



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

9/23/2022 10:10:09 AM

Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Emergency Management

TITLE-SERIES: 170-06

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

RULE NAME: Purchasing Policy

CITE STATUTORY AUTHORITY: W. Va. Code 5A-3-3a

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 10/24/2022 9:00 AM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Brandolyn N Felton-Ernest

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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 rule specifies guidelines for purchasing and paying for commodities and services necessary for the operation of the West Virginia Division of Emergency Management pursuant to West Virginia Division of Emergency Management's purchasing exemption.

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

This amendment to the rule makes the following changes:

Changes the filing date of the rule

Changes the effective date of the rule

Removes the definition for "Department of Revenue", "Logistics Section", "Non-Reportable Assets" and "Travel Management Office (TMO)"

Changes the numbering of the section after removal of definitions

Added new language regarding W.Va. Code 15-14-9(a) which states the Emergency Management Division should not have to request moneys from any radio sales

Changes the non-emergency purchasing amounts

Changes and addresses purchasing over \$50,000, which changes from \$25,000

Changes and addresses purchasing methods for direct awards consistent with the other changes

Changes and addresses requests for quotations amounts

Notes that the purchaser may purchase the commodities and services on the Impossible to Bid List directly from the vendor unless otherwise noted or listed on the West Virginia Purchasing Division's Impossible to Bid List

Adds Automobiles to the Impossible to Bid list consistent with the June 21, 2022 announcement from the West Virginia 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:

This rule clarifies that the Emergency Management Division should not have to request moneys from any radio sales pursuant to W.Va. Code 15-14-9(a).

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

None

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2022 Increase/Decrease (use "-")	2023 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):

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

Yes

Brandolyn N Felton-Ernest -- 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.

170-06 TITLE 170
PROCEDURAL RULE
WEST VIRGINIA DIVISION OF EMERGENCY MANAGEMENT

SERIES 6
PURCHASING POLICY

§170-6-1. General

1.1. Scope. -- This rule specifies guidelines for purchasing and paying for commodities and services necessary for the operation of the West Virginia Division of Emergency Management pursuant to West Virginia Division of Emergency Management's purchasing exemption. This rule is not applicable to any purchases made on an emergency basis for the SORN system pursuant to W.Va. Code Rules §170-04-01 *et seq.*, or for any purchase contemplated or completed pursuant to W.Va. Code 5A-3-3c.

1.2. Authority. -- W. Va. Code §5A-3-3a.

1.3. Filing Date. -- ~~November 18, 2021.~~

1.4. Effective Date. -- ~~December 20, 2021.~~

§170-6-2. For the Purposes of This Rule

2.1. "Accounting Section" means the West Virginia Division of Emergency Management Accounting Section.

2.2. "Auditor" means the West Virginia State Auditor.

2.3. "Commodities" means supplies, material, equipment, contractual services, and any other articles or things used by or furnished to a department, agency or institution of State Government.

2.4. "DAS - Purchasing Section" means the West Virginia Division of Administrative Services Purchasing Section.

~~2.5. "Department of Revenue" means State of West Virginia Department of Revenue.~~

~~2.6.~~ 2.65. "Direct Award Purchase" means any contract or purchase entered into without a competitive process, based on a justification that only one known source exists or that only one single supplier can fulfill the requirements.

~~2.7.~~ 2.76. "Director" means Director of the Division of Emergency Management.

~~2.8.~~ 2.87. "Division" means Division of Emergency Management.

~~2.9.~~ 2.98. "Employee" means employees of the West Virginia Division of Emergency Management.

~~2.10.~~ 2.102. "Expendable Commodities" means commodities which, when used in the ordinary course of business, will become consumed or of no market value within the period of one year or less.

~~2.14.~~ 2.140. "Expression of Interest (EOI)" means a Best Value Procurement tool used for

architectural and engineering services which is defined in W. Va. Code 5G-1, as “those professional services of an architectural or engineering nature as well as incidental services that members of those professions and those in their employ may logically or justifiably perform.

~~2.12. “Logistics Section” means the Logistics Section of the West Virginia Division of Emergency Management.~~

~~2.13. “Non-Reportable Assets” means non-reportable assets defined as either assets that are valued at less than \$1,000 or have a useful life of less than one year, or assets expendable in nature.~~

2.141. “Procurement Section” means the West Virginia Division of Emergency Management Procurement Section.

2.152. “Purchaser” means any employee of the West Virginia Division of Emergency Management who is assigned purchasing authority.

2.163. “Reportable Assets” means any personal assets, excluding expendable commodities that has an original acquisition cost of \$1,000 or more and a useful life of one year or longer.

2.174. “Request for Proposal (RFP)” means an agency request for proposal.

2.185. “Request for Quotation (RFQ)” means an agency request for quotation.

~~2.19. “Travel Management Office (TMO)” means the State Travel Management Office within the Department of Administration.~~

2.2016. “Working Days” means Monday through Friday, but excludes Saturday, Sunday, State Holidays and days that government offices are closed due to declaration of an emergency.”

2.2117. “wvOASIS” means the State’s accounting system managed by the Enterprise Resource Planning Board in conjunction with the West Virginia Department of Administration and the State Auditor’s Office.

§170-6-3. Policy Training

3.1. Each employee of the West Virginia Division of Emergency Management, who has the authority or responsibility to purchase commodities and services, shall be advised of the West Virginia Purchasing Card Policies and Procedures, contained on the West Virginia State Auditor's website, and the policies of the West Virginia Division of Emergency Management.

3.2. Training will be made available by the Assistant Director - DAS Purchasing Section, or their designee, annually to Division employees, involved in the purchase of commodities and services, in addition to required P-Card training. All Division employees conducting purchasing transactions will be required to meet all mandatory training requirements, either in person or provided online.

§170-6-4. Procedures

4.1. The Division may utilize any other State contract, if the vendor approves, or Federal contracts to make purchases when in the best interest of the West Virginia Division of Emergency Management and/or the State of West Virginia or as one of three required bids as applicable.

4.2. Amounts spent with vendors for like purchases are viewed comprehensively. The Division will monitor expenditures with vendors for like purchases to ensure that the total amount spent with a given vendor, within any 12-month period, does not exceed an applicable bid threshold without the proper level of documentation and bidding.

§170-6-5. Firm Fixed Pricing

5.1. All contracts should be entered into for a firm, fixed price per unit of goods or service. In such cases where the nature of the procurement prohibits a firm, fixed price, a detailed written justification must be included in the file.

§170-6-6. Remedies

6.1. The Assistant Director – DAS Purchasing Section may require that the Division attempt to resolve any issues that it may have with the vendor prior to pursuing a remedy contained herein. The Division must document any resolution efforts and provide copies of those documents to the Assistant Director – DAS Purchasing Section.

