



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Corrections

TITLE-SERIES: 90-10

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

RULE NAME: Purchasing Procedure

CITE STATUTORY AUTHORITY: W. Va. Code 15A-3-14

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 11/28/2022 9:00 AM

COMMENTS MAY BE MAILED OR EMAILED TO:

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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 explains and clarifies the operative procedures for the purchase of commodities, services, repairs, alterations, or printing by the Division of Corrections and Rehabilitation (DCR) pursuant to the DCR's purchasing exemption.

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

There is a change to the filing and effective dates of the rule. There is language added to clarify that pursuant to statute, the Division of Administrative Services shall provide procurement services for DCR. Language is added that for Agency Section delegated purchases of \$25,000 or less, Agency Sections have the primary responsibility to draft specifications. When this language was added, the subsequent headings were changed to include proper formatting in the rule. There were changes made in the section regarding purchases of \$25,000 or less. In the rule, references to "Sole source" were changed to "Direct award". Additional language was added to the rule regarding emergency procurement. Information in the rule regarding reports were omitted.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

0

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

0

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

0

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.

TITLE 90
PROCEDURAL RULE
WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION

SERIES 10
PURCHASING PROCEDURE

§90-10-1. General.

1.1. Scope: These Purchasing Procedures are an explanation and clarification of operative procedures for the purchase of commodities, services, repairs, alterations, or printing by the Division of Corrections and Rehabilitation ("DCR") pursuant to the DCR's purchasing exemption.

1.2. Authority -- W. Va. Code §15A-3-14.

1.3. Filing Date -- ~~October 5, 2020.~~

1.4. Effective Date -- ~~November 5, 2020.~~

§90-10-2. Definitions.

2.1. As used in these procedures, all terms have the same meaning as provided in W. Va. Code §15A-3-14 as follows:

2.1.1. "Agency" means the Division of Corrections and Rehabilitation and all the Division sections within.

2.1.2. "Agency Section" means any section or facility in the Division of Corrections and Rehabilitation.

2.1.3. "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.

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

2.1.5. "Commissioner" means the Commissioner of the Division of Corrections and Rehabilitation.

2.1.6. "Assistant Director of Purchasing" means the Assistant Director of Purchasing of the Division of Administrative Services or anyone that the Assistant Director of Purchasing has designated to perform a specific task or function.

2.1.7. "Director" means the Director of the Division of Administrative Services.

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

2.1.9. "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.

2.1.10. "Non-Responsive" means a bid that fails to conform to the solicitation in all material respects.

2.1.11. "Purchasing Office" means the section within the Division of Administration.

2.1.12. "Requisition" means a written or electronic request sent to the Purchasing Office for the purchase of commodities and services.

2.1.13. "Secretary" means the head of a department, as appointed by the Governor.

2.1.14. "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.

§90-10-3. Applicability.

3.1. These procedures apply to all Agency Sections.

3.2. All purchases must be approved by the Commissioner or designee.

3.3. All automated systems prescribed by the Purchasing Office as statewide systems are mandatory for Agency Sections.

§90-10-4. Authority of Director of the Division of Administrative Services ~~and Commissioner of Division of Corrections and Rehabilitation~~.

4.1. Pursuant to W. Va. Code §15A-2-1(b), the Division of Administrative Services shall provide procurement services for the Agency. Therefore, the Director or designee shall:

4.1.1. Ensure that purchases and contracts for commodities, services, repairs, or printing are based on competitive bid whenever possible.

4.1.2. Establish a list of commodities, services, repairs, alterations, or printing by the Agency that are not possible to submit for competitive bid. The Director or the Director's designee, the Assistant Director of the Purchasing Section, shall approve the list before the beginning of each fiscal year and shall make the list available for public review.

4.1.2.a. Agency Sections may purchase the commodities and services on the list directly from the vendor and are not required to solicit competition for purchase of those items approved by the Director or designee. However, competition is always encouraged.

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

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

4.1.3. Purchase or contract for, in the name of the Agency, the commodities, services, repairs, alterations, or printing required by the Agency Sections.

