

PREVAILING WAGE

- **When does it apply?**

WVDE legal counsel is currently researching prevailing wage in order to make a determination as to when prevailing wage applies to county boards of education. Once a determination is made, additional guidance will be provided.

Prevailing Wage is required by WV State Code §21-5A, which can be located on the West Virginia Legislature Website by clicking on State Code and then searching for the applicable code section. A link to the relevant code section and specific excerpts are below:

<http://www.legis.state.wv.us/wvcode/ChapterEntire.cfm?chap=21&art=5A>

§21-5A-1. Definitions.

(1) The term "public authority," as used in this article, shall mean any officer, board or commission or other agency of the state of West Virginia, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement, including any institution supported in whole or in part by public funds of the state of West Virginia or its political subdivisions, and this article shall apply to expenditures of such institutions made in whole or in part from such public funds.

(2) The term "construction," as used in this article, shall mean any construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public improvement let to contract. The term "construction" shall not be construed to include temporary or emergency repairs.

§21-5A-2. Policy declared.

It is hereby declared to be the policy of the state of West Virginia that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in this state in which the construction is performed, shall be paid to all workmen employed by or on behalf of any public authority engaged in the construction of public improvements.

§21-5A-3. Fair minimum rate of wages; determination; filing; schedule of wages part of specifications.

Any public authority authorized to let to contract the construction of a public improvement, shall, before advertising for bids for the construction thereof, ascertain from the state commissioner of labor, the fair minimum rate of wages, including fair minimum overtime and holiday pay, to be paid by the successful bidder to the laborers, workmen or mechanics in the various branches or classes of the construction to be performed; and such schedule of wages shall be made a part of the specifications for the construction and shall be published in an electronic or other medium and incorporated in the bidding blanks by reference when approved by the commissioner of labor where the construction is to be performed by contract. The "fair minimum rate of wages," for the intents and purposes of this article, shall be the rate of wages paid in the locality in this state as hereinbefore defined to the majority of workmen, laborers or mechanics in the same trade or occupation in the construction industry. The commissioner of labor or a member of his or her department designated by him or her shall assemble the data as to fair minimum wage rates and shall file wage rates. Rates shall be established and filed as hereinafter provided on the first day of January of each year. These rates shall prevail as the minimum wage rate on all public improvements on which bids are asked during the year beginning with the date when such new rates are filed and until the new rates are filed, the rates for the preceding year shall remain in effect: *Provided*, That such rates shall not remain in effect for a period longer than fifteen months from the date they are published, but, this provision shall not affect construction of a public improvement then underway.

§21-5A-6. Contracts to contain provisions relative to minimum wages to be paid.

In all cases where any public authority has ascertained a fair minimum rate or rates of wages as herein provided, and construction of a public improvement is let to contract, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate or rates of wages which shall not be less than the fair minimum rate or rates of wages as provided by this article.

Prevailing Wage is also addressed with West Virginia Code of State Rules (CSR) 42-07, which can be found on the WV Secretary of State's website by clicking on Search for Rules, then Code of State Rules, and then searching for the applicable number. A link to the relevant CSR and a specific excerpt related to certification of the wage rates are below:

<http://apps.sos.wv.gov/adlaw/csr/rule.aspx?rule=42-07>

42-7-4.3. The final payment to the contractor shall be withheld until such time as the public authority, who is charged with the disbursement of the funds has ascertained and so certified to the Commissioner that the wage rates as determined by the Commissioner are paid. Further, final payment shall be withheld if the Commissioner notifies public authority that the contractor is in violation of the Act or these regulations.

- **Where do you go to compare it to?**

Each year, the Wage & Hour section of the West Virginia Division of Labor establishes the “Prevailing Hourly Rate” of wages in each of the classification of work for building, highway and heavy construction projects. The prevailing rate for each locality is determined by the Labor Commissioner on an annual basis. Information is solicited from public authorities and contractors; both union and non-union alike. Once received, the data is analyzed and the rates for all 55 counties in West Virginia are determined separately.

Below is a link from the WV Division of Labor website to the 2011 Prevailing Wage Rates:

<http://www.sos.wv.gov/administrative-law/wagerates/Pages/2011BuildingConstruction.aspx>

- **What does the contractor need to supply for proof?**

WV State Code §42-7-7 states the following: “The contractor and each subcontractor OR the officer of the public authority in charge of the construction of a public improvement shall keep an accurate record. “ It goes on to state that all records must be maintained for a period of no less than 3 years. While there is no mandatory format, state code outlines the specific information that must be included in the payroll records. A copy of applicable state code is attached.

According to the FAQ on the WV Division of Labor website, the submission of weekly certified payrolls is normally required by the federal government (for projects under their jurisdiction), the public authority or the general contractor for the duration of the project. While the WV Division of Labor does not require the routine submission of certified payrolls to their office, they do request them as part of a prevailing wage investigation.

A payroll certification form (a copy is attached) can be located on the WV Division of Labor website at:

<http://www.wvlabor.com/newwebsite/Documents/wageforms/payroll.pdf>

- **Additional Prevailing Wage Information**

Attached is a copy of the FAQ from the WV Division of Labor website. It contains very useful information about prevailing wage rates, how they should be paid, whether overtime applies, how it applies to salaried employees, etc.

The WV Division of Labor is willing to assist with determination as to whether prevailing wage applies to a particular project. A copy of the form to submit is attached. This form can be found on the WV Division of Labor website at:

<http://www.wvlabor.com/newwebsite/Documents/wageforms/newer%20forms/Prevailing%20Wage%20Project%20DeterminationPDF.pdf>

The WV Division of Labor is also willing to assist with determining the proper wage classification for a particular employee. A copy of the form to submit is attached. This form can be found on the WV Division of Labor website at:

<http://www.wvlabor.com/newwebsite/Documents/wageforms/newer%20forms/Prevailing%20Wage%20Classification%20Review%20Request.pdf>

It is highly recommended that public authorities exercise proper due diligence pertaining to the payment of prevailing wage by contractors, particularly since the public authority will be held responsible if prevailing wage is not being paid properly. An example of providing due diligence would be performing periodic “audits” of certified payrolls to confirm that the contractor is truly in compliance.

