstanding the foregoing, approval to purchase used equipment under this subsection is contingent upon meeting all the requirements applicable to direct award procurement.

7.5. Emergency Procurement.

7.5.1. Any request to procure specific commodities or services for immediate delivery exceeding \$25,000 on an emergency basis must be submitted in writing to the Procurement Office. The Procurement Officer shall review a section or office's written request and issue written approval or disapproval.

7.5.2. Approval to procure goods or services on an emergency basis will permit the sections and offices to purchase the required goods or services directly from a vendor. Provided, however, the section or office must obtain three bids, if possible. Required documentation must be submitted to the Procurement Office as soon as possible for processing.

7.5.3. What qualifies as an emergency under this section shall be evaluated by the Procurement Officer on a case by case basis, but will at least include:

7.5.3.a. Unforeseen events or circumstances including delays by vendors, delays in transportation, or an unanticipated volume of work, as well as procurement of specific commodities for immediate delivery related to an official declaration of emergency by the Governor or federal officials.

7.5.3.b. Emergency purchases are not used for hardship, resulting from neglect, poor planning, or lack of organization by a section or office.

7.6. Best Value Procurement.

7.6.1. Best value procurement includes a request for proposal pursuant to W. Va. Code §5A-3-10b or an expression of interest pursuant to W. Va. Code §5G-1-1.

7.6.2. Requests for Quotation are the preferred method and gold standard of procurement, but a section or office may utilize a best value procurement method to procure goods and services, excluding construction.

7.6.2.a. In order to utilize a request for proposal, the section or office must provide adequate justification explaining why an evaluation based on price and compliance with specification alone would not be adequate.

7.6.2.b. The Procurement Officer shall review each request to utilize a request for proposal and may permit the use of a request for proposal if he or she determines in writing that it is in the best interest of the Department.

7.6.3. A request for proposal 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 Department.

7.6.3.a. The two components must then be evaluated based upon the criteria specified in the request for proposal, scored, and combined to form a total score.

7.6.3.b. The highest scoring vendor will be awarded a contract. No proposal may be evaluated using any criteria other than the criteria specified in the request for proposal.

7.6.4. Expressions of interest may only be used to procure architectural, engineering, or other services pursuant to W. Va. Code §5G-1-1 et seq.

7.7. Purchases from contracts issued by other public agencies and entities.

7.7.1. The Procurement Officer may approve a request by a section or office to purchase from, join as a party, or otherwise utilize contracts issued by agencies of the federal government, agencies of other states, other public bodies, or other state agencies.

7.7.2. The Procurement Officer may also sign an agreement with a vendor that has the effect of adding sections or offices to a contract issued by agencies of the federal government, agencies of other states, other public bodies, or other state agencies.

The Procurement Officer may, but is not required to, designate such a contract an agency contract and require that sections and offices utilize it.

7.7.3. The Procurement Officer may also lead, participate in, or join after issuance cooperative purchasing arrangements with other public agencies and entities created by public agencies.

7.7.4. Before undertaking any activity authorized by this section, the Procurement Officer shall determine that the contracts being utilized and/or created are valid, properly awarded, financially advantageous, and comparable to what can be obtained through competitive bidding. The last requirement will be satisfied if the contract was created or is to be created from a competitive procurement method.

7.7.5. The Procurement Officer shall require sections and offices to prove their requests to use such contracts do not conflict with existing contracts the section of office is required to use.

7.7.6. All section and office requests to take an action authorized under this subsection must be submitted in advance to the Procurement Officer with necessary evidence and documentation. The Procurement Officer shall approve only those requests submitted with evidence that justifies use of such contracts. Any request that is not supportable shall be returned to the section or office.

7.8. Multiple Awards.

7.8.1. The Procurement Officer may elect to award a contract to more than one vendor when the Procurement Officer determines in writing such action would be in the best interest of the Department. In arriving at that determination, the Procurement Officer will consider the following factors, insofar as they are applicable:

7.8.1.a. The quality, availability, and reliability of the supplies, materials, equipment, or service and their adaptability to the particular use required;

7.8.1.b. The ability, capacity, and skill of the bidder;

7.8.1.c. The sufficiency of the bidder's financial resources;

7.8.1.d. The bidder's ability to provide maintenance, repair parts, and service;

7.8.1.e. The compatibility with existing equipment;

7.8.1.f. The need for flexibility in evaluating new products on a large scale before becoming contractually committed for all use; and

7.8.1.g. Any other relevant factors.

7.8.2. In situations where a multiple award is necessary, the Procurement Officer shall place a written explanation into the public file. If a multiple award is requested by a section or office, that section or office must provide written justification to the Procurement Officer. The Procurement Officer's decision shall be final in all cases.