6.2. Contract Cancellation.

6.2.1. Cancellation. The Director may cancel a purchase or contract immediately under any one of the following conditions including, but not limited to:

6.2.1.a. The vendor agrees to the cancellation;

6.2.1.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;

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

6.2.1.d. The existence of an organizational conflict of interest is identified;

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

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

6.2.1.g. The contract was awarded in error.

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

6.2.3. Opportunity to Cure. 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 Director may request that the vendor remedy the contract breach or legal violation within a time frame the Director determines to be appropriate. If the vendor fails to remedy the contract breach or legal violation or the Director 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.

6.2.4. Re-Award. The Assistant Director – DAS Purchasing Section may award the cancelled

contract to the next lowest responsible bidder (or next highest scoring bidder if best value procurement) without a subsequent solicitation if the following conditions are met:

6.2.4.a. 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

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

6.2.4.c. 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.

6.3. Non-Responsible. If the Assistant Director – DAS Purchasing Division believes that a vendor may be non-responsible, the Assistant Director – DAS Purchasing Section may request that a vendor provide evidence that 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. If the Assistant Director – DAS Purchasing Section determines that the vendor is non-responsible, the Assistant Director – DAS Purchasing Section shall reject that vendor's bid and shall not award the contract to that vendor. 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. 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.

6.4. Damages.

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

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

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

§170-6-7. Registration, Advertising, Bidding and Award

7.1 Registration of Vendors:

7.1.1. Purchasing Division Registration. All vendors must register with the Purchasing Division prior to being awarded a contract, except that the following categories of vendors are exempt from this registration requirement.

7.1.1.a. Purchasing card vendors providing travel related services are not required to register with the Purchasing Division.

7.1.1.b. Purchasing card vendors receiving an aggregate total yearly payment less than \$25,000.00 from a spending unit are not required to register with the Purchasing Division.

7.1.1.c. Any company or corporation, or subsidiary of the company or corporation, listed on any nationally recognized stock exchange is not required to register with the Purchasing Division.

7.1.2. Vendors shall register by submitting the vendor registration and disclosure statement provided by the Purchasing Division.

7.1.3. Purchasing Division Fee Payment. All vendors shall pay to the Purchasing Division, an annual registration fee of \$125 prior to being awarded a contract, except that the following categories of vendors are exempt from this requirement.

7.1.3.a. Purchasing card vendors providing travel related services are not required to pay the registration fee.

7.1.3.b. Vendors paid only by the State purchasing card that receive aggregate total yearly payments of less than \$25,000.00 from a spending unit are not required to pay the registration fee.

7.1.3.c. Vendors receiving orders for goods or services of \$2,500 or less, from all spending units, regardless of payment method, are not required to pay the registration fee.

7.1.3.d. Vendors providing a good or service under a direct award are not required to pay the registration fee for providing that good or service for which they have been designated a direct award vendor.

7.1.3.e. Any vendor can be exempted from paying the registration fee if the Assistant Director – DAS Purchasing Section determines that waiving the registration fee would be in the best interest of the Division.

7.1.4. A vendor with multiple locations shall pay only one fee when operating under one Federal Employer Identification Number (FEIN).

7.1.5. Other Registrations, Licenses, etc. The vendor must be licensed and in good standing in accordance with 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 Tax Department, West Virginia Insurance Commission, 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.

7.1.6. Failure to Register. The Division is prohibited from awarding any contract to any vendor not properly registered. 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 7.1. of these Rules, the vendor will be given a period of time that the Assistant Director – DAS Purchasing Section deems sufficient to cure the failure. If after that period vendor has not cured the failure, the Assistant Director – DAS Purchasing Section may disqualify the vendor's bid or cancel the contract.

7.2. Advertising. Solicitations that exceed \$25,000 must be advertised using advertising media such as WV Oasis Purchasing Bulletin, or any other media the Assistant Director – DAS Purchasing Section considers advisable.

7.3 Bidding.

7.3.1. The Procurement Section or DAS - Purchasing Section must receive bids from vendor prior to the date and time of the bid opening listed on the solicitation forms provided by the Procurement Section or DAS - Purchasing Section. The Procurement Section and/or DAS – Purchasing Section must reject bids received after the designated time and date. Each vendor is solely responsible for delivering its bid to the location designated in the solicitation documents.

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

7.3.3. The Assistant Director – DAS Purchasing Section may allow bids by electronic transmission, to include by facsimile and email. Bids by electronic transmission must be received by the Procurement Section or DAS- Procurement Section prior to the bid opening date and time. A bid will not be considered received until after transmission is completed. 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 State 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 Division. The Division makes no guarantee of confidentiality when vendors utilize electronic transmission.

7.3.4. Copies of bids will be open for public inspection in the office of the Division or at DAS- Purchasing Section at any time after the completion of the public bid opening. No original bid may be removed from the presence of a Procurement Section or DAS – Purchasing Section representative. The Director may prescribe policies to include scanning, copying or other methods of assuring public access. The purchasing files of the Division are open for public inspection after the award for the solicited commodity or service has been made.

7.3.5. A bidder may make a change to a sealed bid before the bid opening. A bidder must submit changes in writing or by electronic transmission to the Procurement Section or DAS - Purchasing Section. To be effective, any change must be received by the Procurement Section or DAS – Purchasing Section prior to the date and time of the bid opening. Changes by electronic transmission must be made in the manner provided in Subdivision 7.3.3. of this rule.

7.3.6. The Assistant Director – DAS Purchasing Section may reject a bid that a vendor declares to be erroneous after the bid opening, but otherwise appears to be responsive, if all of the following conditions exist: (1) An error was made; (2) The error materially affected the bid; (3) Rejection of the bid would not cause a hardship on the Division, other than losing an opportunity to receive commodities, services or printing at a reduced cost; and (4) Enforcement of the part of the bid in error would be unconscionable. In order for the Assistant Director – DAS Purchasing Section to reject a bid under this subsection, the public file must contain documented evidence that all of the conditions set forth in this subdivision exist.

7.3.7. The Assistant Director – DAS Purchasing Section must reject a bid that is found to be non-responsive. A non-responsive bid is one that fails to conform to the solicitation in all material respects.

7.3.8. The official time clock of the Division or the DAS - Purchasing Section for the purpose of receipt of bids, shall be the time clock as displayed in the offices of the Division or the DAS - Purchasing Section, whichever is specified in the bid announcement

7.3.9. If there is a conflict between the extension (total) price and the unit price in the bid, the unit price prevails. The Division reserves the right to recalculate a vendor's extension (total) pricing.

7.3.10. 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 Assistant Director – DAS Purchasing Section may assume that items offered meet the specifications.

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

7.3.12. Vendors may contact the Procurement Section or DAS – Purchasing Division to obtain official bid forms.

7.3.13. 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.

