

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

Senate Bill 182

BY SENATORS BLAIR, SYPOLT AND RUCKER

[Originating in the Committee on Government
Organization; reported on February 20, 2017]

1 A BILL to amend and reenact §5-22-1 of the Code of West Virginia, 1931, as amended; to amend
2 and reenact §21-1D-5 of said code; and to amend and reenact §21-11-11 of said code, all
3 relating to the submission of bids for government construction contracts; information and
4 documents required for the awarding of certain contracts; providing procedures for the
5 required submission of a list of subcontractors who will perform more than \$25,000 of work
6 on certain projects; providing procedures for the required submission of a drug-free
7 workplace affidavit for any solicitation for a public improvement contract; and providing
8 procedures for the required submission of a contractor's license number with certain bid
9 documents.

Be it enacted by the Legislature of West Virginia:

1 That §5-22-1 of the Code of West Virginia, 1931, as amended, be amended and
2 reenacted; that §21-1D-5 of said code be amended and reenacted; and that §21-11-11 of said
3 code be amended and reenacted, all to read as follows:

**CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE
GOVERNOR, SECRETARY OF STATE AND ATTORNEY GENERAL;
BOARD OF PUBLIC WORKS; MISCELLANEOUS AGENCIES,
COMMISSIONS, OFFICES, PROGRAMS, ETC.**

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 in this section may be referred to as the West
2 Virginia Fairness In Competitive Bidding Act.

3 (b) As used in this section:

4 (1) "Lowest qualified responsible bidder" means the bidder that bids the lowest price and
5 that meets, as a minimum, all the following requirements in connection with the bidder's response
6 to the bid solicitation. The bidder ~~must~~ shall certify that it:

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

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

10 (C) Has supplied a valid bid bond or other surety authorized or approved by the contracting
11 public entity.

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

15 (3) "State spending unit" means a department, agency or institution of the state
16 government for which an appropriation is requested, or to which an appropriation is made by the
17 Legislature.

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

24 (d) Following the solicitation of bids, the construction contract shall be awarded to the
25 lowest qualified responsible bidder who shall furnish a sufficient performance and payment bond.
26 The state and its subdivisions may reject all bids and solicit new bids on the project.

27 (e) The apparent low bidder on a contract valued at more than \$250,000 for the
28 construction, alteration, decoration, painting or improvement of a new or existing building or

29 structure with a state spending unit shall submit a list of all subcontractors who will perform more
30 than \$25,000 of work on the project including labor and materials. This section does not apply to
31 other construction projects such as highway, mine reclamation, water or sewer projects. The list
32 shall include the names of the bidders and the license numbers as required by article eleven,
33 chapter twenty-one of this code. This information shall be provided to the state spending unit
34 within one business day of the opening of bids for review prior to the awarding of a construction
35 contract. ~~If no subcontractors who will perform more than \$25,000 of work are to be used to~~
36 ~~complete the project it will be noted on the subcontractor list. Failure to submit the subcontractor~~
37 ~~list within one business day after the deadline for submitting bids shall result in disqualification of~~
38 ~~the bid~~ If the apparent low bidder fails to submit the subcontractor list, the Purchasing Division
39 shall request by telephone and electronic mail that the low bidder and second low bidder provide
40 the subcontractor list within one business day of the request. Failure to submit the subcontractor
41 list within one business day of receiving the request shall result in disqualification of the bid. A
42 subcontractor list may not be required if the bidder provides notice in the bid submission or in
43 response to a request for a subcontractor list that no subcontractors who will perform more than
44 \$25,000 of work will be used to complete the project.

45 (f) Written approval must be obtained from the state spending unit before any
46 subcontractor substitution is permitted. Substitutions are not permitted unless:

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

48 (2) The state spending unit refuses to approve a subcontractor in the original bid because
49 the subcontractor is under a debarment pursuant to section thirty-three-d, article three, chapter
50 five-a of this code or a suspension under section thirty-two, article three, chapter five-a of this
51 code; or

52 (3) The contractor certifies in writing that the subcontractor listed in the original bill fails, is
53 unable or refuses to perform the subcontract.

54 (g) The contracting public entity may not award the contract to a bidder which fails to meet

55 the minimum requirements set out in this section. As to a prospective low bidder which the
56 contracting public entity determines not to have met one or more of the requirements of this
57 section or other requirements as determined by the public entity in the written bid solicitation, prior
58 to the time a contract award is made, the contracting public entity shall document in writing and
59 in reasonable detail the basis for the determination and shall place the writing in the bid file. After
60 the award of a bid under this section, the bid file of the contracting public agency and all bids
61 submitted in response to the bid solicitation shall be open and available for public inspection.

62 (h) A public official or other person who individually or together with others knowingly
63 makes an award of a contract under this section in violation of the procedures and requirements
64 of this section is subject to the penalties set forth in section twenty-nine, article three, chapter five-
65 a of the Code of West Virginia.

