

# **WEST VIRGINIA LEGISLATURE**

**2018 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 283**

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND

PREZIOSO

(BY REQUEST OF THE EXECUTIVE)

[Originating in the Committee on Government

Organization; reported on January 31, 2018]

1 A BILL to amend and reenact §5-22-1 of the Code of West Virginia, 1931, as amended; to amend  
2 and reenact §5A-3-10b, §5A-3-10c, §5A-3-10e, §5A-3-33d, §5A-3-33f, §5A-3-37, and  
3 §5A-3-45 of said code; to amend said code by adding thereto a new section, designated  
4 §5A-3-61; to amend and reenact §5G-1-3 of said code; to amend and reenact §6D-1-1 of  
5 said code; and to amend and reenact §18B-5-4 of said code, all relating generally to  
6 procurement by state agencies; defining terms; authorizing competitive bidding of certain  
7 open-ended repair and maintenance contracts; modifying use and consideration of  
8 alternates in solicitations; prohibiting alternates from being accepted out of order;  
9 modifying criteria to be considered in best value procurement awards; eliminating sole  
10 source procurement; establishing direct award procurement requirements; establishing  
11 prequalification agreements and their requirements and procedures; authorizing agency-  
12 delegated bidding and its procedure; increasing certain cost limits from \$50,000 to \$1  
13 million; authorizing awarding contracts without competitive bidding if certain requirements  
14 are met; eliminating master contracts and direct ordering process; expanding the scope  
15 of those who may be debarred; eliminating preferences for resident vendors, vendors  
16 employing state residents, and veteran residents; establishing the concept of “reciprocal  
17 preference” for an in-state vendor over an out-of-state vendor from any state that gives or  
18 requires a preference to bidders from that state and setting forth its requirements;  
19 modifying the value determination of certain motor vehicles that are to be sold; permitting  
20 funds from sale of surplus property be deposited in alternate fund if original fund no longer  
21 exists; permitting spending units to use a standardization process to purchase  
22 commodities and setting forth its requirements; permitting an architectural or engineering  
23 firm to be selected without bidding if certain conditions exist; increasing certain contract  
24 limits from \$100,000 to \$1 million; requiring certain reporting; and authorizing rulemaking.

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

**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, at a minimum, all the following requirements in connection with the bidder's response  
6 to the bid solicitation. The bidder 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 (4) "Alternates" means any additive options or alternative designs included in a solicitation  
19 for competitive bids that are different from and priced separately from what is included in a base  
20 bid.

21 (5) "Construction project" means a specifically identified scope of work involving the act,  
22 trade, or process of building, erecting, constructing, adding, repairing, remodeling, rehabilitating,  
23 reconstructing, altering, converting, improving, expanding, or demolishing of a building, structure,  
24 facility, road, or highway. Repair and maintenance of existing public improvements that is  
25 recurring or ongoing in nature and that is not fully identified or known at any one time shall be  
26 considered a construction project and procured according to this article on an open-ended basis,  
27 so long as the work to be performed under the contract falls into a generally accepted single class,  
28 or type, and bidders are notified of the open-ended nature of the work in the solicitation: *Provided,*  
29 That no open-ended repair or maintenance contract may exceed \$1 million.

30 (c) The state and its subdivisions shall, except as provided in this section, solicit  
31 competitive bids for every construction project exceeding \$25,000 in total cost.

32 (1) If a solicitation contains a request for any alternates, the alternates shall be listed  
33 numerically in the order of preference in the solicitation.

34 (2) A vendor who has been debarred pursuant to §5A-3-33b though §5A-3-33f of this code,  
35 may not bid on or be awarded a contract under this section.

36 (d) All bids submitted pursuant to this chapter shall include a valid bid bond or other surety  
37 as approved by the State of West Virginia or its subdivisions.

