



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: Education TITLE-SERIES: 126-203
RULE TYPE: Legislative Exempt Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: Exempt Purchasing Procedures (8210)
CITE STATUTORY AUTHORITY: W. Va. Code §§29A-3B-1, et seq.; W. Va. Board of Education v. Hechler, 180 W. Va. 451, 376 S.E.2d 839 (1988); and, W. Va. Bd. of Educ. v. Bd. of Educ., 239 W. Va. 705, 806 S.E. 2d 136 (2017)

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 11/13/2023 4:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Phillip Uy, Finance Officer
ADDRESS: WVDE Office of Internal Operations, Capitol Bldg. 6, Suite 700
1900 Kanawha Blvd. E., Charleston, WV 25305
EMAIL: puy@k12.wv.us

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:

Policy 8210 sets forth the procedures of the West Virginia Board of Education for procurements exempt under W. Va. Code §5A-3-1 et seq. or the requirements of the West Virginia State Purchasing Division.

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

None - this is a new rule/policy for procurements exempt under W. Va. Code §5A-3-1 et seq. or the requirements of the West Virginia State Purchasing Division.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

There will be no economic impact on revenues of state government as a result of the proposed amendment of 126CSR203, Policy 8210.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

There will be no economic impact on special revenue accounts as a result of the proposed amendment of 126CSR203, Policy 8210.

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

There will be no economic impact on the state or its residents as a result of the proposed amendment of 126CSR203, Policy 8210.

D. FISCAL NOTE DETAIL:

| Effect of Proposal | Fiscal Year | | |
|------------------------------------|--|--|--|
| | 2023 Increase/Decrease (use "-") | 2024 Increase/Decrease (use "-") | Fiscal Year (Upon Full Implementation) |
| 1. Estimated Total Cost | 0 | 0 | 0 |
| Personal Services | 0 | 0 | 0 |
| Current Expenses | 0 | 0 | 0 |
| Repairs and Alterations | 0 | 0 | 0 |
| Assets | 0 | 0 | 0 |
| Other | 0 | 0 | 0 |
| 2. Estimated Total Revenues | 0 | 0 | 0 |

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

There will be no economic impact on revenues of state government, special revenue accounts, or the state or its residents as a result of the proposed amendment of 126CSR203, Policy 8210.

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

Yes

Kelli D Talbott -- 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.

126CSR203, Policy 8210, Exempt Purchasing Procedures
Executive Summary

**West Virginia Department of Education
Office of Internal Operations**

Policy Cycle: 30 day Comment Period Adoption of Policy

Policy Process: Revision Repeal and Replace New

Introduction: Policy 8210 sets forth the procedures of the West Virginia Board of Education for procurements exempt under W. Va. Code §5A-3-1 et seq. or the requirements of the West Virginia State Purchasing Division.

Background: Policy 8210 applies to purchases exempt under W. Va. Code §5A-3-1(c) including the following: purchases of textbooks, instructional materials, digital content resources, instructional technology, hardware, software, telecommunications, and technical services by the WVBE for use in, and in support of, the public schools.

Impact: N/A

Action:

- Release for 30 day public comment.
- Approve by WVBE with effective date of ____/____/20__

**West Virginia Department of Education
Office of Internal Operations**

Internal Stakeholders

- Phillip Uy, Director, Internal Operations
- Jo Adkins, Manager, Internal Operations
- Michelle Childers, Coordinator, Internal Operations
- Kelli Talbott, General Counsel, Legal Services

126CSR203

**TITLE 126
PROCEDURAL RULE
BOARD OF EDUCATION**

**SERIES 203
EXEMPT PURCHASING PROCEDURES (8210)**

§126-203-1. General.

1.1. Scope. -- This rule contains the procedures of the West Virginia Board of Education (WVBE) for procurements exempt under W. Va. Code §5A-3-1 et seq. or the requirements of the West Virginia State Purchasing Division.

1.2. Authority. -- W. Va. Constitution, Article XII, §2; and W. Va. Code §18-2-5 and §5A-3-1(c).

1.3. Filing Date. --

1.4. Effective Date. --

§126-203-2. Applicability.

2.1. This policy applies to the West Virginia Board of Education, West Virginia Department of Education, West Virginia Schools of Diversion and Transition, and West Virginia Schools for the Deaf and the Blind.

§126-203-3. Definitions.

3.1. Award. Written determination of the selection of a vendor to perform under a contract issued after encumbrance and final WVBE approval.