66 (i) No officer or employee of this state or of a public agency, public authority, public
67 corporation or other public entity and no person acting or purporting to act on behalf of an officer
68 or employee or public entity ~~shall~~ may require that a performance bond, payment bond or surety
69 bond required or permitted by this section be obtained from a particular surety company, agent,
70 broker or producer.

71 (j) All bids shall be open in accordance with the provisions of section two of this article,
72 except design-build projects which are governed by article twenty-two-a of this chapter and are
73 exempt from these provisions.

74 (k) Nothing in this section applies to:

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

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

79 (3) Emergency repairs to building components and systems. For the purpose of this
80 subdivision, the term "emergency repairs" means repairs that if not made immediately will

81 seriously impair the use of building components and systems or cause danger to persons using
82 the building components and systems; and

83 (4) A situation where the state or subdivision thereof reaches an agreement with
84 volunteers, or a volunteer group, in which the governmental body will provide construction or
85 repair materials, architectural, engineering, technical or other professional services and the
86 volunteers will provide the necessary labor without charge to, or liability upon, the governmental
87 body.

CHAPTER 21. LABOR.

ARTICLE 1D. WEST VIRGINIA ALCOHOL AND DRUG-FREE WORKPLACE ACT.

§21-1D-5. Employee drug-free workplace policy required to bid for a public improvement contract.

1 After July 1, 2008, any solicitation for a public improvement contract shall require each
2 contractor that submits a bid for the work to submit ~~at the same time~~ an affidavit that the contractor
3 has a written plan for a drug-free workplace policy prior to being awarded a contract. If the affidavit
4 is not submitted with the bid submission, the Purchasing Division shall request by telephone and
5 electronic mail that the low bidder and second low bidder provide the affidavit within one business
6 day of the request. Failure to submit the affidavit within one business day of receiving the request
7 shall result in disqualification of the bid. A public improvement contract may not be awarded to a
8 contractor who does not have a written plan for a drug-free workplace policy and who has not
9 submitted that plan to the appropriate contracting authority in timely fashion.

10 For subcontractors, compliance with this section may take place before their work on the
11 public improvement is begun.

12 A drug-free workplace policy shall include the following:

13 (1) Establish drug testing and alcohol testing protocols that at a minimum require a
14 contractor to:

15 (A) Conduct preemployment drug tests of all employees;

16 (B) Conduct random drug testing that annually tests at least ten percent of the contractor's
17 employees who perform safety-sensitive duties;

18 (C) Conduct a drug test or alcohol test of any employee who may have caused or
19 contributed to an accident while conducting job duties where reasonable cause exists to suspect
20 that the employee may be intoxicated or under the influence of a controlled substance not
21 prescribed by the employee's physician when, but not limited to, the employer has evidence that
22 an employee is or was using alcohol or a controlled substance drawn from specific documented,
23 objective facts and reasonable inferences drawn from these facts in light of experience and
24 training.

25 The drug or alcohol test shall be conducted as soon as possible after the accident occurred
26 and after any necessary medical attention has been administered to the employee;

27 (D) Conduct a drug test or alcohol test of any employee when a trained supervisor has
28 reasonable cause to believe that the employee has reported to work or is working under the
29 influence of a drug of abuse or alcohol. Written documentation as to the nature of a supervisor's
30 reasonable cause shall be created.

31 In order to ascertain and justify implementation of a reasonable cause test, all supervisors
32 will be trained to recognize drug- and alcohol-related signs and symptoms;

33 (2) Require that all drug tests performed pursuant to this section be conducted by a
34 laboratory certified by the United States Department of Health and Human Services or its
35 successor;

36 (3) Establish standards governing the performance of drug tests by such a laboratory that
37 include, but are not limited to, the following:

38 (A) The collection of urine specimens of individuals in a scientifically or medically approved
39 manner and under reasonable and sanitary conditions;

40 (B) The collection and testing of urine specimens with due regard for the privacy of the

41 individual being tested and in a manner reasonably calculated to prevent substitutions or
42 interference with the collection and testing of specimens;

43 (C) The documentation of urine specimens through procedures that reasonably preclude
44 the possibility of erroneous identification of test results and that provide the individual being tested
45 a reasonable opportunity to furnish information identifying any prescription or nonprescription
46 drugs used by the individual in connection with a medical condition to the medical review officer;

47 (D) The collection, maintenance, storage and transportation of urine specimens in a
48 manner that reasonably precludes the possibility of contamination or adulteration of the
49 specimens;

50 (E) The testing of a urine specimen of an individual to determine if the individual ingested,
51 was injected or otherwise introduced with a drug of abuse in a manner that conforms to
52 scientifically accepted analytical methods and procedures that include verification and
53 confirmation of any positive test result by gas chromatography or mass spectrometry;

54 (4) Establish standards and procedures governing the performance of alcohol tests;

55 (5) Require that a medical review officer review all drug tests that yield a positive result;

56 (6) Establish procedures by which an individual who undergoes a drug test or alcohol test
57 may contest a positive test result;

