



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

12/7/2021 1:35 PM

Office of West Virginia
Secretary Of State

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

AGENCY: Tourism

TITLE-SERIES: 144-03

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

RULE NAME: PURCHASING PROCEDURES

CITE STATUTORY AUTHORITY: W.Va. Code §5B-2I-4

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

January 6, 2022

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

Yes

**James Bailey -- 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 144
PROCEDURAL RULE
DEPARTMENT OF TOURISM

SERIES 3
PURCHASING PROCEDURES

§144-3-1. General.

1.1. Scope – This rule establishes the procedures for the purchase of commodities and services by the Department of Tourism.

1.2. Authority. – W. Va. Code §5B-2I-4.

1.3. Filing Date. – December 7, 2021.

1.4. Effective Date. – January 6, 2022.

§144-3-2. Definitions.

2.1. “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.

2.2. “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, such as a request for proposal (RFP) or a request for quotation (RFQ).

2.3. “Department” means the Department of Tourism.

2.4. “Direct Award” means a procurement method allowing for the non-competitive purchase of commodities or services when only one vendor is reasonably determined to be able to 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.

2.5. “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.

2.6. “Open-end Contract” means a contract that covers a period of time in which all terms, conditions, and prices are specified for quantity.

2.7. “Procurement Officer” means the Procurement Officer of the Department or anyone the Procurement Officer has designated to perform specific tasks or functions. This person or these persons may perform other functions in addition to procurement for the Department.

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

2.9. “Secretary” means the Secretary of the Department of Tourism.

§144-3-3. Overview.

3.1. W.Va. Code § 5B-2I4(l) provides that the Department of Tourism shall be exempt from the purchasing procedures required by W.Va. Code § 5A-3-1 et seq. Although exempt from the standard state purchasing procedures, this procedural rule sets forth the procedures for the purchase of commodities and services by the Department of Tourism.

3.2. W. Va. Code §5B-2I-4(k) provides that the Department of Tourism shall utilize, to the fullest extent practicable and efficient, existing resources of the Department of Commerce for functions necessary for the operation of the Department of Tourism but which functions are not directly related to the purposes of the Department of Tourism, and that the Department of Tourism may enter into such agreements with the Department of Commerce or other agencies of the state as may be necessary or advisable to utilize existing resources of this state. Therefore, existing agreements for commodities and services, or existing commodities and services, at the Department of Commerce or other agencies of this state may be utilized by the Department of Tourism for the benefit of the Department of Tourism in carrying out its powers and duties set forth in W. Va. Code §5B-2I-4.

§144-3-4. Duties of Procurement Officer.

4.1. The Procurement Officer shall, in addition to other responsibilities provided throughout this rule, perform the following duties:

4.1.1. Ensure that purchases and contracts for commodities and services are based on competitive bids whenever, in the opinion of the Procurement Officer, it is appropriate and in the best interest of the Department of Tourism.

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

4.1.2.a. The Department 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.

4.1.2.b. The Procurement Officer may, upon the approval of the Secretary, amend the list of commodities and services that are not possible for competitive bid by the Department as he or she may determine to be appropriate. 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.

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

4.1.4. Purchase or contract for commodities and services required by the Department.

4.1.5. Review specifications and descriptions before soliciting bids to ensure specifications and descriptions do not have the purpose of favoring 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, if determined necessary, the amount of deposit or bond that may be required for security on certain contracts.

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

4.1.11. Authorize staff to review, audit, and approve requests, purchases, and other transactions and performance that fall under the duties of the Procurement Officer. 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.

4.1.12. Recommend to the Secretary the following corrective actions if any personnel fail to comply with the guidance established for purchases of \$25,000 or less:

4.1.12.a. Suspend or reduce purchasing permission for the responsible personnel.

4.1.12.b. Require additional reports and documentation relating to purchases of \$25,000 or less for Procurement Officer review.

4.1.12.c. Require additional oversight that the Procurement Officer deems appropriate.

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

4.1.13. Ensure that all materials, supplies, and equipment are inspected upon delivery and again prior to final acceptance to ensure compliance with the contract requirements and specifications, and any discrepancies should be document. The Procurement Officer may require a vendor to pick up any merchandise not conforming to specifications and replace the merchandise immediately, or to pay such damages as are determined to be appropriate.

§144-3-5. Procurement of Advertising and Marketing Agencies, Consultants, Enterprises, Firms, or Persons.

5.1. The provisions of this section shall apply to the procurement of advertising and marketing agencies, consultants, enterprises, firms, or persons, as deemed by the Secretary, in his or her sole discretion, necessary or advisable to assist the Department in carrying out its powers and duties.