What is prevailing wage?

In the state of West Virginia, a wage of no less than the prevailing hourly rate of wages as established each year by the West Virginia Division of Labor (Division) shall be paid to all workmen employed by or on behalf of any public authority engaged in the construction of a public improvement. (§21-5A-2) All “workmen” engaged in the construction activity are entitled to receive the established hourly rate of wages as established by the Division for the classification of work being performed in the county where the work is actually performed.

What jobs are covered?

The prevailing wage statute includes, but is not limited to, the following projects. *Any questions relating to the applicability of the prevailing wage statute to specific projects must be submitted to the Division in writing. Such requests are to be sent to the attention of Larry I. Walker, Wage & Hour Director, West Virginia Division of Labor, Building 6, Room 749-B, Charleston, West Virginia 25305.*

- Public improvement construction projects that are performed by or on behalf of any public authority that is authorized to engage in construction activity. The term public authority includes West Virginia state agencies; county commissions; city municipalities; public service commissions, etc. (§ 21-5A-1(1); § 42CSR7-2.5 § 21-5A-1 (5) § 21-5A-1 (2))
- Projects that are funded at least in part by monies provided by the West Virginia Economic Development Authority. (Chapter 31 of the WV Code)
- Projects financed by (TIF) tax increment financing. (Chapter 7, Article 11B of the WV Code)

§ 21-5A-1 (1) The term “public authority” as used in this article shall mean any officer, board or commission or other agency of the state of West Virginia or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement, including any institution supported in whole or in part by public funds of the state of West Virginia or its political subdivisions, and this article shall apply to expenditures of such institutions made in whole or in part from such public funds.

§ 42CSR7-2.5 A “public authority” includes any officer, board or commission or other agency of the State of West Virginia, or any political subdivision thereof, or any authority created by the Legislature of West Virginia.

§ 21-5A-1 (5) The term “public improvement” as used in this article, shall include all buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures upon which construction may be let to contract by the state of West Virginia or any political subdivision thereof.

§ 21-5A-1 (2) The term “construction” as used in this article shall mean any construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public improvement let to contract. The term “construction” shall not be construed to include temporary or emergency repairs.

How are the rates determined and where do I find them?

The rates for each trade classification are set each year by the Division during the 1st week of January for Building, Heavy and Highway construction projects. The rate for each category is determined separately. The posted rates are available for review on the Secretary of State's website @ www.wvsos.org. A link to that site is also available from this website. Once there, you'll see a listing of all fifty five West Virginia counties in alphabetical order. For Building rates, simply choose the county in which your project is being performed. To find the rates for Heavy and Highway projects, you'll need to first choose "**Heavy and Highway**" (highlighted in green) which is found in the second paragraph prior to the listing of counties. Heavy and Highway rates are listed by classification of work instead of the project locality.

There are two (2) rates for each classification. Which rate do I pay?

The established prevailing wage rate is separated in two (2) parts for each classification of work. The first part is the "basic hourly" rate and the second part is the "fringe benefit" rate. *Both rates must be added together to determine the total prevailing wage rate requirement.*

What if I don't provide fringe benefits? Do I still have to pay the fringe benefit amount?

The "basic hourly" rate, must be paid "in full" to all workmen regardless of whether or not the employees are receiving fringe benefits. The "fringe benefit" portion of the rate has been separated from the "basic hourly" rate to allow employers the opportunity to "credit off" their hourly monetary costs for providing fringe benefits to their employees. When fringe benefits are not being provided, the total of both rates are to be paid directly to the employee as wages. *Employees must receive the full benefit of the "total prevailing wage package" which is calculated by adding the basic hourly rate and the fringe benefit rate together.* For example (The basic hourly rate + the fringe benefit rate = the total prevailing wage package)

What is considered a fringe benefit?

A fringe benefit is a benefit that is granted by an employer to an employee by company policy that involves a monetary cost such as holiday pay, vacation pay, health insurance, bona fide pension plans, etc. (§§ 42CSR7-2.15 & 42CSR7-2.8) All fringe benefit plans must be authorized by the employee before they can be used as a credit against the fringe benefit portion of the rate. *Benefits required by law such as workers compensation, unemployment premiums and matching social security are not considered "fringe benefits" and cannot be used as a credit against the fringe benefit portion of the rate.*

- Employers may calculate the monetary cost of a qualified fringe benefit by dividing the annual cost for that benefit by 2080 hours for each employee. (annual benefit cost / 2080 hours)
- When benefits such as vacation pay or sick leave are used as a credit against the fringe benefit portion of the rate, those benefits must be paid directly to the employee and cannot be forfeited upon separation of employment.

How do I know which rate to pay?

The appropriate prevailing wage rate is based on the type of work being performed and not the classification of the worker or their experience level. The location (county) and type of project are also a consideration as different rates apply to Building, Heavy and Highway projects for the same type of work. Descriptions of work for each trade classification are provided along with the established rates under the titles of “descriptions” and “appendices”. *Any questions relating to the proper classification(s) of work for a specific job description must be submitted in writing to the Division. All requests must include a complete scope of work and project description. Such requests are to be sent to the attention of Larry I. Walker, Wage & Hour Director, West Virginia Division of Labor, Building 6, Room 749-B, Charleston, West Virginia 25305.*

When does overtime apply on prevailing wage projects?

Overtime hours on prevailing wage projects are paid at time and half and are based on hours actually worked over forty (40) in a seven consecutive day workweek as determined by the employer. Time and a half is only paid on the “basic hourly” portion of the rate. The “fringe benefit” portion of the rate is always paid at straight time regardless of the number of hours worked.

Do owners, corporate officers and salaried employees have to be paid the prevailing wage?

With the exception of sole proprietors, all workmen on prevailing wage projects must be paid at the established hourly rate for the type of work performed regardless of whether they’re paid by the hour or receive a regular salary. Whenever a salaried employee works on a prevailing wage project, that person’s gross salary must equal or exceed the amount of wages they would have been entitled to for the work they performed had they been a regular hourly employee. For example, if an employee normally receives a weekly gross salary of \$800.00 but works forty (40) hours on a prevailing wage project that has an established hourly rate of \$30.00 per hour for the type of work being performed; that employee’s weekly salary would have to be increased to \$1200.00 for that particular pay period.