7.3.14. Per West Virginia Code §15-14-9(a), “There is hereby created in the State Treasury a special revenue account to be known as the Stateside Interoperable Radio Network Account to be administered by the director. The special revenue account shall consist of appropriations made by the Legislature; income derived from the lease of property, towers or tower space owned, operated or controlled by the WVDHSEM or any other state agency managed as part of the SIRN; moneys received by the Department of Health and Human Resources or WVDHSEM as proceeds of any claims for damages to structures, equipment or property of any kind, including moneys in the Insurance Property Loss Claims Fund administered by the Division of Health; income from the investment of moneys held in the special revenue account; grant money and all other sums available for deposit to the special revenue account from any source, public or private; and moneys received from the sale of recycled two-way telecommunications equipment pursuant to §15-14-6(10) of this code.” As such, the Emergency Management Division should not have to request moneys from any radio sales.

7.4. Awards.

7.4.1. Any award made by the Assistant Director – DAS Purchasing Section will be made in accordance with the law governing the type of procurement being awarded. The Assistant Director – DAS Purchasing Section may make multiple or split awards when it is in the best interest of the Division.

7.4.2. The Assistant Director – DAS Purchasing Section may accept or reject, in whole or in part, any bid when the Assistant Director – DAS Purchasing Section feels it to be in the best interest of the Division. If any bid is rejected, the Assistant Director – DAS Purchasing Section, or designee, shall place a written explanation in the purchase order file.

7.4.3. When tie bids are received, the Assistant Director – DAS Purchasing Section shall break the tie by: allowing the tied vendors to make a final offer, flip of a coin, draw of the cards, or any other impartial method considered prudent by the Assistant Director – DAS Purchasing Section.

7.4.4. Requirements for bonds and deposits. The Assistant Director – DAS Purchasing Section shall determine the applicability and amount of bonds or deposit required of a vendor at any time, if, it is judged that security is necessary to safeguard the Division from undue risk. The Assistant Director – DAS Purchasing Section may require the vendor to submit a certified check, certificate of deposit, performance bond, litigation bond or any other security acceptable to the Director, payable to the State of West Virginia. Neither personal checks nor company checks are acceptable. 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 spending unit or other relevant party that the bond or security in question has fully served its purpose, the Assistant Director – DAS Purchasing Section may return the bond or security.

7.4.4.a. Any bonds submitted via fax should be followed by an original bond received by the

Procurement Section or DAS – Purchasing Section within two (2) business days.

7.5. Specifications.

7.5.1. 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 vendor. 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 unless a specific brand/model must be purchased by the Division for compatibility reasons or uniformity.

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

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

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

7.5.1.a.3. Drafting specifications that are so restrictive that only one desired vendor can meet the requirements without adequate justification for the restrictions, unless a specific brand/model must be purchased by the Division for compatibility reasons or uniformity.

7.5.1.b. Nothing contained in the subsection will be construed to prevent the Division from drafting specifications with restrictions and mandatory requirements that are necessary to perform the objectives for which the commodity or service is purchased.

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

7.5.1.d. If the Procurement Section or DAS – Purchasing Section uses a brand or vendor name to describe a needed commodity or service, the Procurement Section or DAS – Purchasing Section 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.

7.5.1.d.1. 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 Assistant Director – DAS Purchasing Section, or designee, shall not disqualify the vendor's bid due to inequality of non-mandatory components.

7.5.1.d.2. Any request by Procurement Section or DAS – Purchasing Section staff 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.

7.5.2. The Assistant Director – DAS Purchasing Section has authority to develop standard specifications that will form the basis of Division contracts used by the Division.

7.6 Bid Evaluation.

7.6.1. 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 Assistant Director - DAS Purchasing Section may develop a form that evaluators can sign for certification purposes under this subsection.

7.6.2. When a requisition is submitted to the Procurement Section or DAS – Purchasing Section for public advertisement, until an award is made, evaluators and Division personnel are not permitted to communicate with vendors about the solicitation or any component thereof without prior approval from the Assistant Director – DAS Purchasing Section.

7.6.2.a. All communication regarding the solicitation must be directed to the Assistant Director – DAS Purchasing Section until an award has been made.

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

7.7 Deliveries. Receivers for the Division are responsible for: (1) the inspection of commodities, services, or printing upon delivery to ensure that purchases meet contractual requirements, and (2) maintaining records of receipt.

7.8. Change Orders.

7.8.1. Review and Approval. The Assistant Director – DAS Purchasing Section has the authority and responsibility to review change orders just as he or she has authority and responsibility for review and approval of the original contract.

7.8.2. Change Order Submission. Any change order request submitted to the Procurement Section or DAS Purchasing Section must include the vendor's agreement in writing.

7.8.3. The Assistant Director – DAS Purchasing Section may ask for and the Division must provide, any documentation or further explanation that the Assistant Director – DAS Purchasing Section deems necessary to aid in reviewing a change order request.

7.8.4. A contract change order is required whenever the change affects the payment provision, time for completion of the work and/or the scope of the work.

7.8.5. Changes to the original purchase order must be sequentially numbered in the appropriate space. The explanation of change to an existing contract must be described with sufficient detail and clarity that any individual could review and generally understand the contract and change.

7.8.6. Any change to existing contracts that adds work or changes contract cost, and were not included in the original contract, must be approved by the Director or designee.

7.8.7. A Change Order is required for all contract renewals or extensions.

7.8.8. Rejection. If the Director reviews the change order and determines that it has not been properly justified; fails to include necessary documentation; is or could be construed as an attempt to circumvent the bidding process; or is otherwise unfit to be approved; the Director shall reject the change order.

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

7.8.10. Timing of Work.

7.8.10.a. The Division must not permit vendors to perform work that the Division anticipates will be added to a contract through a change order until such time as the change order has been:

7.8.10.a.1. Formally approved by the Procurement Section or DAS – Purchasing Section and the Attorney General's office.

7.8.10.a.2. Encumbered by the Procurement Section or DAS – Purchasing Section.

7.8.10.a.3. Mailed to the vendor.

7.8.10.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.*

§170-6-8. Non-Emergency Purchasing up to ~~\$5~~\$10,000.00

8.1. For any purchase up to and including ~~five~~ ten thousand dollars (~~\$5~~\$10,000.00), of a non-emergent nature, competitive bids are not required but are encouraged when possible. Required documentation includes, but is not limited to, signed and completed purchase requisition, invoice or receipt, receiving report or packing slip, a copy of the contract front sheet showing item numbers and pricing page(s), if applicable.