3.2. Best Value Procurement. Procurement method used in awarding a contract based on evaluating and comparing all established quality criteria and cost is not the sole determining factor in the award. This includes RFPs and EOLs.

3.3. Bid. Offer by a vendor in response to a procurement document to provide commodities or services in accordance with the specifications of the WVBE-issued procurement document and includes a proposal to an RFP.

3.4. Bond. Surety or other security that guarantees payment or performance under a contract, including a bid bond, labor and material payment bond, maintenance bond, and performance bond.

3.5. Change Order. Written modification or amendment to a WVBE-issued contract in the manner provided in the contract or upon the mutual consent of the WVBE and the vendor.

3.6. Commodities. Goods, supplies, materials, equipment, or any other tangible item.

3.7. Contract. Binding agreement entered into between the WVBE and a vendor to provide the commodities or services requested in the procurement and includes a purchase order.

3.8. Cooperative Procurement. Use of a contract awarded by another entity, including but not limited to, another State agency, board, commission, or another organization regularly involved in the procurement of commodities or services for which the process of procurement and award were determined by the WVBE to be in accordance with reasonable procurement standards.

3.9. Direct Award. Procurement method to award a contract to a vendor able to provide the commodities and services when it is asserted that there is not any known competition.

3.10. Emergency Procurement. Acquisition method used when unforeseen circumstances have arisen including, but not limited to, a threat to public health, welfare, or safety, to a degree that immediate action is warranted to stabilize the situation or protect the State's assets, not because of poor planning, neglect, or lack of organization.

3.11. Expression of Interest (EOI). Procurement method that seeks vendors to provide information and express an interest in a procurement for architectural and engineering services.

3.12. FOIA. Freedom of Information Act provided in W. Va. Code §29B-1-1, et seq.

3.13. Life Cycle Costing. Evaluation method that considers the cost of the commodity and service being acquired over its expected life or usage.

3.14. Master Agreement. Contract with specified terms and conditions except quantity, which shall also be known as an open-end contract.

3.15. Procurement. Process of purchasing, renting, leasing, or otherwise acquiring, receiving, and maintaining commodities and services.

3.16. Procurement Document. RFQ, RFP, RFI, EOI or other document and all attachments related to the bidding or other means used to acquire commodities and services.

3.17. Protest. Formal written statement from a prospective or an actual vendor that states the vendor's dissent or disagreement as to either specification(s) or contract award.

3.18. Request for Information (RFI). Document issued by the WVBE seeking information to aid in preparing specifications.

3.19. Request for Proposal (RFP). Document issued by the WVBE to obtain commodities and services for which cost is not the sole determining factor for award.

3.20. Request for Quotation (RFQ). Document issued by the WVBE to obtain a quotation or bid.

3.21. Requisition. Written or electronic request for the purchase of commodities and services.

3.22. Responsible Vendor. Vendor believed to have the capability to perform a contract and the integrity and reliability to assure good faith performance.

126CSR203

3.23. Responsive Vendor. Vendor submitting a bid that conforms in all material respects to the requirements and specifications of a procurement document.

3.24. Services. Intangible items including, but not limited to, labor, time, expertise, maintenance, software, and service agreements.

3.25. Specification. Clear and accurate description of the physical, functional or performance characteristics, or nature of a commodity being acquired, and including, but not limited to, requirements for inspection, testing, and performance.

3.26. State. State of West Virginia.

3.27. Total Ownership or Operational Cost. Evaluation method that considers the costs of signing, bidding, implementing, operating, training, transitional costs, residual value, disposal, and processes for a commodity or service.

3.28. WVBE. For the purposes of this policy: West Virginia Board of Education, West Virginia Department of Education, West Virginia Schools of Diversion and Transition, and the West Virginia Schools for the Deaf and the Blind.

3.29. WVBE Purchasing. Offices within the WVBE with personnel assigned to oversee and manage procurement.

3.30. Vendor. Person or entity considering or submitting a bid, a person or entity selected as the lowest responsible vendor in connection with a bid, or a person or entity that has been awarded the contract.

§126-203-4. Exempt Purchasing Authority.

4.1. This policy applies to purchases exempt under W. Va. Code §5A-3-1(c) including the following: purchases of textbooks, instructional materials, digital content resources, instructional technology, hardware, software, telecommunications, and technical services by the WVBE for use in, and in support of, the public schools.

§126-203-5. General Information.