58 (7) Require that when an employee of a contractor tests positive for a drug of abuse or
59 alcohol, or if an employee is caught adulterating a drug or alcohol test, as defined in section four
60 hundred twelve, article four, chapter sixty-a of this code, the employee ~~shall be~~ is subject to
61 appropriate disciplinary measures up to and including termination from employment, in
62 accordance with the contractor's written drug-free workplace policy. If not terminated, the
63 employee ~~shall be~~ is subject to random drug or alcohol tests at any time for one year after the
64 positive test;

65 (8) Require that when a supervisor has reasonable cause to believe an employee is under
66 the influence of a drug of abuse or alcohol at work and requires the employee to take a drug or

67 alcohol test, the employee shall immediately be suspended from performing safety-sensitive tasks
68 by the contractor until such time as a drug or alcohol test is performed and results of that test are
69 available;

70 (9) Require a contractor to provide to any employee testing positive for a drug of abuse or
71 alcohol the list of community resources where employees may seek assistance for themselves or
72 their families as identified in paragraph (D), subdivision (12) of this section;

73 (10) Require that a contractor assist an employee who voluntarily acknowledges that the
74 employee may have a substance abuse problem by providing the list of community resources
75 where employees may seek assistance for themselves or their families as identified in paragraph
76 (D), subdivision (12) of this section;

77 (11) Require that a contractor establish a written drug-free workplace policy regarding
78 substance abuse and provide a copy of the written policy to each of its employees and to each
79 applicant for employment. The written policy shall contain, at a minimum, all of the following:

80 (A) A summary of all the elements of the drug-free workplace policy established in
81 accordance with this article;

82 (B) A statement that it is the contractor's intention to create a drug-free workplace
83 environment;

84 (C) Identification of an employee who has been designated the contractor's drug-free
85 workplace representative;

86 (D) Shall list the types of tests an employee may be subject to, which may include, but are
87 not limited to, the following:

88 (i) Preemployment;

89 (ii) Post-accident;

90 (iii) Random; and

91 (iv) Reasonable cause.

92 (12) Require that a contractor provide within six weeks of new employment at least two

93 hours of drug-free workplace employee education for all employees unless that employee has
94 already received such training anytime within a prior two-year period. The employee shall
95 participate in drug-free workplace employee education at least biannually thereafter. The
96 employee education shall include all of the following:

97 (A) Detailed information about the content of the contractor's specific drug-free workplace
98 policy and an opportunity for employees to ask questions regarding the policy;

99 (B) The distribution of a hard copy of the written drug-free workplace policy, including
100 collecting an employee-signed acknowledgment receipt from each employee;

101 (C) Specific explanation of the basics of drugs and alcohol abuse, including, but not limited
102 to, the disease model, signs and symptoms associated with substance abuse, and the effects and
103 dangers of drugs or alcohol in the workplace; and

104 (D) A list of community resources where employees may seek assistance for themselves
105 or their families;

106 (13) Require that a contractor provide at least two hours of drug-free workplace supervisor
107 training for all supervisory employees and annually thereafter. The supervisor training shall
108 include all of the following:

109 (A) How to recognize a possible drug or alcohol problem;

110 (B) How to document behaviors that demonstrate a drug or alcohol problem;

111 (C) How to confront employees with the problem from observed behaviors;

112 (D) How to initiate reasonable suspicion and post-accident testing;

113 (E) How to handle the procedures associated with random testing;

114 (F) How to make an appropriate referral for assessment and assistance;

115 (G) How to follow up with employees returning to work after a positive test; and

116 (H) How to handle drug-free workplace responsibilities in a manner that is consistent with
117 the applicable sections of any pertinent collective bargaining agreements.

ARTICLE 11. WEST VIRGINIA CONTRACTOR LICENSING ACT.

§21-11-11. Notice included with invitations to bid and specifications.

1 Any architect or engineer preparing any plan and specification for contracting work to be
2 performed in this state shall include in ~~such~~ the plan, specification and invitation to bid a reference
3 to this article informing any prospective bidder that ~~such~~ the person's contractor's license number
4 ~~must~~ shall be included on any bid submission. A subcontractor shall furnish ~~such~~ the person's
5 contractor's license number to the contractor prior to the award of the contract. If an apparent
6 low bidder fails to submit a license number in accordance with this section, the Purchasing
7 Division shall request by telephone and electronic mail that the low bidder and the second low
8 bidder provide the license number within one business day of the request. Failure of the bidder
9 to provide the license number within one business day of receiving the request shall result in
10 disqualification of the bid.

NOTE: The purpose of this bill is to provide procedures that will prevent the disqualification of low bids for government construction contracts due to documentation technicalities. The bill deals with the submission of bids and the information and documents required for the awarding of certain contracts. It provides procedures for the required submission of a list of subcontractors who will perform more than \$25,000 of work on certain projects. The bill provides procedures for the required submission of a Drug Free Workplace Affidavit for any solicitation for a public improvement contract. And, the bill provides procedures for the required submission of a contractor's license number with certain bid documents.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.