5.2. Requirement for purchases \$250,000 or more.

5.2.1. In the procurement of services estimated to cost \$250,000 or more, the Secretary shall encourage such advertising and marketing agencies, consultants, enterprises, firms or persons to submit an expression of interest, which shall include a statement of qualifications, including anticipated concepts and proposed advertising, marketing, and advertising campaigns. All potential contracts shall be announced by public notice published as a Class II legal advertisement in compliance with the provisions of W. Va. Code §59-3-1, et seq.

5.2.2. A committee of three to five representatives of the Department and/or the Tourism Advisory Council, as selected by the Secretary, shall evaluate the statements of qualifications and other materials submitted by interested firms and select three firms which, in their opinion, are best qualified to perform the desired service.

5.2.3. The committee shall then rank, in order of preference, the three firms selected and shall commence scope of service and price negotiations with the first ranked firm.

5.2.4. If the Department is unable to negotiate a satisfactory contract with the first ranked firm, at a fee determined to be fair and reasonable, price negotiations with the firm of second choice shall commence.

5.2.5. Failing accord with the second ranked firm, the committee shall undertake price negotiations with the third ranked firm.

5.2.6. If the Department is unable to negotiate a satisfactory contract with any of the selected firms, the office shall select additional firms in order of their competence and qualifications and it shall continue negotiations in accordance with this section until an agreement is reached.

5.3. Requirement for purchases less than \$250,000.

5.3.1. If the procurement of the services is estimated by the Secretary to cost less than \$250,000, the Department shall conduct discussions with three (3) or more firms solicited on the basis of known or submitted qualifications for the assignment prior to the awarding of any contract.

5.3.2. Provided, that if a judgment is made that special circumstances exist and that seeking competition is not practical, the Department may select a firm on the basis of previous satisfactory performance and knowledge of the Department's needs.

5.3.3. After selection, the Department and the selected firm shall develop the scope of desired services and negotiate a Contract.

§144-3-6. General Procurement Methods.

6.1. Purchases of \$25,000 or less, except for those made pursuant to §145-17-5 of this rule, shall be subject to the following requirements:

6.1.1. Purchases of \$25,000 or less per transaction for commodities and services may be made without processing the purchase as a formal solicitation, provided the purchase adheres to the purchasing procedures established by this rule.

6.1.2. A series of requisitions or procurements may not be intentionally used to circumvent competitive bidding or spending thresholds, otherwise known as stringing.

6.2. Purchases in excess of \$25,000.

6.2.1. Purchases of commodities or services in excess of \$25,000, except for those made pursuant to §145-17-5 of this rule, shall be made by the Procurement Officer through the use of competitive bidding: *Provided*, That a purchase may be exempt from competitive bidding if it is made pursuant to an exception provided for in this rule.

6.3. Open-End Contracts.

6.3.1. The Department may secure, and once secured may use, open-end contracts to obtain commodities and services to supply the repetitive needs of the Department.

6.4. Best Value Procurement.

6.4.1. The Procurement Officer may utilize best value procurement to enter into a contract when he or she determines in writing that it is advantageous to the Department.

6.4.2. In order to utilize a request for proposal using best value procurement, the Department must document reasonable justification as to why an evaluation based solely on price and compliance with stated specifications would not be adequate.

6.4.3. The Procurement Officer shall review each request to utilize a request for proposal using best value procurement and may permit the use thereof if he or she determines that it is in the best interest of the Department.

6.4.4. A request for proposal using best value procurement must contain provisions necessary to conduct a two-part evaluation, the first part being a review of the proposal against the requirements sought in the request for proposal to determine whether each proposal is responsive and may be considered further, and the second part being a review of the proposals against one another to determine the best value to the Department, given the overall value of the proposals to the Department, including a consideration of price differences between proposals made.

6.4.5. The vendor determined to provide the best value to the Department will be awarded the contract.

6.5. Purchases Utilizing Other Public Agencies and Entities.

6.5.1. Notwithstanding the Department's exemption from W. Va. Code §5A-3-1 et seq., where the Secretary determines it is in the best interest of the Department, the Department may utilize the services of the Division of Purchasing in the procurement process.

6.5.2. In the discretion of the Procurement Officer, the Department may 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.

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

6.5.4. The Procurement Officer may lead, participate in, or join after issuance cooperative purchasing arrangements with other public agencies, entities created by public agencies, or non-profit entities, including without limitation institutions or entities affiliated with institutions of higher education.

6.5.5. Before undertaking any activity authorized by this subsection, 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.

6.6. Negotiation When All Bids Exceed Available Funds.

6.6.1. Prior to receiving bids, a valid maximum budgeted amount for each requisition may be determined, which may not be disclosed to any vendor prior to the bid opening and may not be changed after the bid opening.