§170-6-9. Non-Emergent Purchasing ~~\$5~~\$10,000.01 to ~~\$25~~\$50,000.00

9.1. For purchases between ~~five~~ ten thousand dollars and one cent (~~\$5~~\$10,000.01) and ~~fifteen~~ thirty thousand dollars (~~\$15~~\$30,000.00), of a non-emergent nature, a minimum of three verbal or written bids are required, when possible, *and* the lowest bid meeting specifications must be awarded the purchase order/contract unless there are extenuating circumstances. A price from an internet site shall be considered a bid for these circumstances, as long as it includes all relevant costs, including shipping and any other fee associated with the product. All bids must be documented on or attached to a EMD Form-49 and present in the file. A “no bid” is not considered a bid. Required documentation includes, but is not limited to, signed and completed purchase requisition, invoice or receipt, receiving report or packing slip, a copy of the contract front sheet showing item numbers and pricing page(s), if applicable.

9.2. For purchases between ~~fifteen~~ thirty thousand dollars and one cent (~~\$15~~\$30,000.01) up to and including ~~twenty-five~~ fifty thousand dollars (~~\$25~~\$50,000.00), of a non-emergent nature, a minimum of three signed written bids are required, when possible, and the lowest bid meeting specifications should be awarded the purchase order/contract unless there are extenuating circumstances. All bids must be signed written bids, if services are involved, Agency terms and conditions, WV-96 if vendor terms and conditions are involved, Purchasing Affidavit, Non-Conflict of Interest form and vendor verification in VCUST, a copy of the contract front sheet showing item numbers and pricing page(s) if applicable

§170-6-10. Purchasing over ~~\$25~~\$50,000.00

10.1. To accomplish any purchase of ~~over twenty-five~~ fifty thousand ~~or greater~~, of a non-emergent nature, the Division will transact and work directly with the DAS - Purchasing Section for all purchases

over ~~\$2550~~,000.00. Purchases of this type will be accomplished using Requests for Quotation (“RFQ”), Requests for Proposals (“RFP”), Expressions of Interest (“EOI”) or Direct Award solicitation

§170-6-11. Purchasing Methods

11.1 Direct Award:

11.1.1. A direct award is a procurement method that provides a contract to a vendor without competitive bidding when circumstances allow. Solicitation and competition are encouraged rather than to process a direct award request; however, a direct award may be made if the following circumstances occur:

11.1.1.a. Written justification documenting that the direct award is in the best interest of the Division.

11.1.1.b. When there is no other source or that no other source would be willing or able to replace the existing source without a detrimental effect on the spending unit.

11.1.1.c. No other vendor expresses an interest in providing the commodity or service in question.

11.1.2. Direct Award of ~~\$2550~~,000.00 or less:

11.1.2.a. The process outlined below for a direct award at the delegated level.

11.1.2.b. \$0 to ~~\$510~~,000.00: No documentation required but competition is always encouraged.

11.1.2.c. ~~\$510~~,000.01 to ~~\$2550~~,000.00: Assistant Director - DAS Purchasing Section must approve or disapprove the transaction. (An email will meet this requirement.)

11.1.2.d. All documentation must be maintained in the purchasing file, including its justification to make the award and any documentation awarding the purchase shall also be maintained in the purchasing file.

11.1.3. Direct Award Exceeding ~~\$2550~~,000.00:

11.1.3.a. Direct Award purchases exceeding ~~\$2550~~,000.00 shall be in accordance with subsection 10.1 above.

11.2. Emergency Purchases:

11.2.1. This section only applies to emergency purchases not contemplated or completed pursuant to W.Va. Code R. §170-04-01 *et seq.*, or for any purchase contemplated or completed pursuant to W.Va. Code 5A-3-3c and W.Va. Code R. § 170-05-01 *et seq.*

11.2.2. An emergency purchase can only be made, unless covered by a separate procedural rule of the Division, or pursuant to a separate section of West Virginia Code, upon reasonable and sufficient grounds that some unforeseen or unexpected circumstance has suddenly created a situation requiring that commodities or services be purchased. A record of competitive bids must be maintained in the file if applicable. Emergency purchases are not to be utilized for hardships resulting from neglect, poor planning, or lack of organization by the Division.

11.2.3 An emergency purchase can only be made if the Director, Deputy Director, or Assistant Director - DAS Purchasing Section, or their designee, exercising sound judgment and discretion, concludes in good faith and upon reasonable and sufficient grounds that some unforeseen or unexpected circumstance has suddenly created a situation requiring that commodities or services be immediately purchased. A request for an emergency purchase must be made to the Procurement Section or the Assistant Director - DAS Purchasing Section, which at a minimum shall describe the situation and cause, necessitating the emergency purchase.

11.2.4. Declared State of Emergencies by Governor: In accordance with West Virginia Code §15-5-6, the governor has the authority to suspend certain laws, rules and/or regulations regarding the acquisition of commodities and services by public organizations in the event the governor declares an emergency. When emergency needs relate directly to the declared state of emergency, these procedures are available and outlined on the Purchasing Division's website at <http://www.state.wv.us/admin/purchase/EmergencyProcs2.html>.

11.3 Request for Quotation:

11.3.1. Requests for Quotations (RFQ) should be used to acquire most tangible property (i.e. equipment, supplies, etc.) and most services. The RFQ is required for most Division delegated purchases between ~~\$1530,000.01~~ and ~~\$2550,00.00~~. Exceptions to this requirement may be granted by the Assistant Director - DAS Purchasing Section. Such exceptions may include Direct Award purchases, emergency purchases and any other exceptions that the Assistant Director - DAS Purchasing Section deems in the best interest of the State.

11.3.2. Solicitation of Bids: To achieve the goal of competitive bidding, a minimum of three bids are required, when possible. For Division delegated purchasing (procurements of ~~\$2550,000~~ or less), care must be taken to solicit vendors capable of providing the necessary products or services. If wvOasis is utilized to advertise solicitations, three bids are not necessary.

11.4. Requests for Proposals:

11.4.1. Requests for Proposals (RFPs) are a procurement method that can be utilized when the method of achieving an objective is not well known, making the development of mandatory requirements difficult. Using this method, the lowest price is not the sole determining factor. The RFP method is typically longer than other procurement methods and requires significant agency personnel time and resources to complete.

11.4.2. Limitations:

11.4.2.a. RFPs are limited to procurements with an estimated value of \$100,000, unless it's determined by the Assistant Director – DAS Procurement Section to utilize the RFP method for a smaller procurement.

11.4.3. Approval Request:

11.4.3.a. The Division must have authorization from the Director or designee prior to requesting the DAS Purchasing Section to utilize the RFP procurement method. This request should include justification to show that the RFP is in the best interest of the Division.

11.4.3.b. The justification should include a description of the service being sought, an

explanation of why the RFQ procurement method is not appropriate, any prior solicitation that has been utilized to procure the service in the past, the expected cost of the project, and any other pertinent information that the Director deems appropriate.

