



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: Treasurer TITLE-SERIES: 112-17

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

RULE NAME: Exempt Purchasing

CITE STATUTORY AUTHORITY: §5A-1-12, §12-1-7, §18-30A-6, §18-31-4

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 12/17/2021 4:30 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: James G Fuerhoff

ADDRESS: 1900 Kanawha Boulevard East, Rm E-145
Charleston, WV 25305

EMAIL: james.fuerhoff@wvsto.com

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 details the purchasing procedures for the West Virginia State Treasurer's Office.

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

The rule updates the office's purchasing procedures and adds a definition of rapid award contract.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

N/A

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

N/A

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

N/A

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

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

N/A

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

Yes

James G Fuerhoff -- 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 112
PROCEDURAL RULE
STATE TREASURER'S OFFICE**

**SERIES 17
EXEMPT PURCHASING**

§112-17-1. General.

1.1. Scope. -- This rule contains the procedures of the West Virginia State Treasurer's Office for procurements exempt from W. Va. Code §5A-3-1 et seq. or the requirements of the West Virginia State Purchasing Division. This rule is filed in compliance with W. Va. Code §5A-1-12, which requires state agencies exempt from some or all of the requirements of ~~chapter 5A of the~~ W. Va. Code §5A-3-1 et seq. ~~are~~ to adopt internal purchasing procedures.

1.2. Authority. -- W. Va. Code §5A-1-12, W. Va. Code §5-10B-3, W. Va. Code §12-1-7, W. Va. Code §12-3A-3, W. Va. Code §12-5-7, W. Va. Code §12-6C-5, W. Va. Code §18-30-5, W. Va. Code §18-30A-6, and W. Va. Code §18-31-4.

1.3. Filing Date. -- ~~October 16, 2020~~

1.4. Effective Date. -- ~~December 1, 2020~~

§112-17-2. Definitions.

2.1. "Addendum" means a written modification to specifications or other procurement document issued by the STO.

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

2.3. "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.

2.4. "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 STO issued procurement document and includes a proposal to an RFP.

2.5. "Bond" means a surety or other security that guarantees payment or performance under a contract, including a bid bond, labor and material payment bond, maintenance bond and performance bond.

2.6. "Change Order" means a written modification or amendment to an STO issued contract in the manner provided in the contract or upon the mutual consent of the STO and the vendor.

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

2.8. "Competitive Negotiation" means the process determined to be in the best interests of the STO and by which the STO negotiates with the highest scoring vendors believed to be competent, responsible and responsive in a procurement and for which cost is considered but not determinative in making an award.

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

2.10. "Cooperative Procurement" means use of 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 STO to be in accordance with reasonable procurement standards.

2.11. "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.

2.12. "Emergency Procurement" means 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, not because of poor planning, neglect or lack of organization.

2.13. "Expression of Interest" or "EOI" means a procurement method that seeks vendors to provide information and express an interest in a procurement.

2.14. "FOIA" means Freedom of Information Act found in West Virginia Code §29B-1-1 et seq.

2.15. "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.

2.16. "Master Agreement" means a contract with specified terms and conditions except quantity, which is also known as an open-end contract.

2.17. "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.

2.18. "Procurement" means the process of 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 states the vendor's dissent or disagreement as to a procurement document or process pertaining to an STO procurement.

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2.21. “Rapid Award Contract” means a procurement method available to the STO’s investment and savings programs for purchases that are exempt from requirements of W. Va. Code §5A-3-1 et seq., upon approval of the Legal Division and the Treasurer or Assistant Treasurer and when time is of the essence.

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

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

2.24. “Request for Quotation” or “RFQ” means a document issued by the STO to obtain a quotation or bid.

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

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

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

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

2.29. “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.

2.30. “State” means the State of West Virginia

2.31. “STO” means the West Virginia State Treasurer, the State Treasurer’s Office, or the State Treasurer’s designee.

2.32. “STO Purchasing” means the division within the STO with personnel who manage the functionality of STO procurement.

2.33. “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 costs is not the determining factor in award.

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

§112-17-3. Purchasing Authority.

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The following are the exemptions from the provisions of W. Va. Code §5A-3-1 et seq. for the STO:

3.1. Banking, Investments and Related Commodities and Services – W.Va. Code §12-1-7 and §12-3A-3.

3.1.1. W.Va. Code §12-1-7 provides that only the Treasurer has authority to enter into contracts with financial institutions for banking commodities and services.