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

5.2. The methods used to procure commodities and services needed by the WVBE include competitive bidding, direct purchases, and best value procurement.

5.3. Documentation will be maintained for all procurements by WVBE Purchasing to protect the integrity of the process.

126CSR203

5.4. WVBE contracts shall comply with all applicable laws, rules, and regulations. Procurement documents must contain standard agency terms and conditions necessary to comply with West Virginia law.

5.5. A required black out period will be observed from the release of an RFQ, RFP, or EOI until the award or cancellation. Any contact with the WVBE during a blackout period will only be permissible through WVBE Purchasing.

5.6. Vendors will be provided with instructions for submitting bids and may contact WVBE Purchasing when necessary.

5.7. WVBE contracts must contain a clause that permits the WVBE to cancel the contract upon 30-days written notice to the vendor without stating a reason or being assessed a penalty.

5.8. Bids will not be altered after opening but will be made available for review or copying.

5.9. Use of a purchasing card may be required as a valid payment method for any procurement if its use is appropriate.

5.10. All bid openings will be open to the public and overseen by WVBE Purchasing. For bids received pursuant to an RFP, WVBE Purchasing will confirm each original package contains a separately sealed cost proposal.

5.11. All bids received will be available to the public as soon as they can be scanned or copied after the opening of a bid. The evaluation committee may conduct oral interviews or site visits to confirm the points assigned for a technical evaluation. After an award, the purchasing file will be available for review or copying.

5.12. The WVBE may enter into negotiations to finalize or amend contracts when necessary.

§126-203-6. Purchasing Requirements.

6.1. Documentation associated with all procurements will be maintained.

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

6.3. Contracts will be issued for all procurements, regardless of the dollar amount, to assist with tracking and ensure proper internal controls.

6.4. The vendor will be responsible for submitting an accurate bid to WVBE Purchasing. The bid must be submitted in accordance with the procurement documents and by the specified bid opening time, date, and location.

6.5. Prior to receiving a contract award, a vendor must be a registered vendor as required by the West Virginia State Purchasing Division, produce documentation of any required licenses or insurance, and be in good standing with the State, including the West Virginia Secretary of State and West Virginia Workers' Compensation.

126CSR203

6.6. Vendors that are awarded a contract of \$1 million or more are required to provide the WVBE with a completed Disclosure of Interested Parties form authorized by the West Virginia Ethics Commission.

6.7. Vendors are prohibited from providing commodities or performing work without receipt of the awarded contract and notice to proceed, when required. The WVBE will not be responsible for any work performed by a vendor prior to, or not in accordance with, the contract award.

6.8. All requests for commodities or services will be submitted in writing by WVBE staff to WVBE Purchasing by draft purchase order, purchase requisition, or other method prescribed by WVBE Purchasing. All requests require the approval of a person with the appropriate signature authority.

6.9. Upon receipt from WVBE staff, a requisition shall be reviewed by WVBE Purchasing to determine the appropriate sourcing method for the procurement.

6.9.a. Sourcing methods that will be considered include, but are not limited to, a review of inventory from stockroom; State sources (e.g., Correctional Industries, sheltered workshops, surplus property); statewide or agency master agreements; cooperative contracts; or obtaining bids if required by the procurement method levels.

6.9.b. Any WVBE contract requested to be used by another State entity or political subdivision must obtain the written approval of both the WVBE and the vendor.

6.10. Procurement limits will be considered in aggregate, on an annual basis, and are as follows:

6.10.a. \$5,000.00 or less - documented attempts to obtain three bids are required. If the procurement is from a sole source, documentation from the sole source stating same must accompany the purchase.

6.10.b. \$5,000.01 - \$20,000.00 - a minimum of three documented bids is required. If the procurement is from a sole source, documentation from the sole source stating same must accompany the purchase.

6.10.c. Over \$20,000.00 must be solicited through wvOASIS.

6.10.d. Limits may be subject to increase when permissible by the State of West Virginia Purchasing Division.

6.11. Any required vendor terms and/or conditions must be submitted and approved before a contract is awarded. Any vendor terms and/or conditions contrary to State law will not be considered.

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

6.13. Any bids not submitted by the specified date and time to the specific location will not be considered.

6.14. All bids physically received by WVBE Purchasing will be stamped with the date and time of actual receipt. All bids received through wvOASIS will be electronically stamped by the system.