4.1.4. Prescribe the way commodities, services, repairs, alterations, or printing shall be purchased, delivered, stored, and distributed.

4.1.5. Review specifications and descriptions before soliciting bids to ensure that specifications and descriptions do not favor a particular 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 Assistant Director of Purchasing determines such action to be appropriate.

4.1.8. Apply and enforce standard specifications.

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

4.1.10. If deemed necessary, ~~P~~prescribe in each contract provisions for liquidated damages, remedies, or other damage provisions in the event of vendor default.

4.1.11. Employ a person whose responsibilities, in addition to other duties, are to identify commodities, services or printing available for purchase from nonprofit sheltered workshops; evaluate the needs for the commodities, services, or printing; coordinate workshops in their production efforts; and provide information to workshops about available opportunities within State government for the purchase of commodities, services, or printing.

4.1.12. Prescribe the manner of inspection for all deliveries of commodities, services, repairs, alterations, or printing to assure compliance with specifications.

4.1.13. The Director or designee may authorize Purchasing Office staff, or the internal auditor, to review and audit Agency Sections requests and purchases and other transactions and performance that fall under the authority of the Purchasing Office. Authorized staff may also provide relevant training for Agency personnel. Inspectors shall have access at any and all times to personnel, records, reports, and other documents as needed.

4.1.14. The Director or designee shall review the protest of bid specifications and/or contract award and issue a written decision on the protest. The Director or designee may opt to conduct a hearing on the protest matter and/or, in the discretion of the Director or designee, implement a continuation or delay of a purchase order or contract award.

§90-10-5. Remedies.

5.1. The Director or designee may require that the Agency Sections attempt to resolve any issues that it may have with the vendor prior to pursuing a remedy contained herein. The Agency Sections must document any resolution efforts and provide copies of those documents to the Purchasing Office.

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

5.2.1. The vendor agrees to the cancellation.

5.2.2. The vendor has obtained the contract by fraud, collusion, conspiracy, or conflicts with any statutory or constitutional provision of the State of West Virginia.

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

5.2.4. The existence of an organizational conflict of interest is identified.

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

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

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

5.3. Opportunity to Cure.

5.3.1. In the event that a vendor fails to honor any contractual term or condition, or violates any provision of federal, state, or local law, regulation, or ordinance, the Director or designee may request that the vendor remedy the contract breach or legal violation within a time frame the Director or designee determines to be appropriate.

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

5.4. Re-Award. The Director or designee may award a 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:

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

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

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

5.5. Non-Responsible.

5.5.1. If the Director or designee believes that a vendor may be non-responsible, the Director or designee may request that a vendor or Agency Section 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.

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

5.5.3. A determination of non-responsibility must be evaluated on a case-by-case basis and can only be made after the vendor in question has submitted a bid.

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

5.6. Suspension.

5.6.1. The Director or designee may suspend, for a period not to exceed one (1) year, the right of a vendor to bid on procurements issued by the Purchasing Office under its authority if:

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

5.6.1.b. The vendor has exhibited a pattern of poor performance in fulfilling his or her contractual obligations to the State. Poor performance includes, but is not limited to, two (2) or more instances of any of the following:

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

5.6.1.b.2. Failure to deliver timely.

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

5.6.1.b.4. Poor performance reports.

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

5.6.1.c. The vendor has breached a contract issued by the Purchasing Office or any Agency Section under its authority and refuses to remedy that breach.

5.6.1.d. The vendor's actions have given rise to one or more of the grounds for debarment listed in WV State Code.

5.6.2. Vendor suspension for the reasons listed in section 5.6 above shall occur as follows:

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

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

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

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

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

5.6.2.b.4. That a request for a hearing must be served on the Director or designee no later than five (5) working days of the vendor's receipt of the notice of suspension.

5.6.2.b.5. That the vendor's failure to request a hearing no later than five (5) working days of the receipt of the notice of suspension will be deemed a waiver of the right to a hearing and result in the automatic enforcement of the suspension without further notice or an opportunity to respond; and

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

5.6.2.c. A vendor's failure to serve a request for hearing on the Director or designee no later than five (5) working days of the vendor's receipt of the notice of suspension will be deemed a waiver of the right to a hearing and may result in the automatic enforcement of the suspension without further notice or an opportunity to respond.