11.4.4. An RFP 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 Division.

11.4.4.a. The two components must then be evaluated based upon the criteria contained in the RFP, scored, and combined to form a total score.

11.4.4.b. The highest scoring vendor will be awarded the contract. No proposal may be evaluated using any criteria other than the criteria specified in the RFP.

11.5. Trade-Ins:

11.5.1. The Division has the ability to trade in used equipment to offset the purchase cost of new equipment. The trade-in process is not delegated to the Purchaser, so any trade-in will be processed through the Division's Procurement Section or the DAS - Purchasing Section regardless of dollar amount.

11.6. Expressions of Interest:

11.6.1. Pursuant to West Virginia Code § 5G-1-1, agencies must utilize the Expression of Interest (EOI) procurement method to solicit architectural and engineering services for projects estimated to exceed \$250,000. For purposes of determining the \$250,000 threshold, the project cost is calculated by combining the construction cost and associated architectural and engineering fees.

11.6.2. All EOIs exceeding \$250,000 must be submitted using the EOI Standard Format for processing as a central procurement. The EOI will then be advertised within wvOASIS and as a Class II legal ad as required by West Virginia Code.

§170-6-12. Vendor Compliance

12.1. Prior to an award, a vendor must be in compliance with the following requirements and, if applicable, documentation verifying compliance shall be retained in the file:

12.1.1. Purchasing Division Registration as set forth in Subsection 7.1 above.

12.1.2. Workers' Compensation/Unemployment: In accordance with West Virginia Code §21A-2-6, verification of current unemployment fee status and Workers' Compensation coverage is required to ensure the vendor is not in default with Workers' Compensation and Employment Compensation. wvOASIS automatically verifies compliance prior to award.

12.1.3. Federal Debarment: Verification that the vendor is not debarred by the federal government. wvOASIS automatically verifies this federal compliance prior to award.

12.1.4. State Debarment: Verification that the vendor is not debarred by the State of West Virginia. The Purchasing Division maintains a list of vendors debarred by the state of West Virginia, which may be accessed at www.state.wv.us/admin/purchase/debar.html. This must be verified for compliance prior to award.

12.1.5. Secretary of State: Unless a waiver is obtained from the Secretary of State's office, every in-state vendor must have a certificate of authority and be in good standing with Secretary of State's office. Out of State Vendors only need to register with the Secretary of State under certain conditions. To search for a business or corporation with the Secretary of State's office, visit <http://apps.sos.wv.gov/business/corporations>. Any vendor that cannot be found or shows a status of "revoked" or "dissolved" is not eligible for award until the issue is resolved. Agencies must verify this compliance manually prior to award and include a copy of the relevant records on the contract purchasing file.

12.1.6. Other: In accordance with the West Virginia Code §148 C.S.R. 1-6.1.e, the vendor must be licensed and in good standing with any and all state and local laws and complete a Purchasing Affidavit, and an Agreement Addendum (WV-96), as applicable.

§170-6-13. Tie Bids

13.1. When purchasing commodities and services ~~of \$25,000 or less~~, occasionally two or more bids of equal terms and amount are received in response to a solicitation, thus, resulting in a *tie bid*. If multiple awards are not made, the tie bid(s) must be resolved. When tie bids are received, the Assistant Director - DAS Purchasing Section shall break the tie by allowing the tied vendors to make a best and final offer, flip of a coin, draw of the cards, or any other impartial method considered prudent by the Assistant Director - DAS Purchasing Section. The means selected to break the tie is determination made at the sole discretion of the Assistant Director- DAS Purchasing Sections, and is not subject to appeal, or protest.

13.2. A non-interested party witness must be present when resolving the tie and documentation of the method and results, with signatures of all witnesses, must also be included in the file. Vendors affected by the tie shall be notified and given an opportunity to attend the tie breaker.

§170-6-14. Multiple Awards

14.1. The Division may elect to award a contract to more than one vendor when the Assistant Director – DAS Purchasing Section determines such action would be in the best interest of the Division. In arriving at a determination, the Assistant Director - DAS Purchasing Section will consider the following factors, insofar as they are applicable:

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

14.1.2. The ability, capacity and skill of the bidder;

14.1.3. The sufficiency of the bidder's financial resources;

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

14.1.5. The compatibility with existing equipment;

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

14.1.7. Any other relevant factors.

14.2. A written explanation will be included in the public file in situations where a multiple award is deemed necessary. The Assistant Director – DAS Purchasing Section decision regarding multiple awards will be final in all cases.

§170-6-15. Addenda

15.1. During the bid process, it may be necessary to for the Procurement Section or DAS Purchasing Section to alter bidding documents. To facilitate a change to a solicitation after issuance for bid in WV OASIS, a formal written addendum is required.

15.2. A formal addendum is necessary to: add, delete, or change specifications or attachments; provide a copy of the pre-bid attendee list; answer technical questions, requests for clarification or requests for product substitutions (on construction projects); extend or alter bid schedule dates/times; or any other such change to the issued bidding documents.

15.3. The following should also be included where applicable:

15.3.1. Specification changes, additions, or noted deletions;

15.3.2. Pre-bid attendee list;

15.3.3. An attachment listing each technical question with a corresponding answer; and

15.3.4. Revised or added sketches, drawings and/or charts.

15.4. The addendum will be provided by publication to all vendors in the same manner as the original solicitation.

15.5. Addenda should be provided to prospective bidders, 7 calendar days prior to the scheduled bid opening date. For complex transactions, such as construction bids, Requests for Proposals, or complex Requests for Quotation, it should be provided within 14 calendar days prior to the scheduled bid opening to allow bidders ample time to prepare and submit bid responses.

15.6. The Procurement Section or DAS Purchasing Section may, at its discretion, extend the bid opening date if it deems it to be in the best interest of the Division.

§170-6-16. Necessary documents for all purchases where a contract is involved

16.1. Purchasing Affidavit.

16.2. Agency Terms and Conditions.

16.3. Agreement Addendum (WV-96) (required when vendors submit alternate terms and condition with their bid).

16.4. Drug Free Affidavit (for certain construction projects).

16.5. Certification of Non-Conflict Form.

16.7. Interested Party Disclosure Form: W. Va. Code § 6D-1-2 requires that for contracts with an actual or estimated value of at least \$1,000,000.00, the vendor must submit to the Procurement Section or

DAS Purchasing Section a disclosure of interested parties to the contract, prior to contract award. Additionally, the vendor must submit to the Procurement Section or DAS Purchasing Section a supplemental disclosure within 30 days of contract completion or termination.

16.7.1. The disclosures must occur on the form prescribed and approved by the West Virginia Ethics Commission. To access this form, visit the West Virginia State Purchasing Division's intranet at <http://www.state.wv.us/admin/purchase/forms.html>.

