



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

11/16/2022 11:20 AM

Office of West Virginia
Secretary Of State

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

AGENCY: Natural Resources

TITLE-SERIES: 58-10

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

RULE NAME: Purchasing Rule

CITE STATUTORY AUTHORITY: §20-1-7(2) and §20-1-7(31)

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

December 16, 2022

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

Yes

James Bailey -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

58 CSR 10

TITLE 58
PROCEDURAL RULE
DEPARTMENT OF COMMERCE
DIVISION OF NATURAL RESOURCES

SERIES 10
PURCHASING RULE

§58-10-1. General.

1.1. Scope. -- This rule establishes the procedures for purchase of commodities and services by the Division of Natural Resources (DNR) pursuant to the DNR's purchasing exemption. These rules do not apply to the construction or replacement of capital improvements, which follow the Purchasing Division procedures and policies.

1.2. Authority. -- W. Va. Code §20-1-7(2) and §20-1-7(31).

1.3. Filing Date. -- November 16, 2022.

1.4. Effective Date. -- December 16, 2022.

§58-10-2. Definitions.

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

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

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

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

2.5. "Chief Procurement Officer" means the Chief Procurement Officer of the Division of Natural Resources or anyone the Chief Procurement Officer has designated to perform specific tasks or functions.

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

2.7. "Director" means the Director of the Division of Natural Resources.

2.8. "Division" means the West Virginia Division of Natural Resources and all the Division sections and offices within.

2.9. "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.

2.10. "Open End Contract" mean a contract that covers a period of time in which all terms, conditions, and prices are specified for quantity.

2.11. "Requisition" means a written or electronic request sent to Chief Procurement Officer for the purchase of commodities and services.

2.12. "Construction" means a specifically identified scope of work involving the act, trade, or process of building , erecting, constructing, adding, repairing, remodeling, rehabilitating, reconstructing, altering, converting, improving, expanding, or demolishing of a building, structure, facility, road, or highway. Repair and maintenance of existing public improvements that are recurring or ongoing in nature and that are not fully identifiable or know at any one time shall be considered a construction project.

2.13. "Architectural and Engineering Services" means 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.

§58-10-3. Applicability.

3.1. This procedural rule applies to the Division of Natural Resources and all sections and offices within.

3.2. All purchases over \$25,000 must be approved by the Director or his or her authorized designee.

3.3. The Director or his or her authorized designee may grant permission to approve purchases up to \$25,000 to the purchasing liaison for each respective section and office.

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

§55-10-4. Duties of Chief Procurement Officer.

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

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

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

4.1.2.a. The Division may purchase the commodities, items for resale, and services on the list directly from the vendor and are not required to solicit competitive bids for purchase of those items approved by the Chief Procurement Officer.

4.1.2.b. The Chief Procurement Officer may, upon approval by the Director, amend the list of commodities, items for resale, and services that are not possible for competitive bid by the Division as he or she may determine to be appropriate. Requests to add commodities or services to the list must be accompanied by written justification and an explanation of why competitive bids are not possible.

4.1.3. Purchase or contract for the commodities, items for resale, and services required by the Division.

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

4.1.5. Review specifications and descriptions before soliciting bids to ensure specifications and descriptions do not have the purpose of favoring a particular brand or vendor.

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

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

4.1.8. Apply and enforce standard specifications.

4.1.9. Prescribe, if determined necessary, the amount of deposit or bond to be submitted for security on certain contracts.

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

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

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

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

§58-10-5. Procurement of Management, Consultants, Construction, Engineering, Architecture, Enterprise.

5.1. The provisions of this section shall apply to the procurement of management, consultants, construction, engineering, architecture, enterprises, firms, or persons to assist the Division in meeting its

purpose pursuant to W.Va. Code §20-1-1 *et seq.* as determined necessary or advisable by the Director in his or her sole discretion.

5.2. Requirements for purchases of \$250,000 or more.

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

5.2.2. A committee of three to give employees of the Division, as selected by and including the Chief Financial Officer, shall evaluate the statements of qualifications and other materials submitted by interested firms and select three firms which, in their opinion, are best qualified to perform the desired service.

