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HB 4031

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 2006

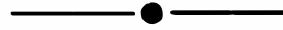


# ENROLLED

COMMITTEE SUBSTITUTE  
FOR

## House Bill No. 4031

(By Mr. Speaker, (Mr. Kiss), and Delegate Trump)  
[By Request of the Executive]



Passed March 10, 2006

In Effect Ninety Days from Passage

FILED

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**E N R O L L E D**

COMMITTEE SUBSTITUTE

FOR

**H. B. 4031**

(BY MR. SPEAKER, (MR. KISS), AND DELEGATE TRUMP)

[BY REQUEST OF THE EXECUTIVE]

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[Passed March 10, 2006; in effect ninety days from passage.]

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AN ACT to repeal §5A-3-33a of the Code of West Virginia, 1931, as amended; to amend and reenact §5A-1-1 of said code; to amend and reenact §5A-3-4, §5A-3-5, §5A-3-10, §5A-3-10a, §5A-3-11, §5A-3-19, §5A-3-33d and §5A-3-45 of said code; to amend said code by adding thereto six new sections, designated §5A-3-9a, §5A-3-10b, §5A-3-10c, §5A-3-11a, §5A-3-11b and §5A-3-11c; and to amend and reenact §5A-3C-11 of said code, all relating to the Purchasing Division of the Department of Administration; providing for the powers and duties of the director; defining certain terms; providing for the director to promulgate legislative rules on contract management procedures, division procedures for oversight of contract management, cancellation of contracts and selling surplus commodities by means of an internet auction site; increasing the annual vendor fee; establishing a fund for fees; providing for specification standards to include cost of mainte-

nance and expected life of commodities; increasing the minimum contract amount requiring competitive bids; providing for competitive bids to be opened publicly; providing requirements for competitive bids; requiring spending units to report multiple contract awards to a single vendor; authorizing the director to conduct compliance reviews of spending units; providing for bids by electronic transmission; providing for bid solicitation requirements; modifying prohibition against awarding contracts to debtors of state; providing for best value procurement; providing for sole source procurement; providing requirements for open market purchases; increasing the maximum amount of purchases which may be made in the open market; providing requirements for contract awards; providing requirements for the delivery of bids to the Purchasing Division; deleting the requirements for duplicate bids; authorizing the director to engage in negotiations and discussions with responsible bidders and to obtain best and final offers; providing for contract awards to multiple vendors; authorizing the director to participate in, sponsor, conduct or administer cooperative purchasing agreements or consortia; providing grounds for debarment of vendors; providing for the disposition of surplus state property by means of an internet auction site; and providing that contracts executed pursuant to the Pharmaceutical Availability and Affordability Act of 2004 are not subject to state purchasing requirements.

*Be it enacted by the Legislature of West Virginia:*

That §5A-3-33a of the Code of West Virginia, 1931, as amended, be repealed; that §5A-1-1 of said code be amended and reenacted; that §5A-3-4, §5A-3-5, §5A-3-10, §5A-3-10a, §5A-3-11, §5A-3-19, §5A-3-33d and §5A-3-45 of said code be amended and reenacted; that said code be amended by adding thereto six new sections, designated §5A-3-9a, §5A-3-10b, §5A-3-10c, §5A-3-11a, §5A-3-11b and §5A-3-11c; and that §5A-3C-11 of said code be amended and reenacted, all to read as follows:

**ARTICLE 1. DEPARTMENT OF ADMINISTRATION.**

**§5A-1-1. Definitions.**

1 For the purpose of this chapter:

2 (1) "Commodities" means supplies, material, equipment,  
3 contractual services, and any other articles or things used by or  
4 furnished to a department, agency or institution of State  
5 Government.

6 (2) "Contractual services" means telephone, telegraph,  
7 electric light and power, water and similar services.

8 (3) "Debarment" means the exclusion of a vendor from the  
9 right to bid on contracts to sell goods or supply services to the  
10 state or its subdivisions for a specified period of time.

11 (4) "Director" means the director of the division referred to  
12 in the heading of the article in which the word appears.

13 (5) "Electronic" means electrical, digital, magnetic, optical,  
14 electromagnetic, or any other similar technology.

15 (6) "Electronic transmission" or "electronically transmit-  
16 ted" means any process of communication not directly involv-  
17 ing the physical transfer of paper that is suitable for the  
18 retention, retrieval and reproduction of information by the  
19 recipient.

20 (7) "Expendable commodities" means those commodities  
21 which, when used in the ordinary course of business, will  
22 become consumed or of no market value within the period of  
23 one year or less.

24 (8) "Nonprofit workshops" means an establishment: (a)  
25 Where any manufacture or handiwork is carried on; (b) which

26 is operated either by a public agency or by a cooperative or by  
27 a nonprofit private corporation or nonprofit association, in  
28 which no part of the net earnings thereof inures, or may  
29 lawfully inure, to the benefit of any private shareholder or  
30 individual; (c) which is operated for the primary purpose of  
31 providing remunerative employment to blind or severely  
32 disabled persons who cannot be absorbed into the competitive  
33 labor market; and (d) which shall be approved, as evidenced by  
34 a certificate of approval, by the State Board of Vocational  
35 Education, Division of Vocational Rehabilitation.

36 (9) "Printing" means printing, binding, ruling, lithograph-  
37 ing, engraving and other similar services.