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

41 ~~(e)~~ (f) Any solicitation of bids shall include no more than ~~seven~~ five alternates. Alternates,

42 if accepted, shall be accepted in the order in which they are listed on the bid form: ~~Provided, That~~  
43 ~~a public entity may accept an alternate out of the listed order if acceptance would not affect~~  
44 ~~determination of the lowest qualified responsible bidder.~~ Any unaccepted alternate contained  
45 within a bid shall expire ~~150~~ 90 days after the date of the opening of bids for review.

46 Determination of the lowest qualified responsible bidder shall be based on the sum of the  
47 base bid and any alternates accepted.

48 ~~(f)~~ (g) The apparent low bidder on a contract valued at more than \$250,000 for the  
49 construction, alteration, decoration, painting, or improvement of a new or existing building or  
50 structure with a state spending unit shall submit a list of all subcontractors who will perform more  
51 than \$25,000 worth of work on the project including labor and materials. This section does not  
52 apply to other construction projects such as highway, mine reclamation, water, or sewer projects.  
53 The list shall include the names of the bidders and the license numbers as required by §21-11-1  
54 *et seq.* of this code. This information shall be provided to the state spending unit within one  
55 business day of the opening of bids for review prior to the awarding of a construction contract. If  
56 the apparent low bidder fails to submit the subcontractor list, the spending unit shall promptly  
57 request by telephone and electronic mail that the low bidder and second low bidder provide the  
58 subcontractor list within one business day of the request. Failure to submit the subcontractor list  
59 within one business day of receiving the request shall result in disqualification of the bid. A  
60 subcontractor list may not be required if the bidder provides notice in the bid submission or in  
61 response to a request for a subcontractor list that no subcontractors who will perform more than  
62 \$25,000 worth of work will be used to complete the project.

63 ~~(g)~~ (h) Written approval must be obtained from the state spending unit before any  
64 subcontractor substitution is permitted. Substitutions are not permitted unless:

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

66 (2) The state spending unit refuses to approve a subcontractor in the original bid because  
67 the subcontractor is under a debarment pursuant to §5A-3-33d of this code or a suspension under

68 §5A-3-32 of this code; or

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

71 ~~(h)~~ (i) The contracting public entity may not award the contract to a bidder which fails to  
72 meet the minimum requirements set out in this section. As to a prospective low bidder which the  
73 contracting public entity determines not to have met one or more of the requirements of this  
74 section or other requirements as determined by the public entity in the written bid solicitation, prior  
75 to the time a contract award is made, the contracting public entity shall document in writing and  
76 in reasonable detail the basis for the determination and shall place the writing in the bid file. After  
77 the award of a bid under this section, the bid file of the contracting public agency and all bids  
78 submitted in response to the bid solicitation shall be open and available for public inspection.

79 ~~(i)~~ (j) The contracting public entity shall not award a contract pursuant to this section to  
80 any bidder that is known to be in default on any monetary obligation owed to the state or a political  
81 subdivision of the state, including, but not limited to, obligations related to payroll taxes, property  
82 taxes, sales and use taxes, fire service fees, or other fines or fees. Any governmental entity may  
83 submit to the Division of Purchasing information which identifies vendors that qualify as being in  
84 default on a monetary obligation to the entity. The contracting public entity shall take reasonable  
85 steps to verify whether the lowest qualified bidder is in default pursuant to this subsection prior to  
86 awarding a contract.

87 ~~(j)~~ (k) A public official or other person who individually or together with others knowingly  
88 makes an award of a contract under this section in violation of the procedures and requirements  
89 of this section is subject to the penalties set forth in §5A-3-29 of this code.

90 ~~(k)~~ (l) No officer or employee of this state or of a public agency, public authority, public  
91 corporation, or other public entity and no person acting or purporting to act on behalf of an officer  
92 or employee or public entity may require that a performance bond, payment bond, or surety bond  
93 required or permitted by this section be obtained from a particular surety company, agent, broker

94 or producer.

95 ~~(l)~~ (m) All bids shall be open in accordance with the provisions of §5-22-2 of this code,  
96 except design-build projects which are governed by §5-22A-1 *et seq.* of this code and are exempt  
97 from these provisions.