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

6.6.2.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.

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

6.6.3. If the Procurement Officer 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.

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

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

6.7. Discussion and Final Offers.

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

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

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

6.8. Contract Management.

6.8.1. 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, which procedures may include, but are not limited to, the following:

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

6.8.1.b. Conducting regular meetings with vendors to assess contract performance, as necessary.

6.8.1.c. Training Department personnel to manage contracts.

6.9. Substitutions.

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

6.9.2. 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.

§144-3-7. Registration, Advertising, Bidding, and Award.

7.1. Registration of Vendors.

7.1.1. All vendors must register through the Vendor Self-Service portal, and pay any applicable fees for such registration, in order to receive payment under a contract with the Department. Vendors shall be required to disclose the information contained in W. Va. Code §5A-3-12, such as ownership, all names under which a vendor is doing business, their physical address, and its corporate offices.

7.1.2. 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.

7.2. Advertising.

7.2.1. Solicitations that exceed \$25,000 must be advertised using an available form of media; such as wvOasis, newspapers, or any other media the Procurement Officer considers reasonable.

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

7.2.3. This subsection shall not apply to solicitations governed by law that mandates certain advertising requirements for the procurement of certain commodities or services be met.

7.3. Specifications.

7.3.1. Specifications must be written to encourage competition to the greatest extent possible. No person may write specifications, or attempt to influence the drafter of specifications, to intentionally limit competition or favor or disfavor a particular brand or vendor. Specifications may not use brand or vendor names to intentionally 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.

7.3.2. Nothing contained in this subsection will be construed to prevent the Department from drafting specifications with restrictions and mandatory requirements that are, in the opinion of the purchaser, necessary to perform the objectives for which the commodity or service is purchased.

7.3.3. The Procurement Officer may develop standard specifications that will form the basis of contracts. Standard specifications may 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.

7.3.4. The Secretary, or his or her designee, has final approval over specifications.

7.4. Bidding.

7.4.1. The Procurement Officer must receive bids from vendors prior to the date and time of the bid closing listed on the solicitation documents.

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

7.4.3. 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.

7.4.4. The Procurement Officer may allow bids by electronic transmission as defined in W. Va. Code §5A-1-1(6), including, without limitation, electronic mail. Bids by electronic transmission must be received by the Procurement Officer prior to the bid closing date and time. A bid will not be considered received until after transmission is completed.

7.4.5. 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 Officer makes no guarantee of confidentiality when vendors utilize electronic transmission.

7.4.6. Copies of bids that are not otherwise exempt pursuant to W. Va. Code §5B-2I-8 or under other provisions of law, may be open for public inspection at any time after the completion of the public bid opening. No original bid may be removed from the presence of a Procurement Officer representative. The Procurement Officer may prescribe policies to assure public access. The non-exempt portions of files are open for public inspection after the award has been made.

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

7.4.8. 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:

7.4.8.a. An error was made;

7.4.8.b. The error materially affected the bid;

7.4.8.c. Rejection of the bid would not cause a hardship on the Department other than losing an opportunity to receive commodities and services at a reduced cost;

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

7.4.8.e. In order for the Procurement Officer to reject a bid under this subdivision, the Procurement Officer must document that all of the conditions set forth in this subdivision exist.

7.4.9. The Procurement Officer must reject a bid that is found to be non-responsive due to failure to conform to the solicitation in all material respects.

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

7.4.11. 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.

7.4.12. Vendors are responsible for the accuracy of the information in the bid.

7.4.13. Vendors may contact the Procurement Officer to obtain guidance related to the form and content required for official bids.

7.4.14. The Procurement Officer may work with a vendor to resolve any technical errors in a bid if it is determined to be in the best interest of the Department.

7.4.15. 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.

7.4.16. The Procurement Officer may, upon approval from the Secretary or his or her designee, reject any bid when it is determined to be in the best interest of the Department.

7.5. Bid Evaluation.

7.5.1. 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 Officer may develop a form that evaluators can sign for certification purposes of this subsection.

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

7.5.2.a. All communications and inquiries from bidders regarding the solicitation must be directed to the Procurement Officer until an award has been made.

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

7.6. Awards.

7.6.1. 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 situations where a multiple award is necessary, the Procurement Officer must document the reasons therefor.

7.6.2. 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 document the rejection in the purchase order file.

7.6.3. When tie bids are received, the Procurement Officer shall break the tie by any impartial method considered prudent by the Procurement Officer.

7.6.4. If all bids received are higher in cost than a publicly advertised price the Procurement Officer is aware of before bids are made public, which final price of such publicly advertised price is inclusive of all costs or expenses contemplated in the solicitation documents, the Procurement Officer may reject all

bids and select the lower-cost, publicly advertised price from an entity that may not have submitted a formal bid.