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

5.6.2.e. Within five (5) working days of receiving the vendor's request for a hearing, the Director or designee will serve on the vendor a notice of hearing that includes the date, time, and place of the hearing.

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

5.6.3. A vendor may appeal a decision of the Director or designee. The appeal must be in writing and served on the Director no later than five (5) working days of receipt of the decision.

5.6.4. The Director, or designee, will schedule an appeal hearing and serve on the vendor, a notice of hearing that includes the date, time, and place of the hearing. The appeal hearing will be recorded, and an official record prepared. Within ten (10) working days of the conclusion of the appeal hearing, the Director will issue and serve on the vendor a written decision either confirming or reversing the suspension.

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

5.7 Vendor Debarment.

5.7.1. The Director or designee may debar a vendor when that vendor's name appears on the West Virginia Division of Purchasing or the United States Excluded Parties List System.

5.8 Damages.

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

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

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

§90-10-6. Registration, Advertising, Bidding, and Award.

6.1. Registration of Vendors.

6.1.1. At Agency's discretion, 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 or as determined by the Agency to waive said registration.

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

6.1.1.b. Purchasing card vendors receiving an aggregate total yearly payment less than \$25,000.00 from Agency Sections are not required to register with the Purchasing Division.

6.1.1.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.

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

6.1.3. Purchasing Division Fee Payment.

6.1.3.a. 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.

6.1.3.a.1. Purchasing card vendors providing travel related services are not required to pay the registration fee.

6.1.3.a.2. Purchasing card vendors receiving an aggregate total yearly payment less than \$25,000.00 from spending units are not required to pay the registration fee.

6.1.3.a.3. Vendors receiving orders for goods or services of \$2,500 or less, regardless of payment method, are not required to pay the registration fee.

6.1.3.a.4. Vendors providing a good or service under a sole source solicitation are not required to pay the registration fee. The fee is considered waived by the Agency for all sole source providers.

6.1.3.a.5. Any vendor can be exempted from paying the registration fee if the Assistant Director of Purchasing determines that waiving the registration fee would be in the best interest of the State of West Virginia.

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

6.1.4. Other Registrations, Licenses, etc.

6.1.4.a. The vendor must be licensed and in good standing in accordance with any and all state and local laws and requirements by any state or local Agency of West Virginia, including, but not limited to, the West Virginia Secretary of State's Office, the West Virginia 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.

6.1.5. Failure to Register.

6.1.5.a. The Director or designee 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 section 6 of these procedures, the vendor will be given a period of time that the Director or designee deems sufficient to cure the failure. If after that period vendor has not cured the failure, the Director or designee may cancel the contract.

6.2. Advertising.

6.2.1. Solicitations that exceed \$25,000 must be advertised using media such as the wvOasis Purchasing Bulletin, or any other media the Director or designee considers advisable.

6.3. Bidding.

6.3.1. The Purchasing Office must receive bids from vendors prior to the date and time of the bid opening listed on the solicitation forms provided by the Purchasing Office. The Assistant Director of Purchasing, and all other Agency staff, must reject bids received after the designated time and date. Each vendor is solely responsible for delivering its bid to the Purchasing Office.

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

6.3.3. The Director or designee may allow bids by electronic transmission. Bids by electronic transmission must be received by the Purchasing Office. A bid will not be considered received until after transmission is completed.

6.3.4. 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 Agency 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 Purchasing Office. The Purchasing Office makes no guarantee of confidentiality when vendors utilize electronic transmission.

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

6.3.6. 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 Purchasing Office. To be effective, any change must be received by the Purchasing Office prior to the date and time of the bid opening.

6.3.7. The Director or designee may reject a bid that a vendor declares to be erroneous after the bid opening, but otherwise appears to be responsive, if all the following conditions exist:

6.3.7.a. An error was made.

6.3.7.b. The error materially affected the bid.

6.3.7.c. Rejection of the bid would not cause a hardship on the Agency Sections involved other than losing an opportunity to receive commodities, services, or printing at a reduced cost.