3.1.2. W.Va. Code §12-3A-3 requires the Treasurer to competitively bid for necessary banking, investment and related commodities and services, which procurements are exempt from §5A-3-1 et seq.

3.2. West Virginia Board of Treasury Investments (“WVBTI”) - W. Va. Code §12-6C-1 et seq.

3.2.1. W. Va. Code §12-6C-5 authorizes the WVBTI to retain and contract with legal, accounting, financial and investment managers, advisors, and consultants.

3.2.2. W. Va. Code §12-6C-7(h) provides the WVBTI is exempt from the provisions of W. Va. Code §5A-3-1 et seq. but is subject to the purchasing policies and procedures of the STO.

3.3. Board of Trustees of the College Prepaid Tuition and Savings Program and the College Prepaid Tuition and Savings Program (“Board”) - W. Va. Code §18-30-1 et seq.

3.3.1. W. Va. Code §18-30-5 requires the Board to execute contracts and other instruments for necessary goods and services, employ necessary personnel and engage the services of private consultants, actuaries, auditors, counsel, managers, trustees, and any other contractors or professionals needed, and that selection of these are not subject to the provisions of W. Va. Code §5A-3-1 et seq.

3.4. State of West Virginia Deferred Compensation Plan (“Plan”) - W. Va. Code § 5-10B-1 et seq.

3.4.1. W. Va. Code §5-10B-1 provides that notwithstanding any provisions of W. Va. Code to the contrary, the Plan is exempt from W. Va. Code §5A-3-1 et. seq. for the various commodities and services listed.

3.5. Treasurer Selection of Financial Advisor - W. Va. Code §12-5 et seq.

3.5.1. W. Va. Code §12-5-7 provides the Treasurer may select or serve as financial advisor for all various securities and indebtedness issued, unless expressly prohibited by law. Selection of professionals shall be competitive, but bidding is not required to comply with W. Va. Code §5A-3-1 et. seq.

3.6. West Virginia Jumpstart Savings Program and its associated Board (“Jumpstart” or “Jumpstart Board”) – W. Va. Code §18-30A-1 et seq.

3.6.1. W. Va. Code §18-30A-6 requires the governing board of the Jumpstart Savings Program to execute contracts and other instruments for necessary goods and services, employ necessary personnel, and engage the services of private consultants, auditors, counsel, managers, trustees, and any other contractors or professionals needed for rendering professional and technical assistance and advice, and that selection of these services is not subject to the provisions of W. Va. Code §5A-3-1 et seq.

3.7. West Virginia Hope Scholarship Program and its associated Board (“Hope Scholarship” or “Hope Scholarship Board”) – W. Va. Code 18-31-1 et seq.

3.7.1. W. Va. Code §18-31-4 requires the Hope Scholarship Board to execute contracts and other instruments for necessary goods and services, employ necessary personnel and engage the services of private consultants, actuaries, auditors, counsel, managers, trustees, and any other contractor or professional needed for rendering professional and technical assistance and advice, and that selection of these services is not subject to the provisions of W. Va. Code §5A-3-1 et. seq.

§112-17-4. General Information.

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

4.2. Methods used to determine the appropriate commodities and services needed by the STO include best value procurement, life cycle costing, and total ownership or operational costing. The requirements or limitations in a procurement document are believed to be reasonable in consideration of STO needs.

4.3. Documentation will be maintained for all procurements by STO Purchasing to protect the processes. The STO internal audit division will audit STO procurement processes and files every two years beginning in 2022 to cover the period of the effective date of this rule through June 30, 2022, and then every two fiscal years thereafter.

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

4.5. There is a black out period from the release of an RFQ, RFP or EOI by the STO until award or cancellation. The only contact with the STO during a blackout period is through STO Purchasing.

4.6. Vendors are provided with instructions for submitting bids and may contact STO Purchasing as needed.

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

4.8. After the bids are opened, they cannot be altered and are considered public records available for review or copying.

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

4.10. Bid openings are open to the public and must be witnessed by two STO staff members one of whom is with STO Purchasing. STO Purchasing personnel will read aloud the names of the vendors submitting bids. For bids received pursuant to an RFP, STO Purchasing will confirm each original package contains a separately sealed cost proposal.

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4.11. Bids received are available to the public as soon as they can be scanned or copied after the opening of a bid, unless a vendor has requested a non-disclosure agreement which has been approved by the STO. The evaluation committee may use oral interviews or site visits to confirm the points assigned for a technical evaluation. After award, the entire purchasing file is available for review or copying.