38 (10) "Record" means information that is inscribed on a  
39 read-only tangible medium or that is stored in an electronic or  
40 other medium and is retrievable in perceivable form.

41 (11) "Removable property" means any personal property  
42 not permanently affixed to or forming a part of real estate.

43 (12) "Request for quotations" means a solicitation for a bid  
44 where cost is the primary factor in determining the award.

45 (13) "Responsible bidder" means a vendor who has the  
46 capability to fully perform the contract requirements, and the  
47 integrity and reliability which will assure good faith perfor-  
48 mance.

49 (14) "Responsive bidder" means a vendor who has submit-  
50 ted a bid which conforms in all material respects to the bid  
51 solicitation.

52 (15) "Secretary" means the Secretary of Administration.

53 (16) "Spending officer" means the executive head of a  
54 spending unit, or a person designated by him or her.

55 (17) "Spending unit" means a department, agency or  
56 institution of the State Government for which an appropriation  
57 is requested, or to which an appropriation is made by the  
58 Legislature.

59 (18) "The state and its subdivisions" means the state of  
60 West Virginia, every political subdivision thereof, every  
61 administrative entity that includes such a subdivision, all  
62 municipalities and all county boards of education.

63 (19) "Vendor" means any person or entity that is registered  
64 with the Purchasing Division to supply the state or its subdivi-  
65 sions with commodities or services and lessors of real property.

**ARTICLE 3. PURCHASING DIVISION.**

**§5A-3-4. Rules of director.**

1 (a) The director shall propose rules for legislative approval  
2 in accordance with the provisions of article three, chapter  
3 twenty-nine-a of this code to:

4 (1) Authorize a spending unit to purchase specified com-  
5 modities directly and prescribe the manner in which such  
6 purchases shall be made;

7 (2) Authorize, in writing, a spending unit to purchase  
8 commodities in the open market for immediate delivery in  
9 emergencies, define such emergencies and prescribe the manner  
10 in which such purchases shall be made and reported to the  
11 director; and for the purposes mentioned in subdivision (1) and  
12 this subdivision (2), the head of any spending unit, or the  
13 financial governing board of any institution, may, with the  
14 approval of the director, make requisitions upon the Auditor for  
15 a sum to be known as an advance allowance account, in no case  
16 to exceed five percent of the total of the appropriations for any  
17 such spending unit, and the Auditor shall draw his or her  
18 warrant upon the Treasurer for such accounts; and all such

19 advance allowance accounts shall be accounted for by the head  
20 of the spending unit or institution once every thirty days or  
21 more frequently if required by the State Auditor or director;

22 (3) Prescribe the manner in which commodities shall be  
23 purchased, delivered, stored and distributed;

24 (4) Prescribe the time for making requisitions and estimates  
25 of commodities, the future period which they are to cover, the  
26 form in which they shall be submitted and the manner of their  
27 authentication;

28 (5) Prescribe the manner of inspecting all deliveries of  
29 commodities, and making chemical and physical tests of  
30 samples submitted with bids and samples of deliveries to  
31 determine compliance with specifications;

32 (6) Prescribe the amount of deposit or bond to be submitted  
33 with a bid or contract and the amount of deposit or bond to be  
34 given for the faithful performance of a contract;

35 (7) Prescribe a system whereby the director shall be  
36 required, upon the payment by a vendor of an annual fee  
37 established by the director, to give notice to such vendor of all  
38 bid solicitations for commodities of the type with respect to  
39 which such vendor specified notice was to be given, but no such  
40 fee shall exceed the cost of giving the notice to such vendor,  
41 nor shall such fee exceed the sum of one hundred twenty-five  
42 dollars per fiscal year nor shall such fee be charged to persons  
43 seeking only reimbursement from a spending unit;

44 (8) Prescribe that each state contract entered into by the  
45 Purchasing Division shall contain provisions for liquidated  
46 damages, remedies, or provisions for the determination of the  
47 amount or amounts which the vendor shall owe as damages, in  
48 the event of default under such contract by such vendor;

49 (9) Prescribe contract management procedures for all state  
50 contracts except government construction contracts including  
51 but not limited to those set forth in article twenty-two, chapter  
52 five of this code;

53 (10) Prescribe procedures by which oversight is provided  
54 to actively monitor spending unit purchases, including but not  
55 limited to, all technology and software commodities and  
56 contractual services exceeding one million dollars, approval of  
57 change orders and final acceptance by the spending units.

58 (11) Prescribe that each state contract entered into by the  
59 purchasing division contain provisions for cancellation of the  
60 contract upon thirty days' notice to the vendor;

61 (12) Prescribe procedures for selling surplus commodities  
62 to the highest bidder by means of an internet auction site; and

63 (13) Provide for such other matters as may be necessary to  
64 give effect to the foregoing rules and the provisions of this  
65 article.

66 (b) The director shall propose rules for legislative approval  
67 in accordance with the provisions of article three, chapter  
68 twenty-nine-a of this code to prescribe qualifications to be met  
69 by any person who on and after the effective date of this section  
70 is to be employed in the Purchasing Division as a state buyer.  
71 The rules must provide that a person may not be employed as  
72 a state buyer unless he or she at the time of employment either  
73 is: (1) A graduate of an accredited college or university; or (2)  
74 has at least four years' experience in purchasing for any unit of  
75 government or for any business, commercial or industrial  
76 enterprise. Persons serving as state buyers are subject to the  
77 provisions of article six, chapter twenty-nine of this code.