NOTE: To qualify as a “sole proprietor”, the individual performing the work must be registered as a “sole proprietorship” with the West Virginia Department of Tax & Revenue. Any work performed by an employee of a sole proprietor must be paid at the established prevailing wage rate for the type of work being performed.

Do I need to complete certified payrolls and if so, where do I get the forms?

The submission of weekly certified payroll records is normally required by the federal government (for projects under their jurisdiction), the public authority or the general contractor for the duration of the project. Although this agency does not require the routine submission of certified payrolls, we do request them as part of a prevailing wage investigation as they normally contain the same recordkeeping information that is required under the state prevailing wage statute. However, if the employee names and addresses are not listed, that information must be submitted in addition to the certified payrolls. (See our Fact Sheet for Record Keeping Requirements for Public Improvement Projects)

The actual certified payroll forms are available on our website under Wage & Hour / Forms and on the United States Department of Labor's (USDOLs) website @ www.dol.gov/esa/whd/forms/wh347_legacy/pdf.

EMPLOYER RECORD KEEPING REQUIREMENTS FOR PUBLIC IMPROVEMENT PROJECTS

Code of State Rule §42-7-7
Records and Inspection

§42-7-7.1 - The contractor and each subcontractor or the officer of the public authority in charge of the construction of a public improvement shall keep an accurate record.

There is no mandatory format; however, all payrolls must contain the following information:

(a) The employee's full name, address and social security number (This is necessary on the first payroll on which his name appears; thereafter, only his name, unless a change of name or address.);

(b) The employee's classification;

(c) The employee's hourly wage rate and, where applicable, his overtime hourly wage rate;

(d) The daily and weekly hours worked in each classification, including actual overtime hours worked (not adjusted);

(e) The itemized deductions made;

(f) The net wages paid;

(1) If space on the payroll form is limited, supplemental data may be recorded, if it is easily accessible to the payroll form.

(2) Appropriate codes are permissible to replace classification names on payrolls: Provided, that a key to such code is submitted to the Commissioner for retention in his files.

(3) All records pertaining to the Public Improvement Project shall be preserved for a period of no less than three (3) years.

West Virginia Division of Labor

Prevailing Wage Project Determination

Name of Company: _____

Address: _____
Street Address *Apartment/Unit #*

City *State* *ZIP Code*

Phone Number: _____ Email Address: _____

Person Completing Form (Circle): Employee Performing Work, Contractor Employing Individual Performing Work, Public Authority, or Third Party

If Third Party selected, state reason for request and/or affiliation with Project:

Date of Request: _____ Date project was awarded/or scheduled to be awarded? _____

Project Location (City): _____ Project Location (County): _____

Public Authority & Funding Information

Name of Public Authority in charge of the project: _____

Phone Number: _____

Address: _____
Street Address *Apartment/Unit #*

City *State* *ZIP Code*

Name of Person in charge of the disbursement of funds and/or overseeing of the project: _____

Phone Number: _____

Address: _____
Street Address *Apartment/Unit #*

City *State* *ZIP Code*

Source of Funding (Circle):: Federal, State, Federal & State, Other

If OTHER selected, please describe in detail source of funding:

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Project Name:

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Scope of Work**

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****If the project has already been awarded, a copy of the contract showing the date of award AND a complete scope of work is required.**

Name

Signature

Date

Please complete and sign this form and mail it to:

**WEST VIRGINIA DIVISION OF LABOR
749 -B BUILDING 6, CAPITOL COMPLEX
CHARLESTON WV 25305**

FACSIMILE: (304) 558-3797

EMAIL: Barbara Gandy – Barbara.L.Gandy@wv.gov

If you need additional information or help with this form, please contact the Wage and Hour Department at (304) 558 -7890 Ext. 145.

West Virginia Division of Labor

Prevailing Wage Classification Review Request

Name of Company:

Address:

Street Address

Apartment/Unit #

City

State

ZIP Code

Phone Number:

Email
Address:

Date of Request:

Person Completing Form
(Circle):

Employee Performing Work, Contractor
Employing Individual to Perform Work,
Public Authority or Third Party

Project Name/or Number

Name of Contractor
performing the work (if
form is being filled out by
someone other than the
contractor):

Date Project was contracted:

If unknown, enter
approximate start date:

Project Location (City):

Project Location
(County):

Provide a complete and
detailed description of work
being submitted for review:

List equipment used by the worker:

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Attach a copy of the scope of work contained in the project contract to an email or fax, if available.

Name

Signature

Date

Please complete and sign this form and mail it to:

**WEST VIRGINIA DIVISION OF LABOR
749 -B BUILDING 6, CAPITOL COMPLEX
CHARLESTON WV 25305**

**FACSIMILE: (304) 558-3797
EMAIL: Barbara Gandy – Barbara.L.Gandy@wv.gov**

If you need additional information or help with this form, please contact the Wage and Hour Department at (304) 558 -7890 Ext. 145.

“PIGGYBACKING” EXPLAINED

Section 8.1.4 of Policy 8200, Purchasing Procedures for Local Educational Agencies, allows County Boards of Education to purchase equipment and other commodities or services directly from a vendor without competitive bidding if the item is available from a statewide contract and “piggybacking” by local governmental entities is permitted in the contract.

What is “piggybacking”?

Piggybacking is defined as the utilization of an existing open-end contract (in this case a statewide contract) to which the requesting agency was not an original party.

What is a statewide contract?

A statewide contract is a legal and binding instrument between the state and a vendor which is used by state agencies and some political subdivisions, such as municipalities, counties, boards of education, to purchase frequently used commodities and services. These contracts are generally issued by the WV Purchasing Division based on the theory that they apply to multiple state agencies.

Do other state agency contracts allowing “piggybacking”?