6.3.7.d. Enforcement of the part of the bid in error would be unconscionable.

6.3.7.e. In order for the Director or designee 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.

6.3.8. The Director or designee must reject a bid that is found to be non-responsive.

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

6.3.10. 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 Director or designee may assume that items offered meet the specifications.

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

6.3.12. Vendors may contact the Purchasing Office to obtain official bid forms.

6.3.13. 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.

6.4. Awards.

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

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

6.4.3. When tie bids are received, the Director or designee shall break the tie by:

6.4.3.a. Allowing the tied vendors to make a final offer.

6.4.3.b. Flip of a coin, draw of the cards, or any other impartial method considered prudent by the Director or designee.

6.4.4. Requirements for bonds and deposits:

6.4.4.a. The Director or designee 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 State from undue risk.

6.4.4.b. The Director or designee may require the vendor to submit a certified check, certificate of deposit, performance bond, litigation bond or any other security acceptable to the Director or designee payable to the State of West Virginia. Neither personal checks nor company checks are acceptable.

6.4.4.c. Vendors can request that bonds or other security be returned after the purpose for which the bond was provided has been fulfilled. Upon confirmation from the Agency Sections or other relevant party that the bond or security in question has fully served its purpose, the Director or designee may return the bond or security.

6.5. Specifications.

6.5.1. For Agency Section delegated purchases of \$25,000 or less, Agency Sections have the primary responsibility to draft specifications, unless otherwise directed by the Commissioner or designee.

6.5.42 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 Agency for compatibility reasons or uniformity.

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

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

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

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

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

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

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

6.5.42.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 Director or designee shall not disqualify the vendor's bid due to inequality of non-mandatory components.

6.5.42.d.2. Any Agency Section request to disqualify a vendor on the grounds that the vendor has bid an unequal product must be accompanied by written justification listing the mandatory component that is unequal and explaining how the product bid is unequal.

6.5.23. The Director or designee has authority to develop standard specifications that will form the basis of Agency contracts used by Agency Sections. Standard specifications shall include information relating to the cost of maintenance and expected life of the commodities, services or printing when the Director or designee determines there are applicable nationally accepted standards.

6.5.34. The Purchasing Office has final authority over specifications and may require that Agency Sections modify specifications. In the event Agency Sections refuse to make the required changes, the Director or designee is prohibited from issuing a solicitation until the Agency Sections provide the Director or designee with a written explanation for the refusal that the Director or designee deems satisfactory.

6.6. Bid Evaluation.

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

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

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

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

6.7. Deliveries.

6.7.1. Agency Sections are responsible for:

6.7.1.a. The inspection of commodities, services, or printing upon delivery to ensure that purchases meet contractual requirements.

6.7.1.b. Maintaining records of receipt.

6.8. Change Orders.

6.8.1. The Director or designee 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.

6.8.2. Change Order Submission.

6.8.2.a. Agency Sections desiring to make a change to a contract must submit a request for the contract change to the Purchasing Office.

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

6.8.3. The Director or designee may ask for, and the Agency Sections must provide, any documentation or further explanation that the Director or designee deems necessary to aid in reviewing a change order request.

6.8.4. Rejection.

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

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

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

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

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

6.8.5. Change orders must be approved by the Attorney General's office, as to form, just as the original contract is approved as to form by that office under West Virginia Code §5A-3-13.

6.8.6. Timing of Work.

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

6.8.6.a.1. Formally approved by the Purchasing Office and the Attorney General's office.

6.8.6.a.2. Encumbered by the Purchasing Office.

6.8.6.a.3. Mailed to the vendor.

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

§90-10-7. Purchasing Methods.

7.1. General.

7.1.1. Contracts requiring more than six (6) months to fulfill are filed with the State Auditor.

7.2. Purchases of \$25,000 or Less.

7.2.1. Agency Sections may make purchases of \$25,000 or less per transaction for certain commodities, services, or printing without processing the purchase as a formal solicitation through the Purchasing Office, provided that the Agency Sections adhere to the most current Purchasing Office procedures established by the Director or designee.