**§5A-3-5. Purchasing section standard specifications – Promulga-  
tion and adoption by director; applicable to all  
purchases.**



1 The director shall promulgate and adopt standard specifica-  
2 tions based on scientific and technical data for appropriate  
3 commodities, which shall establish the quality to which  
4 commodities to be purchased and services to be contracted for  
5 by the state must conform. Standard specifications shall apply  
6 to every future purchase of or contract for the commodities  
7 described in the specifications and shall include information  
8 relating to the cost of maintenance and expected life of the  
9 commodity if the director determines there are nationally  
10 accepted industry standards for the commodity. No purchases  
11 by any spending unit may be exempt from compliance with the  
12 standard specifications so established, but the director may  
13 exempt the purchase of particular items from the standard  
14 specifications if it is considered necessary and advisable. The  
15 director shall update the standard specifications, as necessary.

**§5A-3-9a. Creation of a Fund.**

1 The “Vendor Registration Payment Fund” is hereby  
2 redesignated and continued as the “Vendor Fee Fund,” and the  
3 balance remaining upon the effective date of this section shall  
4 remain upon redesignation. Moneys deposited in this fund shall  
5 be administered by the purchasing division and used for the  
6 purposes established in this article. Expenditures are to be made  
7 only in accordance with appropriation by the Legislature and in  
8 accordance with the provisions of article three, chapter twelve  
9 of this code and upon the fulfillment of the provisions of article  
10 two, chapter eleven-b of this code: *Provided*, That for the fiscal  
11 year beginning the first day of July, two thousand six, expendi-  
12 tures are authorized from deposits rather than pursuant to  
13 appropriations by the Legislature.

14 Amounts collected which are found from time to time to  
15 exceed the funds needed for purposes set forth in this article  
16 may be transferred to other accounts or funds and used for other  
17 purposes by appropriation of the Legislature.

**§5A-3-10. Competitive bids; publication of solicitations for sealed bids; purchase of products of nonprofit workshops; employee to assist in dealings with nonprofit workshops.**

1       (a) A purchase of and contract for commodities, printing  
2 and services shall be based, whenever possible, on competitive  
3 bids.

4       (b) The director shall solicit sealed bids for the purchase of  
5 commodities and printing which is estimated to exceed twenty-  
6 five thousand dollars. No spending unit shall issue a series of  
7 requisitions or divide or plan procurements to circumvent this  
8 twenty-five thousand dollar threshold or otherwise avoid the  
9 use of sealed bids. Any spending unit which awards multiple  
10 contracts for the same or similar commodity or service to an  
11 individual vendor over any twelve-month period, the total value  
12 of which exceeds twenty-five thousand dollars, shall file copies  
13 of all contracts awarded to the vendor within the twelve  
14 preceding months with the director immediately upon exceed-  
15 ing the twenty-five thousand dollar limit, along with a state-  
16 ment explaining how the multiple contract awards do not  
17 circumvent the twenty-five thousand dollar threshold. If the  
18 spending unit does not immediately report to the director, the  
19 director may suspend the purchasing authority of the spending  
20 unit until the spending unit complies with the reporting require-  
21 ment of this subsection. The director may conduct a review of  
22 any spending unit to ensure compliance with this subsection.  
23 Following a review, the director shall complete a report  
24 summarizing his or her findings and forward the report to the  
25 spending unit. In addition, the director shall report to the Joint  
26 Committee on government and finance on the first day of  
27 January and July of each year the spending units which have  
28 reported under this subsection and the findings of the director.

29       (c) The director may permit bids by electronic transmission  
30 to be accepted in lieu of sealed bids.

31 (d) Bids shall be solicited by public notice. The notice may  
32 be published by any advertising medium the director deems  
33 advisable. The director may also solicit sealed bids by sending  
34 requests by mail or electronic transmission to prospective  
35 vendors.

36 (e) The director shall, without competitive bidding,  
37 purchase commodities and services produced and offered for  
38 sale by nonprofit workshops, as defined in section one, article  
39 one of this chapter, which are located in this state: *Provided,*  
40 That such commodities and services shall be of a fair market  
41 price and of like quality comparable to other commodities and  
42 services otherwise available as determined by the director with  
43 the advice of the committee on the purchase of commodities  
44 and services from the handicapped.

45 To encourage contracts for commodities and services with  
46 nonprofit workshops, the director shall employ a person whose  
47 responsibilities in addition to other duties shall be to identify all  
48 commodities and services available for purchase from nonprofit  
49 workshops, to evaluate the need of the state for commodities  
50 and services to coordinate the various nonprofit workshops in  
51 their production efforts and to make available to such work-  
52 shops information about available opportunities within state  
53 government for purchase of commodities or services which  
54 might be produced and sold by such workshops. Funds to  
55 employ such a person shall be included annually in the budget.