§170-6-17. Negotiation When All Bids Exceed Available Funds

17.1. If all bids meeting requirements exceed the budgeted amount, the Division may negotiate a lower price within budget with the lowest bidder. If the negotiation does not lead to the budget amount being met, the DAS - Purchasing Section may negotiate a lower price with the next lowest bidder and continue negotiations with participating bidders after negotiation closes with the preceding bidder.

17.2. Discussion and Final Offers:

17.2.1. As provided in the bid solicitation, the Assistant Director - DAS Purchasing Section or their designee may conduct discussions to obtain best and final offers from bidders to assure full understanding of solicitation requirements. If the Assistant Director - DAS Purchasing Section or their designee 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. All best and final offers shall be treated like a formal bid, except that advertising is not required. All bidders shall provide their best and final offers to the Assistant Director – DAS Purchasing Section prior to the date and time specified.

17.2.2. Government construction contracts, supplies and materials are exempt from this negotiation method.

§170-6-18. Pre-Bid Conferences

18.1. Regardless of the procurement method used, the Procurement Section or DAS Purchasing Section should consider conducting pre-bid conferences on high dollar, complex acquisitions early in the bid process to provide an opportunity to explain and clarify critical aspects of the solicitation, eliminate misunderstandings, and encourage vendor participation.

18.2. In all cases, it is very important for the Assistant Director of the DAS - Purchasing Section, or their designee, who is trained and knowledgeable of the procurement process to attend these conferences.

18.3. Vendor attendance at conferences may be optional or mandatory, as described in the bid document. If mandatory attendance is required, only bids or proposals from those vendors represented at the conference will be accepted. If participating vendors sign the official "sign-in sheet" while the meeting is in progress, then the vendors will be treated as if they were present for the entire conference and will be deemed to have the knowledge that they would have had if attending the entire conference. Teleconference attendance is prohibited unless specified in the bid document.

18.4. "Sign-in sheets" for mandatory pre-bid conferences should contain the following: name of company, person attending (signature and printed name), address, telephone number and facsimile number. If the pre-bid conference is held by teleconference, a report generated from the teleconference service that details attendance will be an acceptable sign in sheet.

18.5. The header information on the sheets should include the requisition number and the date and

time of the pre-bid conference. The original sheet must be filed in the bid file maintained at either the Procurement Section or DAS Purchasing Section. No one individual may represent more than one vendor.

§170-6-19. Architectural and Engineering Projects

19.1. Architectural and engineering services must be procured in accordance with West Virginia Code § 5G-1-1 et seq. These procurements are unique in a number of respects, most notably that cost is not submitted in the vendor's response and that the normal delegated limits previously discussed do not apply. West Virginia Code 5G creates a distinction between procurements on projects of \$250,000.00 or less and those that exceed \$250,000.00. In both cases, however, the final contract must be processed by the DAS - Purchasing Section.

§170-6-20. Changes and Cancellations

20.1. All contracts must contain a term that the State may cancel a Contract immediately if the legislature does not provide adequate funding for the contract.

20.2. All contracts shall contain a term that the Division may cancel a contract upon the issuance of a thirty (30) day notice of cancellation, for any or no reason.

20.3. Administrative changes to contracts may be made after the fact with subsequent approval by the Assistant Director – DAS Purchasing Section. However, it is preferred that such changes be made in advance, whenever possible. Examples of administrative changes include:

20.3.1. Changing a vendor name;

20.3.2. Changing a vendor's address;

20.3.3. Correction of a clerical mistake made by the state;

20.3.4. Contract closeout where the quantity required was originally unknown or estimated, unit prices were included in the original contract, unit prices are not modified as part of the change order, and the quantity required was less than originally anticipated;

20.3.5. Inclusion of the Notice to Proceed documentation, if applicable; and

20.3.6. Any other administrative change not included may be approved by the Assistant Director – DAS Purchasing Section on a case-by-case basis.

§170-6-21. Lease Purchases

21.1. A lease purchase contract is a contract that includes periodic lease payments, and in some cases a final lump sum payment, with ownership of the equipment being vested in the Division immediately or at the lease term expiration. The minimum purchase cost to consider a lease-purchase as an option is \$500,000.00 unless the Director grants an exception to this minimum amount. A letter of justification must be prepared, signed by the Purchaser and submitted to the Procurement Section or the DAS - Purchasing Section prior to any attempt to enter into a Lease Purchase.

§170-6-22. Purchase of Goods from Correctional Industries

22.1. All articles or products which are produced or manufactured by Correctional Industries must be purchased from Correctional Industries in accordance with W. VA. Code §25-7-5.

22.1.1. Correctional Industries may grant an exemption to this requirement as per W. VA. Code §25-7-6 when a correctional industries article or product does not meet the reasonable requirements of the Division, or when the requisition cannot be fulfilled because of insufficient supply or other reason.

22.2. Purchases of correctional industries articles or products by the Division shall be made on requisition.

§170-6-23. Purchases Made with Grant Funds

23.1. If a grant or a portion of a grant awarded to the state does not require the procurement of commodities or services and the Division uses all or a portion of the grant for the procurement of commodities or services that will not directly benefit the Division, the procurement is exempt from the competitive bidding requirements.

23.2. In accordance with W. Va. Code §5A-3-11(i):

23.2.1. A grant awarded by the state is exempt from the competitive bidding requirements, unless the grant is used to procure commodities or services that directly benefit the Division.

23.2.2. If a grant awarded to the state requires the procurement of commodities or services that will directly benefit the Division, the procurement is not exempt from the competitive bidding requirements.

23.2.3. If a grant awarded to the state requires the state to transfer some or all of the grant to an individual, entity, or vendor as a subgrant to accomplish a particular purpose and no contract for commodities or services directly benefitting the Division will result, the subgrant is not subject to the competitive bidding requirements.

§170-6-24. Information Technology Equipment, Services and Software

24.1. W. Va. Code §5A-6-1, et seq., provides that the Chief Technology Officer (CTO) may evaluate and make recommendations on the design and suitability of Information Technology (IT) equipment and related services, and may review and make recommendations on the purchase, lease or acquisition of information equipment and contracts for related services, including temporary IT staffing by all state spending units.

24.2. Please reference West Virginia Office of Technology CTO Policy # CTO-19-001 for guidance, which can be found at <https://technology.wv.gov/security/Pages/policies-issued-by-the-cto.aspx>.

§170-6-25. Quality Assurance

25.1. The Division establishes the quality level by the specifications, and the Procurement Section or DAS Purchasing Section seeks to reduce cost and maintain quality through the competitive bid process. The Procurement Section or DAS Purchasing Section will perform an evaluation of the offers by bidders to obtain maximum benefit for the tax dollars spent. The vendor's responsibility is to provide the quality level established by the specifications and accepted by the Division.