Contracts entered into by other state agencies besides the WV Purchasing Division, such as the Department of Education or the Department of Health and Human Resources, may contain provisions that allow for use by other state agencies, political subdivisions, etc. but the contracts are not required to contain such provisions. When these contracts, referred to as agency-wide contracts, do contain such provisions, other state agencies and political subdivisions may utilize them. Two examples of widely-used agency-wide contracts are Tools for Schools – Elementary and Tools for Schools – Secondary.

Can a county use a contract from a state agency that allows “piggybacking”?

While Policy 8200 does not specifically address the use of such contracts by counties, it is the Office of School Finance interpretation that use of such contracts is allowable. The WV Purchasing Division reviews such contracts and can even determine that use of such a contract is mandatory for other state agencies, essentially making them a statewide contract. Allowing the use of such contracts is in accordance with the intent of Section 8.1 of Policy 8200.

Where can you find statewide and other state contracts that allow “piggybacking”?

The WV Purchasing Division maintains a list of all statewide and other state agency contracts that allow “piggybacking” on their website at the following address:

<http://www.state.wv.us/admin/purchase/contracts.html>

The above site contains a button for statewide contracts and one for “piggybacking” contracts.

RECOMMENDED PROCEDURES FOR WVEIS VENDOR ADDITION

The following recommendations have been designed to assist in adding a vendor to WVEIS:

- Vendor records are created for valid vendors doing business with the county boards of education. Each vendor record is assigned a unique vendor number.
- Each new vendor should complete an IRS Form W-9. This form primarily contains the name of the vendor or entity, their tax identification number, and their business designation code. For foreign vendors, a series of IRS Forms W-8 are required. These forms should be kept on hand to validate the information for a vendor or entity if questions arise from the Internal Revenue Service as a result of an inquiry or audit. To ensure that all information for the new vendor is correct, please make certain that all information has been completed by the vendor and is an original document. Counties may want to obtain a copy of a business license and/or any additional information that they find helpful.
- Prior to adding a vendor into WVEIS, there should be an inquiry to see if the vendor already exists in the vendor file. The vendor search should be made using both the FEIN/SSN and vendor name. Also, please be sure to check for all possible spelling and/or abbreviations. Once it is determined that the vendor is not a duplicate in the system, please enter all necessary information from the W-9 form into WVEIS.
- Proper internal controls along with segregation of duties will reduce the exposure of fraud. Ideally, the person who enters the new vendors should not have access to any other functions in the accounts payable process. However at a minimum, the person who enters the new vendor should not also have the ability to approve invoices.
- If the vendor information needs to be modified, including the address, please obtain a new revised IRS Form W-9 from the vendor before making changes to WVEIS.
- A vendor that becomes inactive may be placed on hold on the vendor screen. By placing them on hold, purchase orders and payments cannot be made to that vendor. Add a comment detailing the reason why that vendor was deactivated. Obtain a new W-9 prior to reactivating a vendor.
- Instances where further vendor verification may be needed:
 1. Vendors whose invoices do not have pre-printed sequential invoice numbers
 2. Vendors with PO Box addresses
 3. Any new vendor over a certain dollar amount (for example: \$25,000)
 4. Unusual looking invoices
 5. Any invoice without a phone number
 6. Any vendor where the W-9 information does not match the business registration information
- Maintenance items:
 1. Review the master vendor file yearly. Deactivate (not delete) any vendors that have not been used within the last 12-15 months.
 2. Annually send out new W-9 forms to a sample of vendors to ensure information has not changed.

AUDIT CERTIFICATE REQUIREMENT FOR RELEASE OF FINAL PAYMENT TO CONTRACTORS

Statutes require the state (and agencies of the state) and local governments obtain assurance that the vendors in which they enter into contracts with are not delinquent for workers compensation or unemployment compensation amounts due. Final settlement of the contract cannot be made until this certificate or assurance is obtained.

The agency that provides verification for Workers Compensation is the "Employer Coverage" division of the West Virginia Insurance Commissioner. The agency that provides verification for Unemployment is "Workforce West Virginia" a division of the Department of Commerce.

State agencies obtain this assurance through the FIMS system which indicates whether a particular vendor is considered delinquent by either of these agencies. Local governments must utilize other verification methods.

Direct confirmation may be attained at each agency's web site. The relevant statutes and agency contact information follows:

WORKERS COMPENSATION

§23-1-1c. Payment withholding; interception; penalty.

(a) All state, county, district and municipal officers and agents making contracts on behalf of the State of West Virginia or any political subdivision thereof shall withhold payment in the final settlement of contracts until the receipt of a certificate from the commission or the company created in article two-c of this chapter to the effect that all payments, interest and penalties thereon accrued against the contractor under this chapter as of the termination of the commission have been paid or that provisions satisfactory to the commission or company created in article two-c of this chapter have been made for payment. Any official violating this subsection is guilty of a misdemeanor and, on conviction thereof, shall be fined not more than one thousand dollars or confined in the county or regional jail for not more than one year, or both fined and confined.

(b) Any agency of the state, for the limited purpose of intercepting, pursuant to section five-a, article two of this chapter, any payment by or through the state to an employer who is in default in payment of contributions, premiums, deposits, interest or penalties under the provisions of this chapter, shall assist the commission or company created in article two-c of this chapter in collecting the payment that is due under subsection (a) of this section. For this purpose, disclosure of joint delinquency and default lists of employers with respect to unemployment compensation as provided in section six-c, article one, chapter twenty-one-a of this code and Workers' Compensation contributions, premiums, interest, deposits or penalties is authorized. The commission and the bureau of employment programs may enter into an interagency agreement to effect the provisions of this section. The lists may be in the form of a computerized database to be accessed by the auditor, the Department of Tax and Revenue, the Department of Administration, the Division of Highways or other appropriate state agency or officer.

Contact person: Karen McClure

Go to www.wvinsurance.gov

- workers compensation
- coverage validation
- violators system
- defaulted employer

Physical mailing address:

Office of the Insurance Commissioner
P.O. Box 11682
Charleston, WV 25339
Attn. Employer Coverage
Karen McClure

Phone number: 304-558-6279 ext 5023

Fax number: 304-558-5586

Email: karen.mcclure@wvinsurance.gov cc deborah.tincher@wvinsurance.gov

UNEMPLOYMENT COMPENSATION

§21A-2-6c. Payment withholding and interception.