**§5A-3-10a. Prohibition for awarding contracts to vendors which  
owe a debt to the state or its political subdivisions.**

1 (a) Unless the context clearly requires a different meaning,  
2 for the purposes of this section, the terms:

3 (1) "Debt" means any assessment, premium, penalty, fine,  
4 tax or other amount of money owed to the state or any of its  
5 political subdivisions because of a judgment, fine, permit

6 violation, license assessment, amounts owed to the workers'  
7 compensation funds as defined in article two-c of chapter  
8 twenty-three of this code, penalty or other assessment or  
9 surcharge presently delinquent or due and required to be paid to  
10 the state or any of its political subdivisions, including any  
11 interest or additional penalties accrued thereon.

12 (2) "Debtor" means any individual, corporation, partner-  
13 ship, association, limited liability company or any other form  
14 or business association owing a debt to the state or any of its  
15 political subdivisions.

16 (3) "Political subdivision" means any county commission;  
17 municipality; county board of education; any instrumentality  
18 established by a county or municipality; any separate corpora-  
19 tion or instrumentality established by one or more counties or  
20 municipalities, as permitted by law; or any public body charged  
21 by law with the performance of a government function and  
22 whose jurisdiction is coextensive with one or more counties or  
23 municipalities.

24 (4) "Related party" means a party, whether an individual,  
25 corporation, partnership, association, limited liability company  
26 or any other form or business association or other entity  
27 whatsoever, related to any vendor by blood, marriage, owner-  
28 ship or contract through which the party has a relationship of  
29 ownership or other interest with the vendor so that the party  
30 will actually or by effect receive or control a portion of the  
31 benefit, profit or other consideration from performance of a  
32 vendor contract with the party receiving an amount that meets  
33 or exceeds five percent of the total contract amount.

34 (b) No contract or renewal of any contract may be awarded  
35 by the state or any of its political subdivisions to any vendor or  
36 prospective vendor when the vendor or prospective vendor or  
37 a related party to the vendor or prospective vendor is a debtor

38 and the debt owed is an amount greater than one thousand  
39 dollars in the aggregate.

40 (c) The prohibition of this section does not apply where a  
41 vendor has contested any tax administered pursuant to chapter  
42 eleven of this code, amount owed to the workers' compensation  
43 funds as defined in article two-c of chapter twenty-three of this  
44 code, permit fee or environmental fee or assessment and the  
45 matter has not become final or where the vendor has entered  
46 into a payment plan or agreement and the vendor is not in  
47 default of any of the provisions of such plan or agreement.

48 (d) All bids, contract proposals or contracts with the state  
49 or any of its political subdivisions submitted or approved under  
50 the provisions of this code shall include an affidavit that the  
51 vendor, prospective vendor or a related party to the vendor or  
52 prospective vendor does not owe any debt in an amount in  
53 excess of one thousand dollars or, if a debt is owed, that the  
54 provisions of subsection (c) of this section apply.

**§5A-3-10b. Best value procurement.**

1 (a) The Director may utilize best value procurement to enter  
2 into a contract when he or she determines in writing that it is  
3 advantageous to the state.

4 (b) A solicitation for bids under best value procurement  
5 shall be made in the same manner as provided in section ten of  
6 this article.

7 (c) Best value procurement awards shall be based on  
8 criteria set forth in the solicitation including, but not limited to,  
9 price, the total cost of acquiring, operating, maintaining and  
10 supporting a commodity or service over its projected lifetime,  
11 the evaluated technical merit of the bidder's bid or proposal, the  
12 bidder's past performance, and the evaluated probability of  
13 performing the requirements stated in the solicitation on time,

14 with high quality, and in a manner that accomplishes the  
15 business objectives set forth in the solicitation.

16 (d) The award must be made to the highest scoring respon-  
17 sive and responsible bidder whose bid is determined, in writing,  
18 to be most advantageous to the state, taking into consideration  
19 all evaluation factors set forth in the best value solicitation.

20 (e) The Director may not use best value procurement to  
21 enter into government construction contracts, including but not  
22 limited to those set forth in article twenty-two, chapter five of  
23 this code.

**§5A-3-10c. Sole source procurement.**

1 The director may award a contract without advertisement  
2 or competition if he or she determines in writing that there is  
3 only one source for the required commodity or service. The  
4 director may require the submission of cost or pricing data in  
5 connection with an award under this section. Prior to an award  
6 under this section, the spending unit requesting the procurement  
7 shall provide written documentation to the director setting forth  
8 the basis for the sole source procurement and the specific  
9 efforts made to determine the availability of other sources. Prior  
10 to a final determination by the director, the registered vendors  
11 will be notified of the commodity or service being sought and  
12 the vendors will be provided an opportunity to indicate an  
13 interest in bidding on such a commodity or service, to establish  
14 whether the commodity or service is, in fact, available only  
15 from a sole source. On an annual basis, the director shall report  
16 the spending units who have determined a sole source for their  
17 commodities or services, the type of commodity or service and  
18 the determination made by the director.

**§5A-3-11. Purchasing in open market on competitive bids; debar-  
ment; bids to be based on standard specifications;  
period for alteration or withdrawal of bids;**

**awards to lowest responsible bidder; uniform bids; record of bids; requirements of vendors to pay taxes, fees and debts; and exception.**

1 (a) The director may make a purchase of commodities,  
2 printing, and services of twenty-five thousand dollars or less in  
3 amount in the open market, but the purchase shall, wherever  
4 possible, be based on at least three competitive bids, and shall  
5 include the cost of maintenance and expected life of the  
6 commodities if the director determines there are nationally  
7 accepted industry standards for the commodities being pur-  
8 chased.