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

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

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

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

§58-10-6. General Procurement Methods.

6.1. Purchases exceeding \$25,000.

6.1.1. Except for purchases made pursuant to Section 12 of this rule, purchases exceeding \$25,000 shall be subject to the following requirements:

6.1.1.a. Unless purchased according to the provisions of Section 12 of this rule or otherwise exempted pursuant to this rule, competitive bidding is required.

6.1.1.b. A minimum of three written bids are required. The lowest bid meeting specifications must be awarded the purchase order or contract. All bids must be maintained in the purchasing file.

6.1.1.c. Agency terms and conditions must be signed by the vendor and be maintained in the purchasing file.

6.1.1.d. Certification of Non-Conflict of Interest must be signed by the employee and appropriate Division staff and maintained in the purchasing file.

6.1.1.e. A series of requisitions or procurements may not be intentionally used to circumvent competitive bidding or spending thresholds, also known as stringing, is prohibited.

6.1.1.f. The purchase of any piece of equipment with a value that exceeds \$5,000 must be listed as a capital asset.

6.2. Recurring purchases under \$25,000.

6.2.1. No purchasing unit may make a series of purchases exceeding \$25,000 per fiscal year with one vendor.

6.2.2. A contract for vendor services must be created when recurring purchases are equal or greater than \$25,000 per fiscal year.

6.3. Bond Purchasing.

6.3.1. Purchase of commodities or services with bond funds will follow the requirements in this rule.

6.3.2. All contracts, purchases, and change orders which use bond funds will be tracked and processed in the State of West Virginia approved accounting software in accordance with the practices, guidelines, and best practices of state appropriated fund expenditures.

6.4. Construction and Architect-Engineering Services.

6.4.1. The Division will procure Architect-Engineer Services in accordance with W. Va. Code §5G-1-1 *et seq.*

6.4.2. The Division will procure Government Construction Contracts in accordance with W. Va. Code §5-22-1 and §5-22-1A.

6.5. Requirements to Use Master Contracts.

6.5.1. The Division will utilize existing statewide contracts with the Department of Administration, when at all possible, to expedite the procurement process unless otherwise approved by the Director or their authorized designee.

6.5.2. Division sections will utilize existing agencywide contracts managed by the Division unless otherwise approved by the Director or their authorized designee.

6.6. Open-End Contracts. The Division may secure and use open end contracts to obtain commodities and services to supply the repetitive needs of the Division.

6.7. Best Value Procurement.

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

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

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

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

6.7.5. The vendor determined to provide the best value to the Division will be awarded the contract.

6.8. Purchases Utilizing Other Public Agencies and Entities.

6.8.1. Notwithstanding the Division's purchasing exemption pursuant to W. Va. Code §20-1-7 *et seq.*, where the Director determines it is in the best interest of the Division, the Division may utilize the services of the Division of Purchasing in the procurement process.

6.8.2. At the discretion the Director or their authorized designee, the Division may purchase from, join as a party, or otherwise utilize contracts issued by agencies of the federal government, agencies of other states, other public bodies, or other state agencies.

6.8.3. Upon recommendation of the Chief Procurement Officer, the Director may sign an agreement with a vendor that has the effect of adding the Division to a contract issued by agencies of the federal government, agencies of other states, other public bodies, or other state agencies.

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

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

6.9. Negotiation When All Bids Exceed Available Funds.

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

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

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

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

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

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

6.9.3.b. The Director or their authorized designee shall determine the method of negotiation.

6.10. Discussion and Final Offers.

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

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

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

6.11. Contract Management.

6.11.1. For contracts for commodities and services in the amount of \$1 million or less, the Chief Procurement Officer may prescribe contract management procedures for all Division contracts, which procedures may include, but are not limited to, the following:

6.11.1.a. Establishing payment benchmarks to assure the Division receives value prior to remitting payment.

6.11.1.b. Conduct regular meetings with vendors to assess contract performance, as necessary.

6.11.1.c. Training Division personnel to manage contracts.