(a) All state, county, district and municipal officers and agents making contracts on behalf of the state of West Virginia or any political subdivision thereof shall withhold payment in the final settlement of contracts until the receipt of a certificate from the commissioner to the effect that all payments, interest and penalties thereon accrued against the contractor under this chapter have been paid or that provisions satisfactory to the commissioner have been made for payment. Any official violating this subsection is guilty of a misdemeanor and, on conviction thereof, shall be fined not more than one thousand dollars or confined in a county or regional jail for not more than one year, or both fined and confined.

(b) Any agency of the state, for the limited purpose of intercepting, pursuant to section sixteen, article five of this chapter and pursuant to section five-a, article two, chapter twenty-three of this code, any payment by or through the state to an employer who is in default in payment of contributions, premiums, deposits, interest or penalties under the provisions of this chapter or of chapter twenty-three of this code, shall assist the commissioner in collecting the payment that is due. For this purpose, disclosure of joint delinquency and default lists of employers with respect to unemployment compensation and workers' compensation as provided in section one-c, article one, chapter twenty-three of this code contributions, premiums, interest, deposits or penalties is authorized. The bureau and the workers' compensation commission may enter into an interagency agreement to effect the provisions of this section. The lists may be in the form of a computerized database to be accessed by the auditor, the department of tax and revenue, the department of administration, the division of highways or any other appropriate state agency or officer.

Contact person: Cathy Corley

Go to www.wv.gov

- WV Agencies
- Work Force West Virginia
- Unemployment
- Employer
- Defaulted Accounts
 - o **Go to log in** to get representative who will give a password to log in and use this password for future reference

Physical mailing address:

Work Force West Virginia
UC Audit and Compliance
112 California Avenue
Charleston, WV 25305

Phone number: 304-558-2451

Fax number: 304-558-6532

Email: ucworkforcecae@wv.gov

MISCELLANEOUS PURCHASING QUESTIONS

Are you required to bid annually for services like pest control?

No, counties are not required to bid annually for services like pest control. Counties are permitted to have contracts for a period of up to 12 months that contain up to two successive one year renewal periods (a maximum of three years if both renewals are exercised). This is allowed under Section 3.2.5 of the Purchasing Policies and Procedures Manual (State Board Policy 8200), which contains the following provisions:

3.2.5.b Life of Contract - Contracts normally cover a 12-month period or cite a specific time for completion for the project or service. A solicitation for a contract that includes an option on the part of the LEA to extend or renew the contract for an additional period may be advantageous and may be considered. If price adjustments are permitted during the contract period, the conditions under which they are authorized must be specified in the original solicitation and resulting contract. All contracts should be reviewed during the contract period to determine if the need still exists for the commodities or services, if prices are fair and reasonable based on the current market conditions, and if performance is satisfactory.

3.2.5.c Renewals - The standard terms and conditions used to indicate a specified date on which the contract becomes effective, and extends for a period of one year or until such "reasonable time" thereafter as is necessary to obtain a new contract or renew the original contract. The "reasonable time" period shall not exceed twelve months. Unless specific provisions are stipulated in the contract document, the terms, conditions and pricing established are firm for the life of the contract.

Contracts that contain renewal provisions may be renewed upon the mutual written consent of the LEA and vendor prior to the expiration date. A letter of justification should be maintained on file, stating pertinent reasons for the recommendation to renew an existing contract. These factors include, but are not limited to, vendor performance, market conditions and other analytical measures that indicate that renewing the contract is in the best interest of the LEA. Renewals shall be in accordance with the terms and conditions of the original contract and are limited to two successive one year periods.

Please note that the decision to exercise a renewal option must be supported by a letter of justification that should be maintained on file.

Also, there is a piggybacking contract available for pest services which a county may find to be in its best interest.

<http://www.state.wv.us/admin/purchase/piggyback/PEST.htm>

Are you required to bid annually for workers compensation?

No, applying the provisions of Section 3.2.5 of the Purchasing and Procedures Manual (State Board Policy 8200), counties are not required to bid annually for services like workers compensation. Counties are permitted to have a contract covering a period of up to 12 months that contains two successive one-year renewal periods (for a total of three years assuming both renewals are exercised).

Please keep in mind that Section 19.2.2 allows for the establishment of locally developed criteria for evaluating and negotiating such services. The contract does not necessarily have to be awarded to the lowest bidder. Section 7.10 requires that counties document the criteria and selection process and retain such documentation in accordance with the document retention schedule.

In addition, counties are required to have an agent of record (whose services are not required to be bid). This agent of record may, but does not have to be, the actual insurance provider as well. The agent of record is permitted to solicit bids on behalf of the board from multiple insurance providers in order to meet the competitive bid requirements.

Once you bid an item, how long does the bid stand for?

Unless otherwise specified on the bid, it is assumed that the bid is only good for the particular procurement for which it was requested. However, when requesting a quote, proposal, etc, the county has the option of specifying a period for which they want the bid to be valid (ex: 60 days, 90 days, 120 days, etc.). Vendors should include a statement specifying the requested validity period on their response to show that they are in agreement with the extended period.

Can county boards purchase food for staff?

No, county boards may not purchase food for staff. There is no statutory authority allowing such a purchase. Food may only be purchased for students and parents.

Section 9.1 of the Purchasing Procedures Manual (State Board Policy 8200) is misleading, as it was taken from state purchasing regulations but, in error, was not modified to apply to county boards. Section 9.1.7 indicates that facilities rentals (including food, beverages, entertainment and other expenses related to conducting a meeting) are exempt from competitive bid requirements. While facilities rental itself would be exempt for county boards, the reference to food and beverages does not apply.

In addition, although food for meetings is listed as an allowable cost under OMB Circular A-87, the lack of a statutory authority allowing food purchases for staff by county boards would take precedence.

Can county boards provide uniforms and other safety equipment for staff?

Yes, county boards are permitted to provide uniforms and safety equipment for SERVICE PERSONNEL only. County boards are also permitted to provide cleaning of such items. It is not a requirement to provide these items.