25.2. Proper Acquisition Planning:

25.2.1. The Purchasers first step is to determine the commodity that is needed, the quantity, the quality level, delivery location and time frame. The Purchaser must also conduct adequate market research to allow for preparation of specifications.

25.3. Develop and Submit Solicitation:

25.3.1. The Purchaser is responsible for assisting the Procurement Section or DAS Purchasing Section with preparing the specifications and other solicitation documents that are necessary for the appropriate procurement process.

25.4. Review Bids/Documents and Make Award Recommendation:

25.4.1. After bids are opened (or documents are obtained in the case of a direct award) the Purchaser is responsible for reviewing the bids/documents to assist the Procurement Section or DAS Purchasing in determining the appropriate vendor for contract award. The Procurement Section will consult with the DAS - Purchasing Section before making an award recommendation.

25.5. Receiving:

25.5.1. Receivers must verify the shipment of commodities with the specifications in the purchase order while reporting of any discrepancies, obvious damages or shortages based upon the purchase order specifications.

25.6. Inventory:

25.6.1. Once payment has been made to the vendor and the shell document established, reportable property must be added to the wvOASIS Fixed Assets System.

25.7. Vendor Responsibilities:

25.7.1. Each vendor is solely responsible for delivering a bid to the Procurement Section or to DAS - Purchasing Section, whichever is specified in the bid announcement, by the specified date and time of the bid opening. The official time clock of the Procurement Section or the DAS - Purchasing Section for the purpose of receipt of bids, shall be the time clock as displayed in the offices of the Division or the DAS - Purchasing Section, whichever is specified in the bid announcement. Vendors are responsible for the accuracy of the information on and in the bid envelopes. Vendor is solely responsible for the accuracy of the information on and in the sealed bid envelopes.

25.8. Compliance with Specifications:

25.8.1. Successful vendors are required to meet or exceed the quality level accepted and specified on the final purchase order in addition to meeting delivery requirements.

25.9. Follow-Up with Suppliers:

25.9.1. To ensure delivery deadlines are met, the vendor should communicate and coordinate with its suppliers to fulfill delivery obligations.

25.10. Dispute Resolution:

25.10.1. The vendor is required to negotiate in good faith with the Division should a dispute arise.

25.11. Damages:

25.11.1. The Division may require a liquidated damages provision for some contracts. The term liquidated damages refers to a specified contract provision which entitles the Division to demand a set monetary amount determined to be a fair and equitable repayment for loss of service due to a vendor's failure to meet specific completion or due dates.

25.11.2. A vendor may be liable for any damages available under the law, regardless of specific damages sections in a bid document, or purchase order.

§170-6-26. Impossible to Bid List

26.1. Competitive Bidding Not Required:

26.1.1. Purchaser may purchase the commodities and services on the list directly from the vendor and are not required to have contracts for the purchase of those items approved by the Division unless otherwise noted or listed on the West Virginia Purchasing Division's Impossible to Bid List below with the applicable item.

26.2. Documentation Requirements:

26.2.1. Even though competitive bidding and Division approval are not required for most Impossible to Bid List procurements, the spending unit must continue to follow documentation requirements associated with the applicable spend threshold, unless otherwise noted below with each item.

26.2.1.a. For example, all vendors must complete vendor registration with the Division, Secretary of State Registration, and the Purchasing Affidavit. Additionally, compliance checks such as vendor debarment, workers' compensation, etc., must be completed prior to completing the transaction.

26.3. Registration Fee Waiver:

26.3.1. The vendor registration fee of \$125 for all vendors providing commodities or services under this Impossible to Bid List is waived if it is in the best interest of the Division.

26.3.1.a. This waiver only applies to transactions conducted under this Impossible to Bid List.

26.3.1.b. If the vendor in question also obtains contracts through competitive bidding, direct award, or some other method, fee payment will be required.

26.4. The following items comprise the Impossible to Bid List of commodities and services that may be purchased directly by Purchasers without advertisement or bid:

26.4.1. Advertising:

26.4.1.a. Any advertisement placed directly with newspapers, trade magazines, internet publications, social media or billboards;

26.4.1.b. Broadcast television and radio advertisements and creative services or marketing services to create such advertisements placed directly with the broadcaster or publisher; or

26.4.1.c. Participation fees for trade shows, conferences, or conventions.

26.4.2. Artwork and Historical Items:

26.4.2.a. This purchase of and service to artwork and historical items, i.e. restoring governors' portraits, refurbishing chandeliers, etc.

26.4.2.a.1. Purchasers attempting to procure commodities and services under this item must obtain written approval from the Procurement Section or the DAS - Purchasing Section prior to making any purchase.

26.4.3. Attorneys and Law Firms:

26.4.3.a. Hiring attorneys and law firms in an official attorney-client capacity.

26.4.3.b. Nothing in this item eliminates the approval or oversight residing within the Attorney General's office.

26.4.4. Aviation Fuel:

26.4.4.a. The purchase of aviation fuel but excludes bulk purchases for delivery to state dispensing stations.

26.4.5. Governmental Agencies (Only includes):

26.4.5.a. Contracts between governmental agencies and spending units when a state or federal law requires the commodity or service be obtained from the governmental agency (any contract or purchase order issued must cite the law and maintain a copy on file); and

26.4.5.b. Regulatory fees legally imposed by government agencies.

26.4.5.b.1. Governmental entities are not required to register with the Secretary of State's Office, so the compliance check is not required.

26.4.5.b.2. If the governmental entity is a West Virginia state agency, then the Purchasing Affidavit is not required.

26.4.6. Entertainers:

26.4.6.a. This includes individuals and/or groups contracted at the request of the Division to entertain or to assist in the production of entertainment.

26.4.7. Hospitality:

26.4.7.a. This includes expenses for food, beverages, facility rental and entertainment relating to conducting Division business.

26.4.8. Media License Fees:

26.4.8.a. This includes program license fees for radio or television.

26.4.9. Medical Fees:

26.4.9.a. Medical services (behavioral and physical) from individual doctors, dentists, clinics, hospitals, laboratory testing facilities, audiologists, county medical examiners, physical and occupational therapists, behavioral counseling and evaluations, etc. for individual patients, inmates, students and clients where the Division is responsible for payment for this one-time service; or

26.4.9.b. Programs designed for low income / uninsured patient care on an individual basis provided that the program is open to all service providers.

26.4.9.c. Body transportation for corpses and indigent burial expenses and direct award medical and psychological consultants for the purpose of determining Federal Social Security Administration Disability by the Disability Determination Services of the WV Division of Rehabilitation Services.

26.4.9.d. Medical fees for the purposes of determining vocational rehabilitation needs of clients of the Division of Rehabilitation Services.