98 ~~(m)~~ (n) Nothing in this section applies to:

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

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

103 (3) Emergency repairs to building components, systems, and public infrastructure. For the  
104 purpose of this subdivision, the term "emergency repairs" means repairs that if not made  
105 immediately will seriously impair the use of building components, systems, and public  
106 infrastructure or cause danger to persons using the building components, systems, and public  
107 infrastructure; and

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

## **CHAPTER 5A. DEPARTMENT OF ADMINISTRATION.**

### **ARTICLE 3. PURCHASING DIVISION.**

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

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

3 (b) A solicitation for bids under best value procurement shall be made in the same manner

4 as provided in §5A-3-10 of this code.

5 (c) Best value procurement awards shall be based on criteria set forth in the solicitation  
6 ~~including, but not limited to, price~~ and information contained in the proposals submitted in  
7 response to the solicitation. Those criteria include, but are not limited to, price and the total cost  
8 of acquiring, operating, maintaining, and supporting a commodity or service over its projected  
9 lifetime, as well as technical criteria. The technical criteria may include, but are not limited to, the  
10 evaluated technical merit of the bidder's bid or proposal, the bidder's past performance, the  
11 degree to which a proposal exceeds other proposals in technical merit, the utility of any novel or  
12 unrequested items in the proposal, and the evaluated probability of performing the requirements  
13 stated in the solicitation on time, with high quality, and in a manner that accomplishes the business  
14 objectives set forth in the solicitation.

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

18 (e) The director may not use best value procurement to enter into government construction  
19 contracts, including, but not limited to, those set forth in §5-22-1 *et seq.* of this code.

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

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



10 ~~available only from a sole source. On an annual basis, the director shall report the spending units~~  
11 ~~who have determined a sole source for their commodities or services, the type of commodity or~~  
12 ~~service and the determination made by the director~~

13 (a) The director may make a direct award of a contract without competitive bidding if:

14 (1) The spending unit requests a direct award in writing;

15 (2) The spending unit provides written justification showing that the direct award is in the  
16 best interest of the state;

17 (3) The spending unit provides written confirmation that competition is not available  
18 because there is no other source for the commodity or service, or that no other source would be  
19 willing or able to replace the existing source without a detrimental effect on the spending unit, the  
20 existence of a detrimental effect being determined by the director in his or her sole discretion;

21 (4) The director publicly advertises a notice of intent to make a direct award without  
22 competition in the state's official bid notification system, as well as any other public advertisement  
23 that the director deems appropriate, for no less than 10 business days; and

24 (5) No other vendor expresses an interest in providing the commodity or service in  
25 question.

26 (b) If a vendor expresses an interest in providing the commodity or service described in  
27 the notice of intent to make a direct award, then the spending unit must convert the direct award  
28 to a competitive bid, unless the director determines that the interest expressed by a vendor is  
29 unreasonable. The competitive bid may, at the discretion of the director, be either a request for  
30 quotation or request for proposal.

31 (c) The notice of intent to make a direct award shall contain the following information:

32 (1) A description of the commodity or service for which a direct award will be made;

33 (2) A time period by which delivery must be made or performance must occur;

34 (3) The price that will be paid for the commodity or service;

35 (4) Any limitations that a competing vendor would need to satisfy;

36 (5) An invitation to all vendors interested in providing the commodity or service to make  
37 that interest known; and

38 (6) Contact information for the director or his or her designee, and instructions to submit  
39 a statement of interest to the director or his or her designee.

40 (d) The director may refuse a spending unit's request to utilize a direct award procurement  
41 if the commodities or services have previously been obtained through competitive bidding.

42 (e) On or before December 1, 2018, and annually thereafter, the director shall report to  
43 the Governor and the Joint Committee on Government and Finance on the spending units who  
44 have requested a direct award for their commodities or services, the type of commodity or service,  
45 and results of the direct award process.

**§5A-3-10e. Master contracts; direct ordering process Prequalification agreement; agency-  
delegated bidding.**

1 (a) Subject to the limitations of this section, the director may permit spending units to  
2 procure commodities ~~directly~~ from a preapproved vendor through a ~~master contract direct~~  
3 ~~ordering process~~ prequalification agreement and delegated prequalification bidding if the director  
4 determines the process is fair, economical, and in the best interests of the state.