6.15. All bids will remain sealed until the date and time specified, at which time WVBE Purchasing will open the bids.

6.16. Altering any bid after opening is strictly prohibited.

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

6.18. WVBE procurements will be evaluated in aggregate based upon a rolling 12-month period.

§126-203-7. Formal Procurement Documents and Processes.

7.1. Request for Quotation (RFQ).

7.1.a. An RFQ shall contain a detailed description of, or specification for, the item(s) being purchased, any required delivery date, quantities, bid price per unit, deadlines, and information on how to complete and submit the RFQ bid.

7.1.b. All bids will be reviewed by WVBE Purchasing and the office requesting the item(s) to verify which bid(s) meet(s) the requirements of the RFQ.

7.1.c. The award will be made to the lowest responsible and responsive vendor.

7.2. Direct Award:

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

7.2.a.1. the procurement file, at a minimum, contains the following:

7.2.a.1.A. written justification that the direct award is in the best interest of the State;
and

7.2.a.1.B. documentation of efforts used to determine that there is no other known source, or that no other known source is willing or able to replace the existing source, without a detrimental effect; vendor's assertions of their sole source status alone is not sufficient evidence of such status; and

7.2.a.1.C. another vendor has not expressed an interest in providing the commodity or service requested.

7.2.b. A direct award may be used for procurements determined to be non-competitive, including the list of commodities and services described in the West Virginia State Purchasing Division Procedures Handbook.

7.2.c. A direct award contract may be extended or renewed if the request is substantiated by a written justification of continuation of the contract and there is not a price increase or a modification to the scope of work under the current award.

7.3. Request for Proposals (RFP).

7.3.a. RFP documentation is required to define the desired commodities and services to allow comparability of submitted bids.

7.3.b. Procurements made through an RFP will be advertised through the State's electronic procurement system.

7.3.c. Since RFPs require a two-part bid opening, technical proposals will be opened and fully evaluated before cost proposals are opened. Vendors will be notified of the date and time the cost portion will be opened.

7.3.d. At the date, time, and location of the bid opening, the bids received will be opened and the names of the vendors submitting a bid will be documented. WVBE Purchasing will verify that the technical portion and cost portion of the bids are separate, and that the cost portion is appropriately sealed. Any vendor who submits cost proposal information within their technical proposal will be disqualified from the RFP process and that bid will not be considered.

7.3.e. After all bids are opened, the technical portion of each bid will be submitted to the named evaluation committee. The cost portion of the bids will remain sealed until the technical evaluation has been completed.

7.3.f. Evaluation Committee.

7.3.f.1. The evaluation committee will consist of either three or five voting members and will be limited to WVBE employees or other State employees.

7.3.f.2. Before an employee can participate as an evaluation committee member, the employee shall complete the required training. The training must have been completed within the prior 12-months. WVBE Purchasing will maintain copies of training completion certificates for committee members.

7.3.f.3. A non-state employee may be permitted to serve as a non-voting advisor or subject matter expert with prior approval of the evaluation committee. Individuals serving as advisors or subject matter experts will be required to sign a non-conflict of interest form provided by WVBE Purchasing.

7.3.f.4. A committee chairperson or co-chairperson shall be selected by the committee. The chairperson will act as the committee liaison to WVBE Purchasing.

7.3.f.5. Evaluation committee members will evaluate the bids in a fair and consistent manner that does not attempt to influence or manipulate other members.

7.3.f.6. The committee shall complete a consensus evaluation.

7.3.f.7. After WVBE Purchasing has accepted the recommendation of points assigned, the cost portions of all bids meeting the required minimum acceptable score will be opened.

7.3.f.8. The evaluation committee will complete the cost score of each bid still being considered and combine the cost score with the technical score to arrive at each bidder's total score.

7.3.f.9. The contract will be awarded to the vendor submitting the bid with the highest total score.

7.4. Emergency Procurements.

7.4.a. If an emergency procurement is determined to be necessary, the WVBE will adhere to the procurement methods included in this rule to the extent practicable.

§126-203-8. Vendor Protests.

8.1. Protest Procedures. The WVBE provides participating vendors with the right to protest either specifications or purchase order awards for exempt purchases.

8.1.a. All protests for purchasing matters authorized under exempt purchasing authority, regardless of the dollar amount, will be directed to WVBE Purchasing. The vendor is responsible for ensuring that the protest is received by WVBE Purchasing within the allotted timelines. A vendor's failure to ensure the receipt of the protest to WVBE Purchasing, resulting in the protest not being received by the timeline established in section 8.2, is not sufficient to warrant an extension of the timeline and/or acceptance of the protest.