4.12. The STO may trade-in any item of equipment no longer needed to reduce the cost of a new item.

4.13. 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 procurement file.

4.14. The STO shall abide by the West Virginia Governmental 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 Governmental Ethics Act.

§112-17-5. Purchasing Requirements.

5.1. Documentation associated with all procurements shall be maintained in files in accordance with the STO record retention policy.

5.2. All purchases of commodities and services are subject to expenditure approval.

5.3. Contracts are issued for all procurements regardless of dollar amounts to assist with tracking and ensure proper internal controls.

5.4. The vendor is responsible for submitting a correct and accurate bid to STO Purchasing by the specified bid opening time and date and location and in accordance with the procurement documents.

5.5. Prior to award of a contract, a vendor 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 the West Virginia Secretary of State and West Virginia Workers Compensation.

5.6. 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 STO a fully completed Disclosure of Interested Parties form authorized by the West Virginia Ethics Commission.

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

5.8. All requests for commodities or services shall be submitted in a written requisition to STO Purchasing via email, written memo, or other method. All requests require the approval of the Treasurer, Assistant Treasurer, Deputy Treasurer, or Director of that STO division or other person with the appropriate signature authority.

5.9. Upon receipt, a requisition is reviewed to determine the sourcing method for the procurement.

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5.9.1. Sourcing methods considered include review of inventory from stockroom; state sources (e.g., ~~C~~Correctional Industries, sheltered workshops, surplus property); statewide or agency master agreements; cooperative contracts; or obtaining bids if required by the procurement method levels.

5.9.2. Any STO contract usable by another state entity or a political subdivision will state the use.

5.10. Procurement method levels are as follows:

5.10.1. \$2500.00 or less – verbal bids when possible

5.10.2. \$2500.01 - \$10,000.00 – three written bids when possible

5.10.3. \$10,000.01 - \$25,000.00 – three written bids

5.10.4. Over \$25,000.00 – formal procurement required unless a direct award or a rapid award is appropriate.

5.10.4. Over \$25,000.00 – formal procurement required unless a direct award or a rapid award is appropriate.

5.11. Any required vendor terms and conditions must be submitted and approved before a contract is awarded.

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

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

5.14. STO will stamp bids with the date and time of actual receipt for bids physically received. Bids received through wvOASIS are stamped by the system.

5.15. Bids shall remain sealed until the specified date and time, at which time the STO will open the bids.

5.16. No bid received may be altered after opening.

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

5.18. Aggregate procurements in excess of \$25,000 by the STO shall not circumvent the formal procurement requirements of §5A-3-1 et seq. and shall not be used with the intent to circumvent the formal requirements in this rule in any 12-month rolling period.

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

§112-17-6. Formal Procurement Documents and Processes.

6.1. Request for Quotation (RFQ)

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6.1.1. 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.

6.1.2. Bids are reviewed by STO Purchasing and the division requesting the item(s) to verify each bid meets the requirements of the RFQ.

6.1.3. Award will be made to the lowest responsible and responsive vendor.

6.2. Direct Award:

6.2.1. A direct award is a procurement method occurring only if:

6.2.1.a. The procurement file contains the following:

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

6.2.1.a.2. Documentation of efforts used to determine 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

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

6.2.1.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.

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

6.3. Request for Proposals (RFP)

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

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

6.3.3. RFPs require a two-part bid opening. Technical proposals are 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.

6.3.4. At the date, time and location of the bid opening, the bids received are opened and the names of the vendors submitting a bid are read aloud and are documented. STO Purchasing will verify that the technical and cost portions of the bids are separate and the cost portion is sealed.

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6.3.5. After bids are opened, the technical portion of each bid will be submitted to the named evaluation committee. The cost portion will remain sealed until the technical evaluation is completed.

6.3.6. In the event only one bid is received and the bid meets the minimum requirements of the RFP, then the technical portion of that bid will be submitted to the evaluation committee for evaluation but not scoring. After the technical evaluation, the cost portion will be opened and provided to the evaluation committee. STO and vendor may negotiate any portion of the commodities or services requested or offered. If the STO and the vendor reach agreement on the commodities and services and terms and conditions, the vendor will be awarded the contract.

6.3.7. Evaluation Committee

6.3.7.a. The evaluation committee shall consist of 3-5 voting members and limited to STO employees or other state employees.