7.2.2. Agency Section purchases of ~~\$2,500~~ 10,000 and less, no bidding required, but encouraged.

7.2.3. Agency Section purchases of ~~\$2,500.01~~ 10,000.01 to ~~\$250,000.00~~, the Agency Section must solicit at least three (3) verbal bids, if possible, from vendors and make a written contract, or agreement, with the lowest responsible bidder. must utilize competitive bidding and must be bid through the Oasis system. The threshold dollar amount applies to both vendors utilized and commodities and/or services purchased.

7.2.4. ~~The Agency Sections purchases of \$20,000.01 to \$25,000.00, the Agency Section must keep records of these purchases on file and make them available for public inspection during the normal office hours of the Agency Sections~~ solicit at least three (3) written bids, if possible, from vendors and make a written contract, or agreement, with the lowest responsible bidder. The threshold dollar amount applies to both vendors utilize and commodities and/or services purchased.

7.2.5. The Agency Sections must keep records of these purchases on file and make them available for public inspection during the normal office hours of the Agency Sections.

7.2.56. If the Agency Section fails to comply with the procedures and requirements established for purchases of \$25,000 or less, the Director or designee has the ability to:

7.2.56.a. Suspend or reduce purchasing authority for that Agency Section.

7.2.56.b. Require the Agency Section to provide additional reports and documentation relating to purchases of \$25,000 or less for Purchasing Office review.

7.2.56.c. Require the Agency Section to submit to additional oversight that the Director or designee deems appropriate.

7.2.56.d. Require that the Agency Section personnel responsible for purchases of \$25,000 or less participate in remedial training provided by the Purchasing Office.

7.3. Purchases in Excess of \$25,000.

7.3.1. Purchases of commodities, services or printing that exceed \$25,000 shall be made by the Purchasing Office, unless otherwise approved by the Director or designee, and the Commissioner.

7.4. Open End Contracts and Statewide Contracts.

7.4.1. The State may secure open end contracts to obtain commodities, services, or printing to supply the repetitive needs of the Agency Sections in the form of statewide contracts, blanket orders, or Agency Sections contracts.

7.4.2. If the Director or designee establishes an Agency open end contract, any Agency Section covered by the contract is required to use it.

7.4.2.a. The Director or designee may grant Agency Sections a waiver that permits the Agency Section to purchase from a source other than the open end contract.

7.4.3. If the Director or designee establishes an Agency contract, all Agency Sections are required to use it.

7.4.3.a. The Director or designee may grant Agency Sections a waiver that permits the Agency Sections to purchase from a source other than the Agency contract.

7.4.4. Granting of a waiver from an open end or Agency contract will be considered on a case-by-case basis and will only be granted if the Director or designee determines that granting the waiver is in the best interest of the State. A waiver will only be granted if the Agency Sections can show that any one of the following conditions exists:

7.4.4.a. The vendor is unable to deliver the commodity or service by the required delivery date, assuming the Agency Sections is not imposing an unreasonable delivery deadline.

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

7.4.4.c. The vendor has refused to perform.

7.5. ~~Sole Source~~ Direct Award Procurement.

7.5.1. The Director or designee may approve the purchase of commodities, services, or printing directly from a vendor as a ~~sole source~~ direct award procurement without competitive bidding, if:

7.5.1.a. The Agency Sections can acquire the required good or services from only one source.

7.5.1.b. The Agency Section provides written documentation to the Director or designee setting forth the basis for the sole source procurement and the specific efforts made to determine the availability of other sources.

7.5.2. Agency Sections are encouraged to solicit competition rather than process a sole source request. The Director or designee has authority to reject sole source requests whenever competition is believed to be available.

7.5.3. ~~Sole source~~ Direct award requests over ~~\$2,500~~ 10,000 shall be publicly advertised and made available for review by vendors. Should this advertisement cause inquiry and concern or requests to bid by prospective bidders or other interested parties, the Director or designee may:

7.5.3.a. Reject the ~~sole source~~ direct award request and require the Agency Sections to submit a requisition for public advertisement and formal bidding.

7.5.3.b. Accept the request and approve the ~~sole source~~ direct award.

7.5.3.c. Take other action as necessary.