6.12. Substitutions.

6.12.1. Substitutions of items called for in a contract is not permitted without prior approval of the Chief Procurement Officer.

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

§58-10-7. Registration, Advertising, Bidding, and Award.

7.1. Registration of Vendors.

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

7.1.2. The vendor must be licensed and in good standing in accordance with any and all state and local laws and requirements by any state or local agency of West Virginia, including, but not limited to, the West Virginia Secretary of State's Office, the West Virginia State Tax Department, West Virginia Office of the Insurance Commissioner, the West Virginia State Auditor, the West Virginia State Treasurer, or other state agencies or political subdivisions prior to being awarded a contract. The vendor must provide all necessary releases to obtain information necessary to verify that the vendor is licensed and in good standing with the above entities.

7.1.3. Failure to Register.

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

7.2. Advertising.

7.2.1. Solicitations that exceed \$25,000.00 must be advertised using an available form of media such as wvOasis, newspapers, or any other media the Chief Procurement Officer considers reasonable.

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

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

7.3. Bidding.

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

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

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

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

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

7.3.6. Copies of bids that are not otherwise exempt pursuant to W. Va. Code §59-3-1 *et seq.*, or under other provisions of the law may be open for public inspection at any time after the completion of the public bid opening. No original bid may be removed from the presence of a Chief Procurement Officer representative. The Chief Procurement Officer may prescribe policies to assure public access. The non-exempt portions of files are open for public inspection after the award has been made.

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

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

7.3.8.a. An error was made.

7.3.8.b. The error materially affected the bid.

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

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

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

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

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

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

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

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

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

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

7.3.16. The Chief Procurement Officer may, upon approval of the Director or his or her designee, reject any bid when it is determined to be in the best interest of the Division.

7.4. Awards.

7.4.1. The Chief Procurement Officer may elect to award a contract to more than one vendor when the Chief Procurement Officer determines in writing such action would be in the best interest of the Division. In situations where a multiple award is necessary, the Chief Procurement Officer must document the reasons therefore.

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

7.4.3. Tie Breakers

7.4.3.a. When tie bids are received, the Chief Procurement Officer shall break the tie by a impartial method including but not limited to the flip of a coin, draw of the cards, or any other considered prudent by the Chief Procurement Officer.

7.4.4. If all bids received are higher in cost than a publicly advertised price the Chief Procurement Officer is aware of before bids are made public, which final price of such publicly advertised price is inclusive of all costs or expenses contemplated in the solicitation documents, the Chief Procurement Officer may reject all bids and select the lower cost, publicly advertised price from an entity that may not have submitted a formal bid.

7.5. Requirements for bonds and deposits.

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

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

7.5.3. Vendors can request that bonds or other security be returned after the purpose for which the bond was provided has been fulfilled. Upon confirmation from the sections, offices, or other relevant party that the bond or security in question has fully served its purpose, the Chief Procurement Officer may return the bond or security.

7.6. Specification.

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

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

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

7.6.4. The Property and Procurement Office has final approval over specifications.

7.7. Bid Evaluation.

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

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

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

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

7.8. Multiple Awards.

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

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

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

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

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

7.8.1.e. The compatibility with existing equipment.

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

7.8.1.g. Any other relevant factors.

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

7.9. Negotiation When All Bids Exceed Available Funds.

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

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

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

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

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

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

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

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

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

7.10. Discussion and Final Offers.

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

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

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

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

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

7.11. Contract Management.

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

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

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

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

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

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

7.11.2.a. Post Award Conferences.

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

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

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

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

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

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

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

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

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

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

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

7.11.2.b.1. Measures outcomes.

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

7.11.2.b.3. Assesses vendor performance.

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

7.12. Inspection.

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

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

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

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

7.13. Substitutions.

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

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

7.14. Change Orders.

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

7.14.2. Change order submission.

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

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

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

7.14.4. The Chief Procurement Officer shall reject the change order if upon review he or she determines it is unjustified, inadequately documented, or unreasonable.

7.14.5. 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.

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

7.14.6.a. Formally approved by the Chief Procurement Officer.