6.3.7.b. Before someone can become an evaluation committee member, he or she shall complete the requisite training. The training must be completed once in a 12-month period. Certificates of Completion of training are provided and maintained by STO Purchasing.

6.3.7.c. A non-state employee may be permitted to serve as non-voting advisor or subject matter expert with prior approval of the evaluation committee. Individuals serving as advisors or subject matter experts are required to sign the Non-conflict of Interest certification form.

6.3.7.d. A committee chairperson or co-chairperson is selected by the committee. The chairperson liaises with STO Purchasing.

6.3.7.e. Evaluation committee members shall evaluate the bids in a fair and consistent manner and not attempt to influence or manipulate other members.

6.3.7.f. The committee in concert shall complete an evaluation, solely evaluating the bids received, of the technical portion of each bid received and reach a consensus on the assigned points. The committee shall complete and make a written consensus recommendation on the technical portions of the bids. The recommendation will be reviewed by STO Purchasing and if determined acceptable, the cost portion of each bid will be opened and provided to the committee.

6.3.7.g. At its first meeting, the committee shall determine whether all bids meet any minimum requirements of the RFP. If the committee believes a bid should be disqualified, it shall send a written recommendation to STO Purchasing to have the bids not meeting minimum requirements disqualified. Bids disqualified by STO Purchasing will not be evaluated further.

6.3.7.h. The committee will continue the technical evaluation of the bids not disqualified and then submit a recommendation of the points assigned for the bids to STO Purchasing and state whether any bids have failed to meet any required minimum acceptable score. Bids failing to meet any required minimum acceptable score for the technical portion of the bids will not be considered further.

6.3.7.i. After STO Purchasing has accepted the recommendation of points assigned, cost portions of the bids meeting any required minimum acceptable score will be opened. Cost portions of

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bids rejected or failing to meet minimum acceptable score may be opened, at the discretion of STO Purchasing.

6.3.7.j. The committee shall complete a mathematical evaluation of the cost portion of each bid still under consideration.

6.3.7.k. If best value purchasing is used, award will be made to the vendor submitting the bid with the highest score. If competitive negotiation is used, discussions will be held with the two or three vendors whose bids had the highest point scores.

6.3.7.l. Any needed changes to a bid or to reach agreement on a contract shall be negotiated.

6.4. Emergency Procurements

6.4.1. In the event the Governor, Treasurer, or other authorized official declares an emergency exists, the Treasurer shall determine to what extent these procedures will apply to procurements and authorize emergency procurements.

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

6.4.3. STO Purchasing will assist in obtaining bids, preparing documentation, verifying any required vendor registration and licensing, and issue any contracts necessary.

6.5. Rapid Award Contract Procurements – STO Investment and Savings Programs

6.5.1. The investment and savings programs managed and administered within the STO include the College Prepaid Tuition and Savings Program; the State of West Virginia Deferred Compensation Plan; the West Virginia Jumpstart Savings Program; the West Virginia Hope Scholarship Program; and the operations of the West Virginia Board of Treasury Investments (“WVBTI”).

6.5.2. Because of the sophisticated nature of the investment and savings programs managed and administered within the STO, certain contracts must be entered into using the Rapid Award Contract (RAC) procurement method when time is of the essence, to avoid unnecessary costs to program beneficiaries or disruptions in services that are crucial to program operations.

6.5.2.a. These contracts can include contracts for necessary goods and services, contracts to employ necessary personnel, and contracts to engage the services of private consultants, auditors, counselors, managers, trustees, and any other contractors or professionals needed for rendering professional and technical assistance and advice to the program or program board. For example, the WVBTI enters into contracts with legal, accounting, financial and investment managers, advisors and consultants.

6.5.2.b. The selection of the goods and services described in subdivision 6.5.2.a. of this rule and their resultant contracts are statutorily exempt from the provisions of W. Va. Code §5A-3-1 et seq.

6.5.3. Approval to Use the Rapid Award Contract Process.

6.5.3.a. In order to award a contract through the RAC process, the responsible investment or savings program Director or Deputy Treasurer must first submit a written request to the STO General Counsel for approval to use the RAC process (a "RAC request"). The RAC request must clearly identify why the RAC process is necessary under unique factual circumstances, identify the entity to which the contract will be awarded, and provide reasoning as to why the RAC process is in the overall best interest of the program and/or its beneficiaries. The STO Legal Division shall review the RAC request and provide a memorandum either approving or disapproving the request. Approval must be based on the General Counsel's determination that unique factual circumstances justify the use of the RAC process and that the use of the RAC process does not run afoul of applicable state or federal law. If the Legal Division disapproves the RAC request, another procurement method permitted by this rule may be used to secure the goods or services.