26.4.9.e. This does not include inmate health care management, hospital management, consulting services or agreements to provide services for groups of patients, inmates, students or clients, etc. for state agencies.

26.4.10. Postage:

26.4.10.a. Stamps and other non-competitive mailing services from the United States Postal Service, not to include services available from statewide contracts.

26.4.10.a.1. The Purchasing Affidavit and Secretary of State registration are not required for transactions processed under this item.

26.4.11. Professional Association Dues:

26.4.11.a. Membership fees or association dues for professional associations that perform a licensing, certification or accreditation function for state employees or agencies (i.e., West Virginia State Bar, West Virginia Board of Accountancy, etc.).

26.4.12. Railroad Car Hire Fees:

26.4.12.a. National association fees required from all railroads to monitor the location and use of railroad cars for the owners.

26.4.13. Investigative Services; Subject Matter Experts and Witnesses for Administrative

Hearing and Legal Proceedings:

26.4.13.a. 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.

26.4.13.b. This does not include agency consulting services or former employees retained by their agency or hired by another agency.

26.4.14. Subscriptions and publications:

26.4.14.a. This includes newspapers, textbooks, and publications (electronic and hard copy) purchased directly from the publisher.

26.4.15. Training Activities:

26.4.15.a. This includes lecturers, honorariums, copyrighted test and training materials, test monitors/examination proctors, and registration fees.

26.4.16. Utilities Regulated by the Public Service Commission:

26.4.16.a. This includes natural gas, water, sewage, electric, telephone, garbage, cable television service, connection fees, trash hauling and dumpster rental (if there is only one PSC approved hauler in the area).

26.4.16.b. This does not include propane gas, coal and satellite television, all of which must be competitively bid.

26.4.17. Court Ordered Payments:

26.4.17.a. This 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 listed above but spending units should comply with those requirements where possible.

26.4.18. Emergency Services (Non-Construction and Non-Architectural/Engineering "A/E"):

26.4.18.a. This includes non-construction and non-A/E services that must be procured on an emergency basis when:

26.4.18.a.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

26.4.18.a.2. Formal bidding would delay a response to a declared state of emergency.

26.4.18.a.3. Any use of this item must be approved by the Director in advance.

26.4.19. Vaccines:

26.4.19.a. This item includes vaccines purchased through contracts issued by the Centers

for Disease Control (CDC).

26.4.20. Transcripts from Court Reporters Employed by Court, Judge or Opposing Counsel:

26.4.20.a. This includes transcripts procured from court reporters who are employed by the court, judge or opposing counsel.

26.4.20.b. These transactions are exempted from all documentation requirements listed above but spending units should comply with those requirements where possible.

26.4.21. Copies of Government Documents/Records Obtained from the Government:

26.4.21.a. This 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 a government entity for other official documents or records obtained from that government entity.

26.4.21.b. Examples of allowable transactions include but are not limited to; fees associated with obtaining documents from the federal court's PACER system, similar fees charged by county or local courts for records, fees required to obtain official copies of real estate records from the County Clerk's Office, and FOIA fees.

26.4.22. Commodities or services for a shared facility arrangement with the U.S. Government:

26.4.22.a. Effective July 1, 2018, commodities or services contracted by the U.S. Government and provided to the Division when those commodities or services are:

26.4.22.a.1. Offered as part of a shared facility arrangement; or

26.4.22.a.2. Those commodities or services for the Division cannot be easily separated from those for the U.S. Government.

26.4.22.b. The Purchasing Affidavit and Secretary of State registration are not required for transactions processed under this item.

26.4.23. Automobiles

26.4.23.a. Effective July 1, 2022, this item includes cars, trucks and SUV's, unless readily available on a state contract, and one of the following conditions are met:

26.4.23.a.1. The automobile class is not available on the statewide contract or is on the statewide contract but cannot be utilized due to manufacturer inability or unwillingness to accept new orders; or,

26.4.23.a.2. The purchase of the automobile from the statewide contract would result in receiving a current model year automobile in a future model year.

§170-6-27. Protests

27.1. All protests must be submitted in writing to the Director and the Chief Hearing Examiner, and contain all of the following information:

27.1.1. The name and address of the protestor;

27.1.2. The requisition, solicitation, purchase order or contract numbers;

27.1.3. A statement of the grounds of protest;

27.1.4. Supporting documentation, if necessary; and

27.1.5. The resolution or relief sought.

27.1.6. Failure to submit this information shall be grounds for rejection of the protest by the Department of Homeland Security, Office of Administrative Hearings, Chief Hearing Examiner.

27.2. The Director, upon receipt of a protest, shall forward the protest, along with all documentation regarding the purchase or award, to the Department of Homeland Security, Office of Administrative Hearings, Chief Hearing Examiner.

27.3. Timeframe for Submission of Protest:

27.3.1. Protests based on bid specifications must be submitted no later than five (5) working days prior to bid opening.

27.3.2. Protest of a purchase order or contract award must be submitted no later than five (5) working days after the award.

27.3.3. The vendor is responsible for knowing the bid opening and award dates. Protests received after these dates may be rejected at the option of the Chief Hearing Examiner of the Department of Homeland Security Office of Administrative Hearings.

27.3.4. Continuation or delay of a purchase order or contract award is at the discretion of the Director.

27.3.5. Master Contract and Direct Award Protests:

27.3.6. Any vendor desiring to protest the specifications of a master contract, or the direct award process may do so prior to five (5) working days before the master contract opening date and five (5) business days before the direct ordering process opening date.

27.3.7. Any vendor desiring to protest the award of a master contract or direct order may do so within five (5) working days of the master contract award and within five (5) business days of the direct order award.

27.3.8. Responsibility for delivery of the protest to the Director shall remain with the protesting vendor. The Procurement Section or DAS Purchasing Section's failure to deliver the protest to the Director shall not be grounds for extending the time for receipt of protests.

27.4. Protest Review:

27.4.1. The Department of Homeland Security, Office of Administrative Hearings, Chief Hearing Examiner, or his or her designee, upon receipt of a protest, shall:

27.4.1.a. Set the protest for hearing within ten (10) business days of receipt of protest;

27.4.1.b. If not rejected as set forth in this section, review the matter of protest, and issue a written decision.

27.4.2. The Department of Homeland Security, Office of Administrative Hearings, Chief Hearing Examiner, or his or her designee, 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 the matter has been decided in a previous protest to the Procurement Section or DAS Purchasing Section.

§170-6-28. Restriction of Vendor by Lessor.

28.1. If the Division is bound to use a specific vendor or contractor, or is limited to a contractor or vendor who shall be selected by a Lessor, in a lease entered into by the Division, the Division shall not be required to put the services or commodities out to bid, but shall instead utilize the vendor or contractor required by the Lessor.