7.9. Negotiation When All Bids Exceed Available Funds.

7.9.1. Sections and offices must submit a valid maximum budgeted amount for each requisition to the Procurement Office. The maximum budgeted amount may not be disclosed to any vendor prior to the bid opening and may not be changed after the bid opening.

7.9.2. If all bids meeting requirements exceed the funds available for the purchase, the Procurement Office may negotiate a lower price within budget with the lowest bidder meeting specifications.

7.9.2.a. If the negotiation does not lead to the budget amount being met, the Procurement Officer may negotiate a lower price within budget with the next lowest bidder and continue negotiations with participating bidders after negotiations close with the preceding bidder.

7.9.2.b. In conducting discussions, there may be no disclosure of any information derived from proposals by competing bidders.

7.9.3. If the Procurement Office solicits bids using a best value procurement, and there is more than one bidder, the Procurement Officer may negotiate a lower price with the highest ranked bidder. If the Procurement Officer does not award the contract to the highest scoring bidder, he or she 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.

7.9.3.a. The Procurement Officer may not extend an offer to any bidder that is not first extended to the prior bidders in order of rank.

7.9.3.b. Nothing contained herein is intended to supersede requirements contained in W. Va. Code §5G-1-1 et seq.

7.9.4. If a section or office fails to provide a valid maximum budgeted amount, the Procurement Officer shall not permit negotiation.

7.9.5. The Procurement Officer shall determine the method of negotiation.

7.10. Discussion and Final Offers.

7.10.1. The Procurement Officer may conduct discussions to obtain best and final offers from bidders to assure full understanding of solicitation requirements.

7.10.1.a. If the Procurement Officer determines that a best and final offer is necessary from one vendor, all vendors shall be afforded the opportunity to provide best and final offers.

7.10.2. All best and final offers shall be treated like a formal bid, except that advertising is not required.

7.10.2.a. All bidders must provide their best and final offers to the Procurement Office prior to the date and time specified by the Procurement Officer.

7.10.3. Government construction contracts and supplies and materials to be used in construction are exempt from the provisions of this section.

7.11. Contract Management.

7.11.1. For contracts for commodities and services in the amount of \$1 million or less, the Procurement Officer may prescribe contract management procedures for all Department contracts, except government construction contracts. These procedures may include, but are not limited to:

7.11.1.a. Establishing payment benchmarks to assure the Department receives value prior to remitting payment.

7.11.1.b. Conducting regular meetings between sections and offices and vendors to assess contract performance.

7.11.1.c. Training Department section and office personnel to manage contracts.

7.11.1.d. Using the Office of Technology Project Manager for its projects.

7.11.2. For contracts for commodities and services in an amount exceeding \$1 million, the following contract management procedures apply.

7.11.2.a. Post Award Conferences.

7.11.2.a.1. The section or office responsible for administering the contract must hold a post award conference with the vendor to ensure a clear and mutual understanding of all contract terms and conditions, and the respective responsibilities of all parties. The agenda for the conference must include, at minimum, the introduction of all participants and identification of Department and vendor key personnel, and discussion of the following items:

7.11.2.a.1.A. The scope of the contract, including specifications of what the section or office is buying;

7.11.2.a.1.B. The contract terms and conditions, particularly any special contract provisions;

7.11.2.a.1.C. The technical and reporting requirements of the contract;

7.11.2.a.1.D. The contract administration procedures, including contract monitoring and progress measurement;

7.11.2.a.1.E. The rights and obligations of both parties and the vendor performance evaluation procedures;

7.11.2.a.1.F. An explanation that the vendor will be evaluated on its performance both during and at the conclusion of the contract and that such information may be considered in the selection of future contracts;

7.11.2.a.1.G. Potential contract problem areas and possible solutions;

7.11.2.a.1.H. Invoicing requirements and payment procedures, with particular attention to whether payment will be made according to milestones achieved by the vendor; and

7.11.2.a.1.l. An explanation of the limits of authority of the personnel of both the section or office and the vendor.

7.11.2.b. The section or office should develop a comprehensive and objective monitoring checklist which:

7.11.2.b.1. Measures outcomes;

7.11.2.b.2. Monitors compliance with contract requirements; and

7.11.2.b.3. Assesses vendor performance.

7.11.3. The Procurement Officer will make reports available to the Director and of Administration upon request.

7.12. Inspection.

7.12.1. The section or office must inspect all materials, supplies, and equipment upon delivery and again prior to final acceptance to ensure compliance with the contract requirements and specifications.