6.5.3.b. Upon the Legal Division's approval of a RAC request, the General Counsel shall submit his or her memorandum approving the request and all other appropriate documentation to the Treasurer or Assistant Treasurer. The Treasurer or Assistant Treasurer shall review the RAC request and the General Counsel's memorandum and provide his or her written approval or disapproval of the RAC request. If the Treasurer or Assistant Treasurer disapproves the RAC request, another procurement method permitted by this rule may be used to secure the goods or services. Upon the Treasurer or Assistant Treasurer's approval of a RAC request, the STO Purchasing Division shall take necessary steps to award a contract using the RAC method for the goods or services described in the RAC request at the direction of the requesting Director or Deputy Treasurer.

6.5.3.c. All RAC request approval documentation shall be part of the contract documentation in accordance with any record retention policy governing the contract.

§112-17-7. Other

7.1. Depository Agreements

7.1.1. W.Va. Code §12-1-2 requires the STO to designate as depositories various financial institutions in the state that meet the requirements in the W.Va. Code and rules. Bidding is not appropriate as any financial institution in the state that meets the requirements may be a state-approved depository. The number of state-approved depositories in West Virginia exceeds 45. Depository contracts need to have a long term to protect the state since the financial institution receives and hold moneys for which the state is responsible. It is not practical to have to enter into new contracts and bonds on any regular basis due to the large number of contracts and their importance.

7.2. Information Technology (IT)

7.2.1. The types of IT are software, hardware, services and support and maintenance. A procurement may include all types of IT. IT and the procurement of IT carries a high level of risk because of the importance, requirements, rapid industry changes, security, sophistication and privacy issues.

7.2.2. Software procurement requires consideration of whether the software meets the needs of the STO, 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.

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

7.2.4. If the 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 will negotiate in good faith. Once IT finds the quotation acceptable, then a change order to the current contract will be issued with the quotation attached. A new contract is not needed.

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

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

7.2.7. At least one year before a contract in the amount of \$2,500.00 or more and with a term longer than one year for software, hardware or IT system terminates, including all available extensions, and IT desires to extend or renew the contract, IT 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 STO. Additional factors to consider include current and anticipated work environment needs, compliance issues, current performance, availability of alternate sources and costs. If the STO determines the contract should not be rebid, it will determine the length of term for the renewal.

7.3. Term

7.3.1. The length of the term of a contract and any extensions are considered at the time the procurement documents are issued and then determined at the time the contract is issued. The STO will use life cycle costing, total ownership or operational cost, or other methods to determine the appropriate length of a term and any extensions or renewals.

7.3.2. A written justification must be in the procurement file for any contract term longer than five years with renewals, as well as for extensions or renewals.

7.3.3. The STO will evaluate existing contracts with terms exceeding 5 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.

§112-17-8. Vendor Complaints and Protests.

8.1. Complaints – A vendor may verbally or in writing complain about a procurement to STO Purchasing. STO Purchasing will provide a written response to the complaint.

8.2. Types of Protests

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8.2.1. 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 STO no later than 5 business days prior to the specified bid opening date and time. Protests received after that date will not be considered.

8.2.2. Protests of Award – After selection of the apparent successful vendor in a procurement using an RFP, STO Purchasing 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 STO Purchasing. Protests received after the stated date and time will not be considered.

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

8.4. Review of Protest and Issuing Decision – The STO will review the letter of protest and issue a written decision. The STO 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 STO.

§112-17-9. Public Records.

9.1. Procurement documents inform vendors that the entire response submitted for that procurement and any resulting contract are considered public documents.

9.2. As public documents, procurement documents are disclosed to the public following the bid opening or award of a contract in accordance with the WVFOIA.

9.3. Any bid or other document in a procurement file may be disclosed pursuant to a WVFOIA 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.

9.4. The STO shall not be liable for any disclosure of a procurement document.

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

9.6. The STO has no duty to inform a vendor that any procurement documents, contracts or other documents or information will be disclosed pursuant to a WVFOIA.

§112-17-10. Violations.

10.1. 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 STO may be held personally liable for the cost of

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the procurement or contract. Procurements and contracts violating federal or state law or this rule are void and of no effect.

10.2. The STO will follow vendor suspensions and debarments by the federal government and/or the West Virginia State Purchasing Division.