9 (b) The director may authorize spending units to purchase  
10 commodities, printing and services in the amount of two  
11 thousand five hundred dollars or less in the open market  
12 without competitive bids: *Provided*, That the cost of mainte-  
13 nance and expected life of the commodities must be taken into  
14 consideration if the director determines there are nationally  
15 accepted industry standards for the commodities being.

16 (c) Bids shall be based on the standard specifications  
17 promulgated and adopted in accordance with the provisions of  
18 section five of this article and may not be altered or withdrawn  
19 after the appointed hour for the opening of the bids.

20 (d) A vendor who has been debarred pursuant to the  
21 provisions of sections thirty-three-a through thirty-three-f,  
22 article three, chapter five-a of this code, may not bid on or be  
23 awarded a contract under this section.

24 (e) All open market orders, purchases based on advertised  
25 bid requests or contracts made by the director or by a state  
26 department shall be awarded to the lowest responsible bidder or  
27 bidders, taking into consideration the qualities of the commodi-  
28 ties or services to be supplied, their conformity with specifica-  
29 tions, their suitability to the requirements of the government,

30 the delivery terms and, if the director determines there are  
31 nationally accepted industry standards, cost of maintenance and  
32 the expected life of the commodities : *Provided*, That state bids  
33 on school buses shall be accepted from all bidders who shall  
34 then be awarded contracts if they meet the state board's  
35 "Minimum Standards for Design and Equipment of School  
36 Buses." County boards of education may select from those  
37 bidders who have been awarded contracts and shall pay the  
38 difference between the state aid formula amount and the actual  
39 cost of bus replacement. Any or all bids may be rejected.

40 (f) If all bids received on a pending contract are for the  
41 same unit price or total amount, the director has the authority to  
42 reject all bids, and to purchase the required commodities,  
43 printing and services in the open market, if the price paid in the  
44 open market does not exceed the bid prices.

45 (g) The bid must be received by the Purchasing Division  
46 prior to the specified date and time of the bid opening. The  
47 failure to deliver or the nonreceipt of the bid by the Purchasing  
48 Division prior to the appointed date and hour shall result in the  
49 rejection of the bid. The vendor is solely responsible for the  
50 receipt of bid by the Purchasing Division prior to the appointed  
51 date and hour of the bid opening. All bids will be opened  
52 publicly by two or more persons from the Purchasing Division.  
53 Vendors will be given notice of the day, time and place of the  
54 public bid opening. Bids may be viewed immediately after  
55 being opened.

56 (h) After the award of the order or contract, the director, or  
57 someone appointed by him or her for that purpose, shall  
58 indicate upon the successful bid that it was the successful bid.  
59 Thereafter, the copy of each bid in the possession of the director  
60 shall be maintained as a public record, shall be open to public  
61 inspection in the office of the director and may not be destroyed  
62 without the written consent of the Legislative Auditor.



**§5A-3-11a. Negotiation when all bids exceed available funds.**

1 (a) Spending units shall include the maximum budgeted  
2 amount available for each purchase in a requisition submitted  
3 to the Purchasing division, No person may disclose this  
4 maximum budgeted amount to any vendor prior to the award of  
5 a contract. If all bids submitted pursuant to a solicitation exceed  
6 the funds available for the purchase, and the director determines  
7 in writing that there are no additional funds available from any  
8 source to permit an award to the responsive and responsible  
9 bidder and the best interest of the state will not permit the delay  
10 attendant to a resolicitation under revised specifications or for  
11 revised quantities, then a negotiated award may be made as set  
12 forth in this section.

13 (1) If the director determines in writing that there is only  
14 one responsive and responsible bidder, he or she may negotiate  
15 the price for a noncompetitive award or the specifications for a  
16 noncompetitive award based solely on the original purpose of  
17 the solicitation.

18 (2) If the Purchasing Division solicits bids with a request  
19 for quotation and there is more than one bidder, the director  
20 may negotiate with bidders determined in writing to be respon-  
21 sive and responsible, based on criteria contained in the bid  
22 invitation: *Provided*, That the Director must negotiate first with  
23 the lowest bidder. If the Director does not award the bid to the  
24 lowest bidder, he or she may close negotiations with that bidder  
25 and enter into negotiations with the next lowest bidder, and may  
26 continue to do so in like manner with the remaining responsive  
27 and responsible bidders. The director may not extend an offer  
28 to any bidder that is not first extended to the prior bidders in  
29 order of rank.

30 (3) If the Purchasing Division solicits bids utilizing a best  
31 value procurement, as set forth in section ten-b of this section,  
32 and there is more than one bidder, the director may negotiate

33 with bidders determined in writing to be responsive and  
34 responsible, based on criteria contained in the bid invitation:  
35 *Provided*, That the Director must negotiate first with the highest  
36 scoring bidder. If the Director does not award the bid to the  
37 highest scoring bidder, he or she may close negotiations with  
38 that bidder and enter into negotiations with the next highest  
39 scoring bidder, and may continue to do so in like manner with  
40 the remaining responsive and responsible bidders. The director  
41 may not extend an offer to any bidder that is not first extended  
42 to the prior bidders in order of rank.

43 (b) After negotiations occur pursuant to subsection(a) of  
44 this section, if the director determines that more than fifteen  
45 percent of the value of the bid must be renegotiated by revising  
46 the specifications of the original solicitation, only a  
47 resolicitation may be initiated or the solicitation may be  
48 withdrawn.

