

COMMITTEE SUBSTITUTE

FOR

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 36

(By Senator Klempa)

[Originating in the Committee on the Judiciary;

reported February 24, 2012.]

A BILL to amend and reenact §5-22-1 of the Code of West Virginia, 1931, as amended, relating to requiring the disclosure of subcontractors within one business day of the opening of bids for certain public construction contracts by the apparent low bidder when any subcontractor is providing over \$25,000 of services on the project; providing exceptions; providing what information is to be submitted to the Division of Purchasing; disqualifying bidders for failure to comply; obtaining approval from the division before substituting any subcontractor; providing circumstances when substitutions are permitted; and providing a sunset provision.

Be it enacted by the Legislature of West Virginia:

That §5-22-1 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 22. GOVERNMENT CONSTRUCTION CONTRACTS.

§5-22-1. Bidding required; government construction contracts to go to lowest qualified responsible bidder; procedures to be followed in awarding government construction projects; penalties for violation of procedures and requirements debarment; exceptions.

1 (a) This section and the requirements set forth in this
2 section may be referred to as the West Virginia Fairness In
3 Competitive Bidding Act.

4 (b) As used in this section:

5 (1) “Lowest qualified responsible bidder” means the
6 bidder that bids the lowest price and that meets, as a
7 minimum, all the following requirements in connection with
8 the bidder’s response to the bid solicitation. The bidder must
9 certify that it:

10 (A) Is ready, able and willing to timely furnish the labor
11 and materials required to complete the contract;

12 (B) Is in compliance with all applicable laws of the State
13 of West Virginia; and

14 (C) Has supplied a valid bid bond or other surety autho-
15 rized or approved by the contracting public entity.

16 (2) "The state and its subdivisions" means the State of
17 West Virginia, every political subdivision thereof, every
18 administrative entity that includes such a subdivision, all
19 municipalities and all county boards of education.

20 (c) The state and its subdivisions shall, except as pro-
21 vided in this section, solicit competitive bids for every
22 construction project exceeding \$25,000 in total cost: *Pro-*
23 *vided*, That a vendor who has been debarred pursuant to the
24 provisions of sections thirty-three-a through thirty-three-f,
25 inclusive, article three, chapter five-a of this code may not
26 bid on or be awarded a contract under this section. All bids
27 submitted pursuant to this chapter shall include a valid bid
28 bond or other surety as approved by the State of West
29 Virginia or its subdivisions.

30 (d) Following the solicitation of bids, the construction
31 contract shall be awarded to the lowest qualified responsible
32 bidder who shall furnish a sufficient performance and

33 payment bond. ~~Provided, That~~ The state and its subdivisions
34 may reject all bids and solicit new bids on the project.

35 (e) The apparent low bidder on a contract for the con-
36 struction, alteration, decoration, painting or improvement of
37 a new or existing building or structure with the Department
38 of Administration, Division of Purchasing, valued at more
39 than \$500,000.00 shall submit a list of all subcontractors who
40 will perform more than \$25,000.00 of work on the project
41 including labor and materials: ~~Provided, That~~ this section
42 shall not apply to any other construction projects, such as
43 highway, mine reclamation, water or sewer projects. The list
44 shall include the names of the bidders and the license
45 numbers as required by article eleven, chapter twenty-one of
46 this code. This information shall be provided to the Division
47 of Purchasing within one business day of the opening of bids
48 for review prior to the awarding of a construction contract.
49 If no subcontractors are to be used to complete the project it
50 will be so noted on the subcontractor list. Failure to submit
51 the subcontractor list within one business day after the
52 deadline for submitting bids shall result in disqualification
53 of the bid.

54 (f) Written approval must be obtained from the Division
55 of Purchasing before any subcontractor substitution is
56 permitted. Substitutions are not permitted unless:

57 (1) The subcontractor listed in the original bid has filed
58 for bankruptcy;

59 (2) The Division of Purchasing refuses to approve a
60 subcontractor in the original bid because the subcontractor
61 is under a debarment pursuant to section thirty-three-d,
62 article three, chapter five-a of this code or a suspension
63 under section thirty-two, article three, chapter five-a of this
64 code; or

65 (3) The contractor certifies in writing that the subcon-
66 tractor listed in the original bill fails, is unable or refuses to
67 perform his subcontract.

68 (g) The amendments to this section made during the 2012
69 regular session of the Legislature shall expire one year from
70 the effective date of the amendments absent further action of
71 the Legislature.

72 ~~(g)~~ (h) The contracting public entity may not award the
73 contract to a bidder which fails to meet the minimum
74 requirements set out in this section. As to any prospective
75 low bidder which the contracting public entity determines

76 not to have met any one or more of the requirements of this
77 section or other requirements as determined by the public
78 entity in the written bid solicitation, prior to the time a
79 contract award is made, the contracting public entity shall
80 document in writing and in reasonable detail the basis for
81 the determination and shall place the writing in the bid file.
82 After the award of a bid under this section, the bid file of the
83 contracting public agency and all bids submitted in response
84 to the bid solicitation shall be open and available for public
85 inspection.

86 ~~(h)~~ (i) Any public official or other person who individu-
87 ally or together with others knowingly makes an award of a
88 contract under this section in violation of the procedures and
89 requirements of this section is subject to the penalties set
90 forth in section twenty-nine, article three, chapter five-a of
91 the Code of West Virginia.

92 ~~(i)~~ (j) No officer or employee of this state or of any public
93 agency, public authority, public corporation or other public
94 entity and no person acting or purporting to act on behalf of
95 such officer or employee or public entity shall require that
96 any performance bond, payment bond or surety bond

97 required or permitted by this section be obtained from any
98 particular surety company, agent, broker or producer.

99 (†) (k) All bids shall be open in accordance with the
100 provisions of section two of this article, except design-build
101 projects which are governed by article twenty-two-a of this
102 chapter and are exempt from these provisions.

103 (†) (l) Nothing in this section shall apply to:

104 (1) Work performed on construction or repair projects by
105 regular full-time employees of the state or its subdivisions;

106 (2) Prevent students enrolled in vocational educational
107 schools from being utilized in construction or repair projects
108 when the use is a part of the student's training program;

109 (3) Emergency repairs to building components and
110 systems. For the purpose of this subdivision, the term
111 emergency repairs means repairs that if not made immedi-
112 ately will seriously impair the use of building components
113 and systems or cause danger to those persons using the
114 building components and systems; and

115 (4) Any situation where the state or a subdivision thereof
116 reaches an agreement with volunteers, or a volunteer group,
117 whereby the governmental body will provide construction or
118 repair materials, architectural, engineering, technical or any

119 other professional services and the volunteers will provide
120 the necessary labor without charge to, or liability upon, the
121 governmental body.

(NOTE: Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.)