7.5.4. The Director or designee may require potential ~~sole source~~ direct award requests at any dollar level above ~~\$2,500~~ 10,000 to be subject to review, approval and processing in the same manner described in these procedures.

7.5.5. The Director or designee must issue prior approval or disapproval for the purchase of used equipment directly from the vendor without competitive bids.

7.5.5.a. If disapproved, the Director or designee must return the request to the Agency Sections and direct another method of purchasing.

7.5.5.b. Notwithstanding the foregoing, approval to purchase used equipment under this subsection is contingent upon meeting all of the requirements applicable to a ~~sole source~~ direct award procurement.

7.6. Emergency Procurement.

7.6.1. Any request to procure specific commodities for immediate delivery on an emergency basis must be submitted in writing to the ~~Director~~ Commissioner or Commissioner's designee. The ~~Director~~ Commissioner or the Commissioner's designee will submit the emergency procurement request to the ~~Commissioner and the~~ Secretary of the Department of Homeland Security, for approval. Once the emergency procurement request has been approved by the Commissioner or Commissioner's designee and the Secretary of the Department of Homeland Security, the Commissioner or Commissioner's designee will provide a copy of the approved emergency procurement request to the Director.

7.6.2. Approval to procure goods or services on an emergency basis will permit the Agency Sections to purchase the required goods or services directly from a vendor. Provided, however, that the Agency Sections must obtain three bids, if possible. Required documentation must be submitted to the Purchasing Office as soon as possible for processing.

7.6.3. What qualifies as an emergency under this subsection shall be evaluated by the Commissioner and the Secretary of the Department of Homeland Security on a case by case basis, but will at least include:

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

7.6.3.b. Emergency purchases are not used for hardship resulting from neglect, poor planning, or lack of organization by the Agency Sections.

7.7. Best Value Procurement.

7.7.1. The term best value procurement means a request for proposal as described in West Virginia Code §15A-3-14.

7.7.2. Requests for Quotation are the preferred method and gold standard of procurement, but an Agency Section may utilize a best value procurement method to procure goods, services, or printing, excluding construction.

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

7.7.2.b. The Director or designee shall review each request to utilize a request for proposal and may permit the use of a request for proposal if determined that it is in the best interest of the State.

7.7.3. A request for proposal must contain provisions for a two-part evaluation, the first part being technical aspects of the proposal and the second part being cost to the State.

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

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

7.7.4. Expressions of interest may only be used to procure architectural, engineering, or other services contained within Chapter 5G, Article 1 of the West Virginia Code.

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

7.8.1. The Director, or designee, may approve a request by an Agency Section to purchase from, join as a party, or otherwise utilize contracts issued by agencies of the federal government, agencies of other states, other public bodies, or other state agencies.

7.8.2. The Director or designee may also sign an agreement with a vendor that has the effect of adding state Agency Sections to a contract issued by agencies of the federal government, agencies of other states, other public bodies, or other state agencies.

7.8.3. The Director or designee may, but is not required to, designate such a contract as an Agency contract and require that Agency Sections utilize it.

7.8.4. The Director or designee may also lead, participate in, or join after issuance cooperative purchasing arrangements with other public agencies and entities created by public agencies.

7.8.5. Before undertaking any activity authorized by this section, the Director or designee shall determine that the contracts being utilized and/or created are valid, properly awarded, financially

advantageous, and comparable to what can be obtained through competitive bidding. The last requirement will be satisfied if the contract was created or is to be created from a competitive procurement method.

7.8.6. The Director or designee shall require Agency Sections to prove that their requests to use such contracts:

7.8.6.a. No price comparison may be based on differing specifications as determined by the Director or designee.

7.8.6.b. Will not cause a West Virginia vendor that offers like products and services to lose substantial business, unless the Director or designee determines based on submitted documentation from the Agency Sections that the difference in price is so great that the State's best interest is served by using the contracts issued by other public agencies and entities; and does not cause extensive hardship to any Agency Sections offered preference under the West Virginia Code.