49 (c) The Director may not renegotiate with any bidder after  
50 closing negotiations with that bidder and entering into negotia-  
51 tions with the next bidder.

**§5A-3-11b. Discussion and final offers.**

1 (a) As provided in the bid solicitation, the director may  
2 conduct discussions with, and obtain best and final offers from,  
3 responsive and responsible bidders who submit proposals  
4 determined to be reasonably susceptible of being selected for  
5 award for the purpose of clarification to assure full understand-  
6 ing of, and responsiveness to, the solicitation requirements.  
7 Bidders must be accorded fair and equal treatment with respect  
8 to any opportunity for discussion and revision of proposals, and  
9 revisions may be permitted after submissions and prior to award  
10 for the purpose of obtaining best and final offers. In conducting  
11 discussions, there may be no disclosure of any information  
12 derived from proposals submitted by competing bidders.

13 (b) The following contracts are exempt from this section:

14 (1) Government construction contracts, including but not  
15 limited to those set forth in article twenty-two, chapter five of  
16 this code; and,

17 (2) The purchase of supplies and material.

**§5A-3-11c. Multiple awards.**

1 The director may elect to award a contract to one or more  
2 responsive and responsible bidders if the director determines in  
3 writing that a single award to an individual bidder would be  
4 insufficient: *Provided*, That the basis for the selection among  
5 multiple contracts at the time of purchase shall be the most  
6 practical and economical alternative and shall be in the best  
7 interests of the state.

**§5A-3-19. Purchases from federal government and other sources.**

1 (a) Notwithstanding any other provision of this article, the  
2 director may, upon the recommendation of a state spending  
3 unit, participate in, sponsor, conduct, or administer a coopera-  
4 tive purchasing agreement or consortium for the purchase of  
5 commodities or services with agencies of the federal govern-  
6 ment, agencies of other states, other public bodies or other state  
7 agencies, if available and financially advantageous. At the  
8 discretion of the director, bids may be solicited to determine  
9 whether participation in such a cooperative purchasing agree-  
10 ment or consortium is financially advantageous.

11 (b) The Department of Administration may approve  
12 administrative fees, not to exceed the amount of fifty thousand  
13 dollars, necessary to participate in a cooperative purchasing  
14 agreement. Fees which exceed fifty thousand dollars are subject  
15 to the competitive bid requirements of this article.

**§5A-3-33d. Grounds for debarment.**

1 Grounds for debarment are:

2 (1) Conviction of an offense involving fraud or a felony  
3 offense in connection with obtaining or attempting to obtain a  
4 public contract or subcontract;

5 (2) Conviction of any federal or state antitrust statute  
6 relating to the submission of offers;

7 (3) Conviction of an offense involving embezzlement, theft,  
8 forgery, bribery, falsification or destruction of records, making  
9 false statements or receiving stolen property in connection with  
10 the performance of a contract;

11 (4) Conviction of a felony offense demonstrating a lack of  
12 business integrity or business honesty that affects the present  
13 responsibility of the vendor or subcontractor;

14 (5) Default on obligations owed to the state, including, but  
15 not limited to, obligations owed to the workers' compensation  
16 funds, as defined in article two-c of chapter twenty-three of this  
17 code, and obligations under the West Virginia Unemployment  
18 Compensation Act and West Virginia state tax and revenue  
19 laws. For purposes of this subsection, a vendor is in default  
20 when, after due notice, the vendor fails to submit a required  
21 payment, interest thereon or penalty, and has not entered into a  
22 repayment agreement with the appropriate agency of the state  
23 or has entered into a repayment agreement but does not remain  
24 in compliance with its obligations under the repayment agree-  
25 ment. In the case of a vendor granted protection by order of a  
26 federal bankruptcy court or a vendor granted an exemption  
27 under any rule of the bureau of employment programs or the  
28 Insurance Commission, the director may waive debarment  
29 under section thirty-three-f of this article: *Provided*, That in no  
30 event may debarment be waived with respect to any vendor  
31 who has not paid all current state obligations for at least the  
32 four most recent calendar quarters, excluding the current

33 calendar quarter, or with respect to any vendor who is in default  
34 on a repayment agreement with an agency of the state;

35 (6) The vendor is not in good standing with a licensing  
36 board, in that the vendor is not licensed when licensure is  
37 required by the law of this state, or the vendor has been found  
38 to be in violation of an applicable licensing law after notice,  
39 opportunity to be heard and other due process required by law;

40 (7) The vendor is an active and knowing participant in  
41 dividing or planning procurements to circumvent the twenty-  
42 five thousand dollar threshold requiring a sealed bid or other-  
43 wise avoid the use of a sealed bid: or

44 (8) Violation of the terms of a public contract or subcon-  
45 tract for:

46 (A) Willful failure to substantially perform in accordance  
47 with the terms of one or more public contracts;

48 (B) Performance in violation of standards established by  
49 law or generally accepted standards of the trade or profession  
50 amounting to intentionally deficient or grossly negligent  
51 performance on one or more public contracts;

52 (C) Use of substandard materials on one or more public  
53 contracts or defects in construction in one or more public  
54 construction projects amounting to intentionally deficient or  
55 grossly negligent performance, even if discovery of the defect  
56 is subsequent to acceptance of a construction project and  
57 expiration of any warranty thereunder;

58 (D) A repeated pattern or practice of failure to perform so  
59 serious and compelling as to justify debarment; or

60 (E) Any other cause of a serious and compelling nature  
61 amounting to knowing and willful misconduct of the vendor

62 that demonstrates a wanton indifference to the interests of the  
63 public and that caused, or that had a substantial likelihood of  
64 causing, serious harm to the public.