If a county does provide these items for service personnel, the county must comply with any IRS regulations. Uniforms may qualify as a Working Condition Benefit that is not taxable to the employee. IRS Publication 15-B defines Working Condition Benefit as “property and services you provide to an employee so that the employee can perform his or her job.” The Publication further states that the tax exemption applies “to the extent the employee could deduct the cost of the property or services as a business expense or depreciation expense if he or she had paid for it.” IRS Publication 529 considers the following to be an unreimbursed employee expense: “work clothes and uniforms if required and not suitable for everyday use.”

Based on the content of these publications, if a county requires that the employee wear the uniform provided, it would not be taxable to the employee. However, if the uniforms are optional for the employees, the cost of the uniforms would be a taxable event because the employee could not claim the expense as an unreimbursed employee expense.

Links to the applicable sections of these IRS publications are below:

http://www.irs.gov/publications/p15b/ar02.html#en_US_2011_publink1000193758

http://www.irs.gov/publications/p529/ar02.html#en_US_publink100027002

Can county boards reimburse employees for expenses other than travel?

In order to reimburse employees for expenses other than travel, a county board must follow all other purchasing requirements, **including having a purchase order in advance of the purchase by the employee.** Substantiation of the expense is required by the employee through invoices, etc.

Counties are not allowed to reimburse employees for sales tax. The only exception to this pertains to the first \$100 (recently increased from \$50) of faculty senate funds allotted to a teacher. If a faculty senate votes to allow the teacher to spend faculty senate funds in excess of \$100, counties are not permitted to reimburse for sales tax on purchases beyond the first \$100.

AGREEMENT ADDENDUM FOR CONTRACTS

Section 12.4 of the Purchasing Policies and Procedures Manual (State Board Policy 8200) contains the following provision:

- 12.4 “If using an agreement provided by the vendor, care must be exercised to ensure that the agreement does not contain contractual requirements that are in violation of state statutes, such as any clause that requires a prepayment, the imposition of a penalty or termination charge should the LEA cancel the agreement, or the requirement that the LEA indemnify or hold harmless the vendor. A sample of an agreement addendum is included in Appendix C that can be attached to any agreement to modify common requirements that are not acceptable.”

The addendum included in Appendix C, which is attached for your reference, is an adaption of the State form (WV-96) that has been modified for use by county boards of education.

A copy of the LEA agreement addendum is attached. The first item on the addendum regarding disputes has been modified from the version contained in Appendix C of the Purchasing Policies and Procedures Manual. Please use the attached version.

Also attached is a memorandum regarding this topic that was issued by the State Attorney General’s Office in 2009. Although the requirements contained in that memorandum relate to state purchasing requirements for State agencies, and contains a reference to the WV-96 Agreement Addendum form, it emphasizes the legal concerns regarding this issue and the need for state and local governmental agencies to exercise due diligence when reviewing contracts and agreements issued by vendors to ensure that they do not contain requirements that may be contrary to State Code.

To ensure that certain common illegal requirements are not imbedded in such contracts, it is strongly recommended that all CSBOs or purchasing directors of boards of education require any vendor that is providing a vendor issued contract for the county board’s signature to sign the attached agreement addendum, particularly when the contract contains terms and conditions or their equivalent.

Also, if you are submitting such contracts or agreements for the Department’s legal review or approval, especially the State Board take-over county boards, be certain to include such signed addendums with the documents that are submitted for review.

AGREEMENT ADDENDUM

In the event of conflict between this addendum and the agreement, this addendum shall control:

1. **DISPUTES** - Any references in the agreement to arbitration or to the jurisdiction of any court other than the Circuit Court of the county in which the Agency is located are hereby deleted. The parties may agree to nonbinding mediation prior to litigation.
2. **HOLD HARMLESS** - Any clause requiring the Agency to indemnify or hold harmless any party is hereby deleted in its entirety.
3. **GOVERNING LAW** -The agreement shall be governed by the laws of the State of West Virginia. This provision replaces any references to any other State's governing law.
4. **TAXES** - Provisions in the agreement requiring the Agency to pay taxes are deleted. As a political subdivision of the State of West Virginia, the Agency is generally exempt from Federal, State, and local taxes and will not pay taxes for any Vendor including individuals, nor will the Agency file any tax returns or reports on behalf of Vendor or any other party.
5. **PAYMENT** - Any references to prepayment are deleted. Payment will be in arrears.
6. **INTEREST** – Should the agreement include a provision for interest on late payments, the Agency agrees to pay the maximum legal rate under West Virginia law. All other references to interest or late charges are deleted.
7. **RECOUPMENT** - Any language in the agreement waiving the Agency's right to set-off, counterclaim, recoupment, or other defense is hereby deleted.
8. **FISCAL YEAR FUNDING** - Service performed under the agreement may be continued in succeeding fiscal years for the term of the agreement, contingent upon funds being appropriated by the Legislature or otherwise being available for this service. In the event funds are not appropriated or otherwise available for this service, the agreement shall terminate without penalty on June 30. After that date, the agreement becomes of no effect and is null and void. However, the Agency agrees to use its best efforts to have the amounts contemplated under the agreement included in its budget. Non-appropriation or non-funding shall not be considered an event of default.
9. **STATUTE OF LIMITATION** - Any clauses limiting the time in which the Agency may bring suit against the Vendor, lessor, individual, or any other party are deleted.
10. **SIMILAR SERVICES** - Any provisions limiting the Agency's right to obtain similar services or equipment in the event of default or non-funding during the term of the agreement are hereby deleted.
11. **ATTORNEY FEES** - The Agency recognizes an obligation to pay attorney's fees or costs only when assessed by a court of competent jurisdiction. Any other provision is invalid and considered null and void.
12. **ASSIGNMENT** - Notwithstanding any clause to the contrary, the Agency reserves the right to assign the agreement to a State agency or another local governmental agency, board or commission of the State of West Virginia upon thirty (30) days written notice to the Vendor and Vendor shall obtain the written consent of Agency prior to assigning the agreement.
13. **LIMITATION OF LIABILITY** - The Agency, as a political subdivision of the State, cannot agree to assume the potential liability of a Vendor. Accordingly, any provision limiting the Vendor's liability for direct damages or limiting the Vendor's liability under a warranty to a certain dollar amount or to the amount of the agreement is hereby deleted. Limitations on special, incidental or consequential damages are acceptable. In addition, any limitation is null and void to the extent that it precludes any action for injury to persons or for damages to personal property.
14. **RIGHT TO TERMINATE** - Agency shall have the right to terminate the agreement upon thirty (30) days written notice to Vendor. Agency agrees to pay Vendor for services received prior to the effective date of termination.
15. **TERMINATION CHARGES** - Any provision requiring the Agency to pay a fixed amount or liquidated damages upon termination of the agreement is hereby deleted. The Agency may only agree to reimburse a Vendor for actual costs incurred or losses sustained during the current fiscal year due to wrongful termination by the Agency prior to the end of any current agreement term.
16. **RENEWAL** - Any reference to automatic renewal is hereby deleted. The agreement may be renewed only upon mutual written agreement of the parties.
17. **INSURANCE** - Any provision requiring the Agency to insure equipment or property of any kind and name the Vendor as beneficiary or as an additional insured is hereby deleted.
18. **RIGHT TO NOTICE** - Any provision for repossession of equipment without notice is hereby deleted. However, the Agency does recognize a right of repossession with notice.
19. **ACCELERATION** – Any reference to acceleration of payments in the event of default or non-funding is hereby deleted.
20. **CONFIDENTIALITY** – Any provision regarding confidentiality of the terms and conditions of the agreement is hereby deleted. Governmental contracts are public records under the West Virginia Freedom of Information Act.
21. **AMENDMENTS** - All amendments, modifications, alterations or changes to the agreement shall be in writing and signed by both parties. No amendment, modification, alteration or change may be made to this addendum without the express written approval of the Agency.