7.14.6.b. Encumbered by the Division.

7.14.6.c. Transmitted to the vendor.

§58-10-8. Remedies.

8.1. The Chief Procurement Officer may require 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 to be retained by the Chief Procurement Officer.

8.2. Contract Cancellation.

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

8.2.1.a. The vendor agrees to cancellation.

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

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

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

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

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

8.2.2. Except as provided in subsection 8.2.1., the Chief Procurement Officer may cancel a purchase or contract for any reason or no reason, upon providing the vendor with 30 days' notice of the cancellation.

8.3. Opportunity to Cure.

8.3.1. In the event that a vendor fails to honor any contractual term or condition, or violates any provision of federal, state, or local law, regulation, or ordinance, the Chief Procurement Officer may request the vendor remedy the contract breach or legal violation within a time frame the Chief Procurement Officer deems appropriate.

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

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

8.5. Non-responsible.

8.5.1. If the Chief Procurement Officer believes that a vendor may be non-responsible, the Chief Procurement Officer may request a vendor provide evidence the vendor either does or does not have the capability to fully perform the contract requirements and the integrity and reliability necessary to assure good faith performance.

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

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

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

8.6. Suspension by the Division.

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

8.6.1.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 purposed of this provision, a pattern is two or more instances within a 12-month period.

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

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

8.6.1.b.2. Failure to deliver timely.

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

8.6.1.b.4. Poor performance reports.

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

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

8.7. Vendor Debarment by the Division.

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

8.7.2. Obtaining lists of vendors declared ineligible under federal laws and regulations.

8.7.3. Notification of the Division sections and offices regarding disbarred vendors.

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

8.7.5. Investigating complaints about vendors from the Division and its sections and offices responsible for contracting with vendors for supplies and services.

8.7.6. The Director has primary responsibility for initiating and conducting disbarment procedures.

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

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

8.7.8.a. The Director shall notify the vendor by certified mail, return receipt requested, of the following:

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

8.7.8.c. The causes relied upon for the proposed debarment.

8.7.8.d. That within 10 working days after receipt of the notice, the vendor may submit in writing information and argument in opposition to the proposed debarment.

8.7.8.e. The procedures governing debarment decision-making, and

8.7.8.f. The potential effect of the proposed debarment.

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

8.7.10. In any debarment decision, the Director shall make a specific finding, based on the substantial record, whether the public interest requires that the debarment decision extend to all

commodities and services of the vendor, or whether the public interest allows the debarment decision to be limited to specific commodities or services. Proof of grounds for disbarment must be clear and convincing.

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

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

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

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

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

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

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

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

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

8.7.17.c. Entities that are related under common ownership or control with a debarred vendor, or

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

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

8.8.1.a. Newly discovered material evidence.

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

8.8.1.c. Elimination of the causes for which the debarment was imposed, or

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

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

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

8.9. Damages.

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

8.9.2. The Division shall seek to collect damages by means determined appropriate by the Director in consultation with legal counsel.

§58-10-9. Protests.

9.1. Submission of a Protest.

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

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

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

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

- 9.1.4.a. The name and address of the protestor.
- 9.1.4.b. The requisition, solicitation, purchase order or contract numbers.
- 9.1.4.c. A statement of the grounds of protest.
- 9.1.4.d. Supporting documentation, if necessary.
- 9.1.4.e. The resolution or relief sought.

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

9.2. Protest Review.

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

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

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

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

§58-10-10. Violations.

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

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

§58-10-11. Encumbrance.

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

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

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

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

11.5. 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.

11.6. 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.

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

§58-10-12. Exemptions.

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

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

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

12.2. Direct Award Procurement.

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

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

12.3. Emergency Procurement.

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

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

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

12.3.4. Determination of what qualifies as an emergency under this subsection shall be evaluated on a case-by-case basis. An emergency includes, but is not limited to, unforeseen events or circumstances including delays by vendors, delays in transportation, or an unanticipated volume of work, as well as procurement of specific commodities for immediate delivery related to an official declaration of emergency by the Governor or federal officials.