**§5A-3-45. Disposition of surplus state property; semiannual  
report; application of proceeds from sale.**

1 (a) The state agency for surplus property has the exclusive  
2 power and authority to make disposition of commodities or  
3 expendable commodities now owned or in the future acquired  
4 by the state when the commodities are or become obsolete or  
5 unusable or are not being used or should be replaced.

6 (b) The agency shall determine what commodities or  
7 expendable commodities should be disposed of and make  
8 disposition in the manner which will be most advantageous to  
9 the state. The disposition may include:

10 (1) Transferring the particular commodities or expendable  
11 commodities between departments;

12 (2) Selling the commodities to county commissions, county  
13 boards of education, municipalities, public service districts,  
14 county building commissions, airport authorities, parks and  
15 recreation commissions, nonprofit domestic corporations  
16 qualified as tax exempt under Section 501(c)(3) of the Internal  
17 Revenue Code of 1986, as amended, or volunteer fire depart-  
18 ments in this state when the volunteer fire departments have  
19 been held exempt from taxation under Section 501(c) of the  
20 Internal Revenue Code;

21 (3) Trading in the commodities as a part payment on the  
22 purchase of new commodities;

23 (4) Cannibalizing the commodities pursuant to procedures  
24 established under subsection (g) of this section;

25 (5) Properly disposing of the commodities as waste; or

26 (6) Selling the commodities to the highest bidder by means  
27 of public auctions or sealed bids, after having first advertised  
28 the time, terms and place of the sale as a Class II legal adver-  
29 tisement in compliance with the provisions of article three,  
30 chapter fifty-nine of this code. The publication area for the  
31 publication is the county in which the sale is to be conducted.  
32 The sale may also be advertised in other advertising media that  
33 the agency considers advisable. The agency may sell to the  
34 highest bidder or to any one or more of the highest bidders, if  
35 there is more than one, or, if the best interest of the state will be  
36 served, reject all bids.

37 (7) Selling the commodities to the highest bidder by means  
38 of an internet auction site approved by the director, as set forth  
39 in an emergency rule pursuant to the provisions of chapter  
40 twenty-nine-a of this code.

41 (c) Upon the transfer of commodities or expendable  
42 commodities between departments, or upon the sale of com-  
43 modities or expendable commodities to an eligible organiza-  
44 tion, the agency shall set the price to be paid by the receiving  
45 eligible organization, with due consideration given to current  
46 market prices.

47 (d) The agency may sell expendable, obsolete or unused  
48 motor vehicles owned by the state to an eligible organization,  
49 other than volunteer fire departments. In addition, the agency  
50 may sell expendable, obsolete or unused motor vehicles owned  
51 by the state with a gross weight in excess of four thousand  
52 pounds to an eligible volunteer fire department. The agency,  
53 with due consideration given to current market prices, shall set  
54 the price to be paid by the receiving eligible organization for  
55 motor vehicles sold pursuant to this provision: *Provided*, That  
56 the sale price of any motor vehicle sold to an eligible organiza-

57 tion may not be less than the “average loan” value, as published  
58 in the most recent available eastern edition of the National  
59 Automobile Dealer’s Association (N. A. D. A.) Official Used  
60 Car Guide, if the value is available, unless the fair market value  
61 of the vehicle is less than the N. A. D. A. “average loan” value,  
62 in which case the vehicle may be sold for less than the “average  
63 loan” value. The fair market value shall be based on a thorough  
64 inspection of the vehicle by an employee of the agency who  
65 shall consider the mileage of the vehicle and the condition of  
66 the body, engine and tires as indicators of its fair market value.  
67 If no fair market value is available, the agency shall set the  
68 price to be paid by the receiving eligible organization with due  
69 consideration given to current market prices. The duly autho-  
70 rized representative of the eligible organization, for whom the  
71 motor vehicle or other similar surplus equipment is purchased  
72 or otherwise obtained, shall cause ownership and proper title to  
73 the motor vehicle to be vested only in the official name of the  
74 authorized governing body for whom the purchase or transfer  
75 was made. The ownership or title, or both, shall remain in the  
76 possession of that governing body and be nontransferable for a  
77 period of not less than one year from the date of the purchase or  
78 transfer. Resale or transfer of ownership of the motor vehicle or  
79 equipment prior to an elapsed period of one year may be made  
80 only by reason of certified unserviceability.

81 (e) The agency shall report to the Legislative Auditor,  
82 semiannually, all sales of commodities or expendable commod-  
83 ities made during the preceding six months to eligible organiza-  
84 tions. The report shall include a description of the commodities  
85 sold, the price paid by the eligible organization which received  
86 the commodities and to whom each commodity was sold.