ACCEPTED BY:

VENDOR:

Local Education Agency: _____ Company Name: _____

Signed: _____ Signed: _____

Title: _____ Title: _____

Date: _____ Date: _____



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

(304) 558-2021
FAX (304) 558-0140

MEMORANDUM

TO: All State Purchasing Officers

FROM: Dawn E. Warfield
Deputy Attorney General

DATE: August 14, 2009

RE: WV-96 Agreement Addendum

The attached form WV-96 Agreement Addendum (revised 10/07) should be used whenever a vendor submits alternative contractual terms and conditions for your signature. Often, these are on preprinted forms that have not been amended or reviewed by the Purchasing Division of the Department of Administration or the Attorney General. The WV-96 Addendum was developed by the Purchasing Division and the Attorney General's Office to eliminate the most common conflicts with State law that are found in contract documents submitted for our review.

A WV-96 Agreement Addendum is not needed when State Purchasing terms and conditions are the only ones being used, and it is not a substitute for any other terms and conditions. It is intended to *amend* documents submitted by a vendor, and has no significance standing alone. The WV-96 must be dated on or *after* the signature date on the vendor's quote or agreement, and must be signed by the *same persons* who signed the vendor's agreement. As a general rule, the vendor should sign first on any contract documents. If they refuse to sign the WV-96 Addendum, you should *not* sign their documents.

Most of the provisions of the WV-96 Addendum are not negotiable. This is particularly true when the WV-96 has been made a mandatory part of an RFP or RFQ – in which case *none* of its provisions are negotiable. Therefore, when a vendor objects to certain items in the WV-96, please *do not* amend, retype or otherwise alter the Addendum (or allow them to do so), and *do not* sign any Addendum that has been altered without the prior written approval of the Purchasing Division and me. Instead, you should request that the vendor submit their objections and any proposed alternative language to you in writing, and forward them to me for review, using one of the following procedures:

1. If the final contract will be awarded through the Purchasing Division, the state Buyer should send me a copy of the Purchasing file, with all relevant documents such as the RFP or RFQ, the vendor's quote, their proposed terms and conditions, and their written objections to the WV-96 with proposed alternative language, if any.

(OR)

2. If the contract will be issued under an agency's delegated purchasing authority, the agency procurement officer should send me copies of all relevant contract documents, including the vendor's quote, their proposed terms and conditions, and their written objections to the WV-96 with proposed alternative language, if any.

Due to legal requirements for the procurement of contracts over \$25,000, I cannot accept a request from an agency procurement officer to negotiate a WV-96 for a contract to be issued by the Purchasing Division. Additionally, please *do not* tell vendors to contact me directly. Without the relevant contract documents to place their issues into context, it is impossible for me to negotiate any resolution. It is also a waste of the agency's money, because I must bill for my time spent dealing with such matters. Once I have received the necessary information from you, I can usually reach a quick resolution with the vendor.

When dealing with these issues, we will normally require the name of the contact person who has the authority to negotiate and approve terms for the vendor. Usually this is a corporate attorney and not the sales person with whom you have been dealing. You should not attempt to negotiate the terms of the WV-96 Agreement Addendum with a vendor. Once an agreement has been negotiated, we will send copies of the approved terms to you or to the Purchasing Division for signature.

In some instances we have negotiated master terms and conditions with a vendor (such as IBM, Oracle or Microsoft, for example) that eliminate the need for a WV-96 Agreement Addendum. If you are told by a vendor that they have reached an agreement with the Attorney General's Office, ask to see that agreement *in writing*. You may call me to confirm such an agreement before signing any documents.

If you have any questions, I may be reached by telephone at (304) 558-2021, by fax at (304) 558-0140, or by e-mail at dawn.warfield@wvago.gov.