7.8.6.c. All Agency Sections requests to take an action authorized under this subsection must be submitted in advance to the Director or designee with necessary evidence and documentation. The Director or designee shall approve only those requests submitted with evidence that justifies use of such contracts. Any request that is not supportable shall be returned to the Agency Sections.

7.9. Multiple Awards.

7.9.1. The Director or designee may elect to award a contract to more than one vendor when the Director or designee determines in writing such action would be in the best interest of the State. In arriving at a determination, the Director or designee will consider the following factors, insofar as they are applicable:

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

7.9.1.b. The ability, capacity, and skill of the bidder.

7.9.1.c. The sufficiency of the bidder's financial resources.

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

7.9.1.e. The compatibility with existing equipment.

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

7.9.1.g. Any other relevant factors.

7.9.2. In situations where a multiple award is necessary, the Director or designee shall place a written explanation into the public file. If a multiple award is requested by Agency Sections, that Agency Section must provide written justification to the Director or designee. The Director or designee's decision shall be final in all cases.

7.10. Negotiation When All Bids Exceed Available Funds.

7.10.1. If all bids meeting requirements exceed the funds available for the purchase, the Commissioner and the Director may negotiate a lower price within budget with the lowest bidder meeting specifications.

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

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

7.10.2. If the Purchasing Office solicits bids utilizing a best value procurement, and there is more than one bidder, the Director or the Commissioner may negotiate a lower price with the highest ranked bidder. If the Director or the Commissioner does not award the contract to the highest scoring bidder, he or she may close negotiations with that bidder and enter into negotiations with the next highest scoring bidder and may continue to do so in like manner with the remaining responsive and responsible bidders.

7.10.2.a. The Director or the Commissioner may not extend an offer to any bidder that is not first extended to the prior bidders in order of rank.

7.10.3. The Director shall determine the method of negotiation.

7.11. Discussion and Final Offers.

7.11.1. The Director or the Commissioner may conduct discussions to obtain best and final offers from bidders to assure full understanding of solicitation requirements.

7.11.1.a. If the Director or the Commissioner determine that a best and final offer is necessary from one vendor, all vendors shall be afforded the opportunity to provide best and final offers.

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

7.11.2.a. All bidders must provide their best and final offers prior to the date and time specified by the Agency.

7.11.3. Government construction contracts and supplies and material are exempt from this section.

7.12. Contract Management.

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

7.12.1.a. Establishing payment benchmarks to assure the Agency receives value prior to remitting payment.

7.12.1.b. Conducting regular meetings between Agency Sections and vendor to assess contract performance.

7.12.1.c. Training Agency Section personnel to manage contracts.

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

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

7.12.2.a. Post Award Conferences.

7.12.2.a.1. The Agency Section is responsible for administering the contract must hold a post award conference with the contractor to ensure a clear and mutual understanding of all contract terms and conditions, and the respective responsibilities of all parties. The agenda for the conference must include, at a minimum, the introduction of all participants and identification of Agency and contractor key personnel, and discussion of the following items:

7.12.2.a.1.A. The scope of the contract, including specifications of what the Agency Section is buying.

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

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

7.12.2.a.1.D. The Administrative Services contract procedures, including contract monitoring and progress measurement.

7.12.2.a.1.E. The rights and obligations of both parties and the contractor performance evaluation procedures.

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

7.12.2.a.1.G. Potential contract problem areas and possible solutions.

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

7.12.2.b. An explanation of the limits of authority of the personnel of both the Agency Section and the contractor.

7.12.2.b.1. The Agency Section must develop a comprehensive and objective monitoring checklist which:

7.12.2.b.2. Measures outcomes.

7.12.2.b.3. Monitors compliance with contract requirements.

7.12.2.b.4. Assesses contractor performance.