7.12.2. The section or office must report any discrepancies to the Purchasing Liaison and Procurement Officer immediately.

7.12.3. If unlisted shortages are discovered, the vendor, Purchasing Liaison and Procurement Officer must be notified immediately.

7.12.4. A vendor may be required to pick up any merchandise not conforming to specifications and replace the merchandise immediately.

7.13. Substitutions.

7.13.1. Substitution of items called for in a contract is not permitted without the Procurement Officer's prior approval.

7.13.1.a. The Procurement Officer will not approve substitution of items unless the substituted items are of equal quality and are offered at the same or lower price.

§145-17-8. Protests.

8.1. Submission of a Protest.

8.1.1. Protests based on bid specifications must be submitted no later than five working days prior to bid opening.

8.1.2. Protest of a purchase order or contract awards must be submitted no later than five working days after the award.

8.1.3. The vendor is responsible for knowing the bid opening and award dates. Protests received after these dates may be rejected by the Procurement Officer.

8.1.4. All protests must be submitted in writing to the Procurement Officer in the Procurement Office and contain the following information:

8.1.4.a. The name and address of the protestor;

8.1.4.b. The requisition, solicitation, purchase order or contract numbers;

8.1.4.c. A statement of the grounds of protest;

8.1.4.d. Supporting documentation, if necessary; and

8.1.4.e. The resolution or relief sought.

8.1.5. Failure to submit this information shall be grounds for rejection of the protest by the Procurement Officer.

8.2. Protest Review.

8.2.1. The Procurement Officer, or his or her designee, shall review the matter of protest and issue a written decision.

8.2.1.a. A hearing may be conducted at the option of the Procurement Officer or assigned designee.

8.2.1.b. Continuation or delay of a purchase order or contract award is at the discretion of the Procurement Officer.

8.2.2. The Procurement Office may refuse to review any protests when the matter involved is the subject of litigation before a court of competent jurisdiction; if the merits have previously been decided by a court of competent jurisdiction; or if it has been decided in a previous protest by the Procurement Office.

§145-17-9. Violations.

9.1. Any person who authorizes or approves a purchase or contract in violation of West Virginia Code or any rule adopted by the Procurement Office may be personally liable for the cost of the purchase or contract. Purchases and contracts violating the West Virginia Code or this rule are void and of no effect. Provided, that the state establishes by a preponderance of the evidence that the individual acted knowingly and willfully.

9.2. Any person receiving anything of value from a known interested party in awarding a purchase order is subject to the provisions of the Ethics Act as determined by the Ethics Commission.

§145-17-10. Encumbrance.

10.1. Account Designation.

10.1.1. Agency sections must designate the appropriate account from which funds to pay for a contract will be taken prior to a contract being awarded, unless the contemplated contract is a type that cannot be encumbered as determined by the Procurement Officer.

10.2. Procurement Office Review.

10.2.1. Prior to issuing a contract, the Procurement Office will verify the amount of funds encumbered is appropriate and the account being encumbered matches what the section or office has requested.

10.3. Encumbrance Amounts.

10.3.1. Contracts must be encumbered prior to issuance in the following amounts:

10.3.1.a. One-time purchase in current fiscal year. Sections or offices seeking a contract for a one-time purchase in the current fiscal year must encumber the full contract amount.

10.3.1.b. Contract spanning multiple years. Sections or offices seeking a contract that will span multiple fiscal years must encumber at least the amount of funds that will be spent under the contract in the current fiscal year.

10.3.1.c. Contract to begin in a future year. Sections or offices seeking a contract that will be awarded prior to the end of a current fiscal year but will become effective after that same fiscal year has ended are not required to encumber funds prior to issuance of the contract.

10.3.1.d. Open-end and statewide contracts. Sections or offices seeking an open-end contract or a statewide contract issued by the Procurement Office are not required to have funds encumbered prior to the issuance of the contract.

§145-17-11. Exemptions.

11.1. Commodities and Services Identified as Impossible to Bid.

11.1.1. Spending unit may purchase commodities and services on the list directly from the vendor without advertisement or bid and are not required to have contracts for the purchase of those items under \$25,000. Over \$25,000.01 contract documents are required.

11.1.2. Even though competitive bidding is not required for the Impossible to Bid List, the agency must continue to follow documentation requirements associated with the applicable threshold of purchases over \$25,000.01 unless otherwise noted with each item. For example, all vendors must complete vendor registration with the Division of Purchasing, Secretary of State Registration, agency Terms and Conditions and the Purchasing Affidavit. The use of a purchase order is required for purchases over \$25,000.01 and the agency shall continue to submit contracts to the Attorney General's office for approval. Governmental entities are not required to register with the Secretary of State's Office, so the compliance check is not required. Additionally, if the governmental entity is a West Virginia state agency then the Purchasing Affidavit is not required.