DEW/sc
Attachment (WV-96)

AGREEMENT ADDENDUM

In the event of conflict between this addendum and the agreement, this addendum shall control:

1. **DISPUTES** - Any references in the agreement to arbitration or to the jurisdiction of any court are hereby deleted. Disputes arising out of the agreement shall be presented to the West Virginia Court of Claims.
2. **HOLD HARMLESS** - Any clause requiring the Agency to indemnify or hold harmless any party is hereby deleted in its entirety.
3. **GOVERNING LAW** - The agreement shall be governed by the laws of the State of West Virginia. This provision replaces any references to any other State's governing law.
4. **TAXES** - Provisions in the agreement requiring the Agency to pay taxes are deleted. As a State entity, the Agency is exempt from Federal, State, and local taxes and will not pay taxes for any Vendor including individuals, nor will the Agency file any tax returns or reports on behalf of Vendor or any other party.
5. **PAYMENT** - Any references to prepayment are deleted. Payment will be in arrears.
6. **INTEREST** - Should the agreement include a provision for interest on late payments, the Agency agrees to pay the maximum legal rate under West Virginia law. All other references to interest or late charges are deleted.
7. **RECOURPMENT** - Any language in the agreement waiving the Agency's right to set-off, counterclaim, recoupment, or other defense is hereby deleted.
8. **FISCAL YEAR FUNDING** - Service performed under the agreement may be continued in succeeding fiscal years for the term of the agreement, contingent upon funds being appropriated by the Legislature or otherwise being available for this service. In the event funds are not appropriated or otherwise available for this service, the agreement shall terminate without penalty on June 30. After that date, the agreement becomes of no effect and is null and void. However, the Agency agrees to use its best efforts to have the amounts contemplated under the agreement included in its budget. Non-appropriation or non-funding shall not be considered an event of default.
9. **STATUTE OF LIMITATION** - Any clauses limiting the time in which the Agency may bring suit against the Vendor, lessor, individual, or any other party are deleted.
10. **SIMILAR SERVICES** - Any provisions limiting the Agency's right to obtain similar services or equipment in the event of default or non-funding during the term of the agreement are hereby deleted.
11. **ATTORNEY FEES** - The Agency recognizes an obligation to pay attorney's fees or costs only when assessed by a court of competent jurisdiction. Any other provision is invalid and considered null and void.
12. **ASSIGNMENT** - Notwithstanding any clause to the contrary, the Agency reserves the right to assign the agreement to another State of West Virginia agency, board or commission upon thirty (30) days written notice to the Vendor and Vendor shall obtain the written consent of Agency prior to assigning the agreement.
13. **LIMITATION OF LIABILITY** - The Agency, as a State entity, cannot agree to assume the potential liability of a Vendor. Accordingly, any provision limiting the Vendor's liability for direct damages to a certain dollar amount or to the amount of the agreement is hereby deleted. Limitations on special, incidental or consequential damages are acceptable. In addition, any limitation is null and void to the extent that it precludes any action for injury to persons or for damages to personal property.
14. **RIGHT TO TERMINATE** - Agency shall have the right to terminate the agreement upon thirty (30) days written notice to Vendor. Agency agrees to pay Vendor for services rendered or goods received prior to the effective date of termination.
15. **TERMINATION CHARGES** - Any provision requiring the Agency to pay a fixed amount or liquidated damages upon termination of the agreement is hereby deleted. The Agency may only agree to reimburse a Vendor for actual costs incurred or losses sustained during the current fiscal year due to wrongful termination by the Agency prior to the end of any current agreement term.
16. **RENEWAL** - Any reference to automatic renewal is hereby deleted. The agreement may be renewed only upon mutual written agreement of the parties.
17. **INSURANCE** - Any provision requiring the Agency to insure equipment or property of any kind and name the Vendor as beneficiary or as an additional insured is hereby deleted.
18. **RIGHT TO NOTICE** - Any provision for repossession of equipment without notice is hereby deleted. However, the Agency does recognize a right of repossession with notice.
19. **ACCELERATION** - Any reference to acceleration of payments in the event of default or non-funding is hereby deleted.
20. **CONFIDENTIALITY**: -Any provision regarding confidentiality of the terms and conditions of the agreement is hereby deleted. State contracts are public records under the West Virginia Freedom of Information Act.
21. **AMENDMENTS** - All amendments, modifications, alterations or changes to the agreement shall be in writing and signed by both parties. No amendment, modification, alteration or change may be made to this addendum without the express written approval of the Purchasing Division and the Attorney General.

ACCEPTED BY:

STATE OF WEST VIRGINIA

VENDOR

Spending Unit: _____

Company Name: _____

Signed: _____

Signed: _____

Title: _____

Title: _____

Date: _____

Date: _____

COPIER LEASE TIPS

- Use the existing statewide contracts/piggybacking contracts whenever possible. The link to the current statewide contract is as follows (the first page of the index is attached):

<http://www.state.wv.us/admin/purchase/swc/DIGCOP.htm>

- The state has structured the new statewide contract so that it now only prequalifies vendors on a short list of machines which then need to be bid out before award. You used to be able to simply go pick a machine.
- Know that the current statewide contracts do not allow for breaking of a copier contract unless it is a matter of non-performance by the vendor, which the vendor must have the opportunity to correct.
- Allow adequate time for the bid. Don't assume you know everything/anything about copiers!
- Clearly understand the difference/significance of bands, cpm, average monthly volumes, and maximum monthly volume.
- Structure the bid to ask the vendors to provide option pricing for components which might be considered in the future.
- Look for areas of overcapacity and waste to trim costs.
- Determine the feasibility of establishing some type of a centralized copy center. This could be as simple as having multiple networked printers/copiers.
- Perform a cost comparison between printers and copiers to see which is cheaper.
- At the state, we generally don't want to own copiers. After several years, they become very costly and we generally lease for a term which has historically been determined to be the useful life of the machine. Our experience has been this is about 3 years.

Statewide Contract Index**DIGCOP**Statewide Contract for Digital Copier Equipment

To view and print the contracts, you must have Adobe Reader installed on your PC. It is a free download.



Notice: File sizes may be large. Depending on your Internet connection, contracts may take several minutes or longer to download.

SPECIFICATIONSSYNOPSIS Revised 4/15/2009COST QUOTE FORMACCESSORY OPTION LISTDIGCOP09A - AARONS PRODUCTS INCORPORATEDCHANGE ORDER 1CHANGE ORDER 2CHANGE ORDER 3CHANGE ORDER 4CHANGE ORDER 5DIGCOP09B - CANON USA INCCHANGE ORDER 1CHANGE ORDER 2CHANGE ORDER 3CHANGE ORDER 4CHANGE ORDER 5DIGCOP09C - KOMAX BUSINESS SYSTEMS LLCCHANGE ORDER 1