8.2. Submission of Protest. A vendor protest relating to bid specifications must be submitted no later than five working days prior to the bid opening. A vendor protest relating to the purchase order or contract award must be submitted no later than five working days after the contract award. The vendor is responsible for knowing the specified bid opening and award dates. Any protests received outside of the timelines established in this section may be rejected at WVBE Purchasing's discretion.

8.2.a. Although the preferred method for protesting is by letter, timely receipt by other means, upon confirmation by WVBE Purchasing, will be considered. All vendor protests must contain the following minimal information:

8.2.a.1. name and address of the protestor;

8.2.a.2. valid requisition, purchase order or contract number(s);

8.2.a.3. statement of the reasons for the protest;

8.2.a.4. supporting documentation; and

8.2.a.5. resolution or relief sought.

8.2.b. A vendor's failure to submit the information required in section 8.2.a. will be sufficient to warrant rejection of the protest by WVBE Purchasing.

8.3. Protest Review.

126CSR203

8.3.a. WVBE Purchasing, or its designee, will review the protest and issue a written decision. A hearing may be conducted at the discretion of WVBE Purchasing or its designee.

8.3.b. Any continuation or delay of the purchase order or contract award while the protest under consideration will be at the discretion of WVBE Purchasing or its designee.

8.3.c. WVBE Purchasing 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 WVBE Purchasing.

§126-203-9. Public Records.

9.1. As public records, procurement documents will be disclosed to the public following the bid opening or the award of a contract upon request to WVBE Purchasing or pursuant to a FOIA request.

9.2. Any bid or other document in a procurement file will be disclosed pursuant to a request to WVBE Purchasing or a FOIA request, even if the bid or other document contains statements or labels attempting to prevent disclosure, such as confidential, trade secret, private, or any other claim.

9.3. The WVBE is not liable for any disclosure of a procurement document.

9.4. The WVBE does not have a duty to inform a vendor that any documents, contracts or other information has been, or will be, disclosed pursuant to a request.

§126-203-10. Vendor Debarments and Suspensions.

10.1. The WVBE will recognize and honor any vendor suspensions and debarments by the federal government and/or the West Virginia State Purchasing Division.

10.2. The WVBE may suspend or debar a vendor at its discretion.

§126-203-11. Severability.

11.1. If any provision of this policy or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this policy.

**126CSR203, Policy 8210, Exempt Purchasing Procedures
Comment Response Form**

COMMENT PERIOD ENDS: November 13, 2023

COMMENT RESPONSE FORM

NOTICE: *Comments, as submitted, shall be filed with the West Virginia Secretary of State's Office and open for public inspection and copying for a period of not less than five years.*

The following form is provided to assist those who choose to comment on Policy 8210, Exempt Purchasing Procedures. Additional sheets may be attached, if necessary.

Name: _____ Organization: _____

Title: _____

City: _____ State: _____

Please check the box below that best describes your role.

- | | | | |
|---|---|--|---|
| <input type="checkbox"/> County Board Member | <input type="checkbox"/> Professional Support Staff | <input type="checkbox"/> Service Personnel | <input type="checkbox"/> Higher Education |
| <input type="checkbox"/> Superintendent | <input type="checkbox"/> Principal | <input type="checkbox"/> Parent/Family | <input type="checkbox"/> Legislator |
| <input type="checkbox"/> Central Office Staff | <input type="checkbox"/> Teacher | <input type="checkbox"/> Community Member | <input type="checkbox"/> Other |

| COMMENTS/SUGGESTIONS |
|---|
| §126-203-1. General. |
| §126-203-2. Applicability. |
| §126-203-3. Definitions. |
| §126-203-4. Exempt Purchasing Authority. |
| §126-203-5. General Information. |
| §126-203-6. Purchasing Requirements. |
| §126-203-7. Formal Procurement Documents and Processes. |

**126CSR203, Policy 8210, Exempt Purchasing Procedures
Comment Response Form**

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|--|
| §126-203-8. Vendor Protests. |
| §126-203-9. Public Records. |
| §126-203-10. Vendor Debarments and Suspensions. |
| §126-203-11. Severability. |

Please direct all comments to:

Phillip Uy, Finance Officer
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West Virginia Department of Education
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Charleston, West Virginia 25305
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