11.1.3. Commodities and Services Impossible to bid are as follows:

11.1.3.a. Advertising: This item includes any advertisement placed directly with newspapers, trade magazines, internet publications, social media or billboards. This item includes broadcast television and radio advertisements placed directly with the broadcaster or publisher and program license fees for radio and television. Additionally, this item includes participation fees for trade shows, conferences, or conventions. This item does not include indirect placement, promotional items, or advertising consultant services.

11.1.3.b. Attorneys and Law Firms: This item includes hiring attorneys and law firms in an official attorney-client capacity. Nothing in this item eliminates the approval or oversight residing within the Attorney General's Office.

11.1.3.c. Governmental Agencies: Governmental entities are not required to register with the Secretary of State's Office so that compliance check is not required. Additionally, if the governmental entity is a West Virginia state agency then the Purchasing Affidavit is not required.

11.1.3.d. Grants: Any and all state or federal grants awarded to any entity. Also exempt from competitive bidding, except where required by federal regulation, are contracts for commodities or services using federal grant funds for which the state agency receives no benefit. In such cases the spending limit thresholds for federal procurement apply.

11.1.3.e. Hospitality: This item includes expenses for food, beverages, facility rental and entertainment relating to conducting state business.

11.1.3.f. Postage: This item includes stamps and other non-competitive mailing services from USPS but does not include services available from statewide contracts. The Purchase Affidavit and Secretary of State registration are not required for transactions process under this item.

11.1.3.g. Professional Association Dues: This item includes membership fees or association dues for professional associations that perform a licensing, certification or accreditation function for state employees or agencies.

11.1.3.h. Investigative Services: Subject Matter Experts and Witnesses for Administrative Hearing and Legal Proceedings: This items includes obtaining investigative services and the services of a subject matter expert or witness that is intended to help prepare for, or will be utilized in, administrative or legal hearings/proceedings. This item does not include any agency consulting services or former employees retained by their agency or hired by another agency.

11.1.3.i. Subscriptions and publications: This item includes newspapers, textbooks, and publications – electronic and hard copy – purchase directly from the publisher. This item also includes database subscriptions for stational information, labor market data, business intelligence and data analysis. Additionally, this item will include any subscriptions for databases related to any state or federal grant requirement.

11.1.3.j. Training Activities: This item includes lecturers, honorariums, copyrighted test and training materials, test monitors/examination proctors, and registration fees, where competition is not available.

11.1.3.k. Court Ordered Payments: This item includes court order payment. A copy of the court order must be maintained in the agency file, unless sealed and restricted by the respective judge. If the order is sealed and restricted, an explanation must be maintained in the agency file referencing the court order. Court ordered payments are exempt from all documentation requirements.

11.1.3.l. Emergency Services (Non-Construction and Non-Architectural/Engineering): This item includes non-construction and non-A/E services that must be procured on an emergency basis when (1) formal bidding would cause the government to lose the ability to perform some critical function for itself or citizens of the State of West Virginia, or (2) formal bidding would delay a response to a declared state of emergency.

11.1.3.m. Transcripts from Court Reporters Employed by Court, Judge or Opposing Counsel: This item includes transcripts procured from court reporters who are employed by the court, judge or opposing counsel. These transactions are exempted from all documentation requirements.

11.1.3.n. Copies of Government Documents/Records Obtained from the Government: This item includes fees paid to the government entity required to obtain records of court and administrative proceedings as well as documents filed in those proceedings, and charges paid to the government entity for other official documents or records obtained from that government entity. An example are FOIA fees.

11.1.3.o. Commodities or services for a shared facility arrangement with the U.S. Government: Commodities or services contracted by the U.S. Government and provided to a state agency when those commodities or services are: (1) offered as part of a shared facility arrangement, and (2) those commodities or services for the State cannot be easily separated from those for the U.S. Government.

11.1.3.p. Obtaining Commodities through the Federal Surplus Property Program: This item includes requests to obtain federal surplus property through the WV State Agency for Surplus Property (WVSASP). Both the donation and fixed price sale methods of obtaining federal property are included. The agency must facilitate the transaction through the WVSASP. The necessary documentation to facilitate the transaction can be obtained from the WVSASP.

Spending Limit Checklist

\$0 -- \$10,000.00	No Bids Required
\$10,000.01 -- \$25,000.00	Three Verbal Bids
\$25,000.01 and Above	Three Written Bids (formal bidding)