87 (f) The proceeds of the sales or transfers shall be deposited  
88 in the State Treasury to the credit on a pro rata basis of the fund  
89 or funds out of which the purchase of the particular commodi-  
90 ties or expendable commodities was made: *Provided*, That the



91 agency may charge and assess fees reasonably related to the  
92 costs of care and handling with respect to the transfer, ware-  
93 housing, sale and distribution of state property disposed of or  
94 sold pursuant to the provisions of this section.

95 (g)(1) For purposes of this section, "cannibalization" means  
96 the removal of parts from one commodity to use in the creation  
97 or repair of another commodity.

98 (2) The Director of the Purchasing Division shall propose  
99 for promulgation legislative rules to establish procedures that  
100 permit the cannibalization of a commodity when it is in the best  
101 interests of the state. The procedures shall require the approval  
102 of the director prior to the cannibalization of the commodity  
103 under such circumstances as the procedures may prescribe.

104 (3) (A) Under circumstances prescribed by the procedures,  
105 state agencies shall be required to submit a form, in writing or  
106 electronically, that, at a minimum, elicits the following infor-  
107 mation for the commodity the agency is requesting to cannibal-  
108 ize:

109 (i) The commodity identification number;

110 (ii) The commodity's acquisition date;

111 (iii) The commodity's acquisition cost;

112 (iv) A description of the commodity;

113 (v) Whether the commodity is operable and, if so, how well  
114 it operates;

115 (vi) How the agency will dispose of the remaining parts of  
116 the commodity; and

117 (vii) Who will cannibalize the commodity and how the  
118 person is qualified to remove and reinstall the parts.

119 (B) If the agency has immediate plans to use the cannibal-  
120 ized parts, the form shall elicit the following information for the  
121 commodity or commodities that will receive the cannibalized  
122 part or parts:

123 (I) The commodity identification number;

124 (ii) The commodity's acquisition date;

125 (iii) The commodity's acquisition cost;

126 (iv) A description of the commodity;

127 (v) Whether the commodity is operable;

128 (vi) Whether the part restores the commodity to an operable  
129 condition; and

130 (vii) The cost of the parts and labor to restore the commod-  
131 ity to an operable condition without cannibalization.

132 (C) If the agency intends to retain the cannibalized parts for  
133 future use, it shall provide information justifying its request.

134 (D) The procedures shall provide for the disposal of the  
135 residual components of cannibalized property.

136 (h) (1) The Director of the Purchasing Division shall  
137 propose for promulgation legislative rules to establish proce-  
138 dures that allow state agencies to dispose of commodities in a  
139 landfill, or by other lawful means of waste disposal, if the value  
140 of the commodity is less than the benefit that may be realized  
141 by the state by disposing of the commodity using another  
142 method authorized in this section. The procedures shall specify  
143 circumstances where the state agency for surplus property shall  
144 inspect the condition of the commodity prior to authorizing the  
145 disposal and those circumstances when the inspection is not  
146 necessary prior to the authorization.

147 (2) Whenever a state agency requests permission to dispose  
148 of a commodity in a landfill, or by other lawful means of waste  
149 disposal, the state agency for surplus property has the right to  
150 take possession of the commodity and to dispose of the com-  
151 modity using any other method authorized in this section.

152 (3) If the state agency for surplus property determines,  
153 within fifteen days of receiving a commodity, that disposing of  
154 the commodity in a landfill or by other lawful means of waste  
155 disposal would be more beneficial to the state than disposing of  
156 the commodity using any other method authorized in this  
157 section, the cost of the disposal is the responsibility of the  
158 agency from which it received the commodity.

**ARTICLE 3C. PHARMACEUTICAL AVAILABILITY AND AFFORD-  
ABILITY ACT OF 2004.**

**§5A-3C-11. Agency's management ability continued.**

1 (a) Nothing contained in this article may be construed to  
2 limit the ability of the various state agencies to enter into  
3 contracts or arrangement or to otherwise to manage their  
4 pharmacy programs until such time as the programs created or  
5 authorized pursuant to this article are implemented.

6 (b) The provisions of article three, chapter five-a of this  
7 code do not apply to the agreements and contracts executed  
8 under the provisions of this article.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

  
\_\_\_\_\_  
Chairman Senate Committee

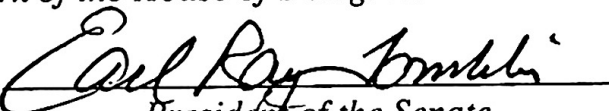
  
\_\_\_\_\_  
Chairman House Committee


Originating in the House.

In effect ninety days from passage.

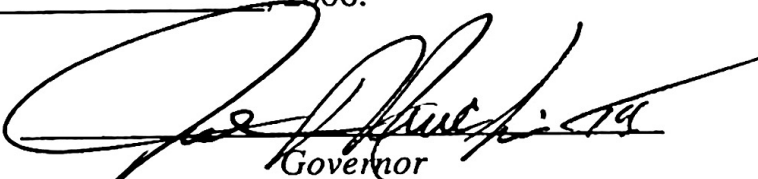
  
\_\_\_\_\_  
Clerk of the Senate

  
\_\_\_\_\_  
Clerk of the House of Delegates

  
\_\_\_\_\_  
President of the Senate

  
\_\_\_\_\_  
Speaker of the House of Delegates

The within is approved this the 4th  
day of April, 2006.

  
\_\_\_\_\_  
Governor

PRESENTED TO THE  
GOVERNOR

MAR 29 2006

Time 4:00 pm