~~7.12.3. The Purchasing Office must make the following reports to the Director on a schedule established by the Director but not less frequently than once a year:~~

~~7.12.3.a. Status Reports.~~

~~7.12.3.a.1. Status reports describe the progress of the work; track the organizational structure of the statement of work in terms of phases, segments, deliverables, and products; and describe what work is complete and what work is pending and contrast that status against the contract schedule.~~

~~7.12.3.a.2. If there are any unresolved issues that the Agency Section is contractually obligated to resolve, those issues should be included in the status report and a resolution should be requested.~~

~~7.12.3.b. Activity Reports.~~

~~7.12.3.b.1. Activity reports describe all activity on the project, regardless of whether substantial progress has been made toward completion of the project.~~

~~7.12.3.b.2. If payment is based on the number of completed transactions, these activities must be specifically set out in the report.~~

7.13. Inspection.

7.13.1. The Agency Section must inspect all materials, supplies, and equipment upon delivery and again prior to final acceptance to ensure compliance with the contract requirements and specifications.

7.13.2. The Agency Section must report any discrepancies to the Director or designee immediately.

7.13.3. If unlisted shortages are discovered, the vendor and the Director or designee must be notified immediately.

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

7.14. Substitutions.

7.14.1. Substitution of items called for in a contract is not permitted without the Director or designee's prior approval.

7.14.1.a. The Director or designee will not approve substitution of items unless the substituted items are of equal quality and are offered at the same or lower price.

§90-10-8. Protests.

8.1. Submission of Protest.

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

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

8.1.3. The vendor is responsible for knowing the bid opening and award dates. Protests received after these dates may be rejected at the option of the Director or designee.

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

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

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

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

8.1.4.d. Supporting documentation, if necessary.

8.1.4.e. The resolution or relief sought.

8.1.5. Failure to submit this information shall be grounds for rejection of the protest by the Director or designee.

8.2. Protest Review.

8.2.1. The Director or designee shall review the matter of protest and issue a written decision.

8.2.1.a. A hearing may be conducted at the option of the Director or designee.

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

8.2.2. The Director or 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 it has been decided in a previous protest by the Purchasing Office.

8.3. Master Contract and Direct ~~Order~~ Award Protests.

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

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

8.4. All protests, regardless of dollar amount should be directed to the Purchasing Office and any protests incorrectly submitted to the Agency Sections must be forwarded by the Agency Sections to the Purchasing Office for further review.

8.4.1. A protest incorrectly delivered to the Agency Sections will not be considered received until it reaches the Purchasing Office. Responsibility for delivery of the protest to the Purchasing Office shall remain with the protesting vendor. An Agency Section's failure to deliver the protest to the Purchasing Office shall not be grounds for extending the time for receipt of protests.

§90-10-9. Violations.

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

9.2. The Director or designee shall suspend from bidding on State purchases up to one year, any vendor violating the West Virginia Code, or the procedures adopted by the Purchasing Office. Appeal of the suspension may be made to the Director.

9.3. Any person receiving anything of value from a known interested party in awarding a purchase order is subject to the provisions of W. Va. Code §5A-3-28, 29, 30 and 31, unless otherwise determined by the Ethics Commission.

§90-10-10. Encumbrance.

10.1. Definitions.

10.2. The words and phrases used herein have the same meanings assigned to them in West Virginia Code §5A-1-1.

10.3. Account Designation.

10.3.1. Agency Sections must designate the appropriate account from which funds to pay for a contract will be taken prior to a contract being awarded, unless the contemplated contract is a type that cannot be encumbered as determined by the Director or designee.

10.4. Purchasing Office Review.

10.4.1. Prior to issuing a contract, the Purchasing Office will verify that the amount of funds encumbered is appropriate and that the account being encumbered matches what the Agency Section has requested.

10.5. Encumbrance Amounts.

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

10.5.1.a. One-time purchase in current fiscal year. Agency Sections seeking a contract for a one-time purchase to be completed in the current fiscal year must encumber the full contract amount.

10.5.1.b. Contract Spanning Multiple Years. Agency Sections seeking a contract that will span multiple fiscal years must encumber at least the amount of funds that will be spent under the contract in the current fiscal year.

10.5.1.c. Contract to Begin in a Future Year. Agency Sections seeking a contract that will be awarded prior to the end of a current fiscal year but will become effective after that same fiscal year has ended is not required to encumber funds prior to issuance of the contract.

10.5.1.d. Open-End and Statewide Contracts. Agency Sections seeking an open-end contract or a division-wide contract issued by the Purchasing Office is not required to have funds encumbered prior to the issuance of the contract.