7.6.5. Requirements for bonds and deposits.

7.6.5.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 by the Procurement Officer that the security is necessary to safeguard the Department from undue risk.

7.6.5.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.

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

7.7. Change orders.

7.7.1. 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.

7.7.2. Change order submission.

7.7.2.a. A request for the contract change must be submitted to the Procurement Officer.

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

7.7.3. The Procurement Officer may request any documentation or further explanation that the Procurement Officer deems necessary to aid in reviewing a change order request.

7.7.4. The Procurement Officer shall reject the change order if upon review he or she determines to be unjustified, inadequately documented, or unreasonable.

7.7.5. Vendors must not be permitted to perform work that will be added to a contract through a change order until such time as the change order has been:

7.7.5.a. Formally approved by the Procurement Officer;

7.7.5.b. Encumbered by the Department; and

7.7.5.c. Transmitted to the vendor.

§144-3-8. Remedies.

8.1. The Procurement Officer may require the Department to attempt to resolve any issues that it may have with the vendor prior to pursuing a remedy contained herein. The Department must document any resolution efforts to be retained by the Procurement Officer.

8.2. Contract Cancellation.

8.2.1. The Procurement Officer may cancel a purchase or contract immediately under any one of the following conditions including without limitation:

8.2.1.a. The vendor agrees to cancellation.

8.2.1.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.

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

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

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

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

8.2.2. Except as provided for in subdivision 8.2.1. of this subsection, 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.

8.3. Opportunity to cure.

8.3.1. 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.

8.3.2. 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.

8.4. Re-award.

8.4.1. The Procurement Officer may award a cancelled contract to the next most qualified responsible bidder, whether that be the next lowest bidder in a cost driven competitive bid or the next highest scoring bidder if best value procurement, without a subsequent solicitation if the Secretary determines it to be in the best interest of the Department.

8.5. Non-responsible.

8.5.1. If the Procurement Officer believes that a vendor may be non-responsible, the Procurement Officer may request a vendor 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.

8.5.2. 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.

8.5.3. 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.

8.5.4. 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.

8.6. Suspension by the Department.

8.6.1. The Secretary may suspend, for a period not to exceed one year, the right of a vendor to bid on procurements issued by the Department

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

8.7. Damages.

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

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

8.7.3. The Department shall seek to collect damages by means are determined appropriate by the Secretary in consultation with counsel.

§144-3-9. Encumbrance.

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

9.2. Prior to issuing a contract, the Procurement Officer will verify the amount of funds encumbered is appropriate and the account being encumbered matches what the Department has requested.

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

9.3.1. A contract for a one-time purchase in the current fiscal year must encumber the full contract amount.

9.3.2. 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.

9.3.3. A contract that will be awarded prior to the end of a current fiscal year but which will become effective after that same fiscal year has ended is not required to encumber funds prior to issuance of the contract.

9.4. Open-end contracts or a statewide contract are not required to have funds encumbered prior to the issuance of the contract.

§144-3-10. Exemptions.

10.1. Commodities and Services Identified as "Not Possible to Bid."

10.1.1. The Department may purchase commodities and services determined to be not possible to bid directly from the vendor without advertisement or bid and are not required to have contracts for the purchase of those items \$25,000 or less. For contracts valued greater than \$25,000, contract documents are required.

10.1.2. Even though competitive bidding is not required for the Not Possible to Bid List, the Department must continue to appropriately document requirements associated with the applicable threshold of purchases of \$25,000 or more unless otherwise noted with each item. For example, all vendors must applicable registration requirements to become vendors of the state.

10.2. Direct Award Procurement.

10.2.1. The Procurement Officer may approve the purchase of commodities and services directly from a vendor as a direct award procurement without competitive bidding if the Department can reasonably acquire the good or services from only one source.

10.2.2. The basis for the direct award procurement and the specific efforts made to determine the availability of other sources must be appropriately documented.

10.3. Emergency Procurement.

10.3.1. A purchase in excess of \$25,000 may be made without competitive bidding if it is necessary due to an emergency hardship.

10.3.2. Any request to procure specific commodities or services pursuant to this subsection must be submitted in writing to the Secretary or his or her designee. The Secretary, or his or her designee, shall review the written request and issue written approval or disapproval.

10.3.3. Approval to procure goods or services on an emergency basis will permit the purchase of required goods or services directly from a vendor.

10.3.4. Determination of what qualifies as an emergency under this subsection shall be evaluated on a case-by-case basis. An emergency includes, but is not limited to, 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.

10.3.5. A purchase may not be made pursuant to this subsection if it's necessary for hardship resulting from neglect, poor planning, or lack of organization.