5 (b) *Definitions.* — For purposes of this section:

6 (1) "Information technology" means hardware and software related to electronic  
7 processing, and storage, retrieval, transmittal, and manipulation of data.

8 (2) ~~"Master contract"~~ "Prequalification agreement" means an agreement, having a term of  
9 no more than ~~one year~~ three years, between the Purchasing Division and at least two ~~preapproved~~  
10 prequalified vendors authorizing a spending unit to purchase a commodity ~~directly and on a~~  
11 recurrent basis through the ~~direct ordering process~~ delegated prequalification bidding process  
12 defined in the prequalification agreement.

13 (3) ~~"Preapproved"~~ "Prequalified vendor" means a "vendor", as that term is defined in §5A-  
14 1-1 of this code, that has entered into a ~~master contract~~ prequalification agreement with the

15 Purchasing Division and may participate in the ~~direct ordering process~~ delegated prequalification  
16 bidding subject to the terms and conditions of the ~~master contract~~ prequalification agreement.

17 (4) "~~Direct ordering process~~" "Delegated prequalification bidding" means the competitive  
18 bidding process whereby the ~~preapproved~~ prequalified vendors that are parties to a ~~master~~  
19 ~~contract~~ prequalification agreement may submit sealed bids directly to spending units to provide  
20 a commodity identified in the ~~master contract~~ prequalification agreement subject to the limitations  
21 set forth in this section.

22 (c) ~~Master contract~~ Prequalification agreement. —

23 (1) For each ~~master contract~~ prequalification agreement, the director shall set forth the  
24 requirements, technical or otherwise, under which a vendor may be qualified to supply a  
25 commodity through the ~~direct ordering process~~ delegated prequalification bidding. For each  
26 ~~master contract~~ prequalification agreement, the director shall follow the notice and advertising  
27 requirements set forth in §5A-3-10 of this code.

28 (2) A ~~master contract~~ prequalification agreement may authorize the ~~direct ordering~~  
29 ~~process~~ delegated prequalification bidding for only one type of commodity.

30 (3) A vendor may submit information to the director to establish that it meets the  
31 requirements set forth in the ~~master contract~~ prequalification agreement.

32 (4) If the director determines that a vendor meets the requirements set forth in the ~~master~~  
33 ~~contract~~ prequalification agreement, the vendor may enter into the ~~master contract~~  
34 prequalification agreement as a ~~preapproved~~ prequalified vendor.

35 (d) ~~Direct ordering~~ Delegated prequalification bidding procedures. —

36 (1) A spending unit may commence the ~~direct ordering~~ delegated prequalification bidding  
37 process by issuing a request for a commodity identified in the ~~master contract~~, prequalification  
38 agreement stating in the request the quantity of the commodity to be procured ~~in that particular~~  
39 instance.

40 (2) The ~~preapproved~~ prequalified vendor that submits the lowest bid in response to the  
41 request shall be awarded the procurement ~~in that particular instance.~~

42 (3) The ~~direct ordering process~~ delegated prequalification bidding may not be utilized for  
43 any request for commodities, ~~other than information technology,~~ anticipated to cost more than  
44 ~~\$50,000~~ \$1 million, unless approved in writing by the Director of Purchasing. The state may not  
45 issue a series of orders each anticipated to cost less than ~~\$50,000~~ \$1 million to circumvent the  
46 monetary limitation in this subsection. The limit expressed herein applies to each delegated  
47 prequalification bid conducted pursuant to the prequalification agreement and not to total  
48 spending under the prequalification agreement.

49 ~~(4) The direct ordering process may not be utilized for any request for information~~  
50 ~~technology anticipated to cost more than \$1 million, unless approved in writing by the Director of~~  
51 ~~Purchasing. The state may not issue a series of orders each anticipated to cost less than \$1~~  
52 ~~million to circumvent the monetary limitation in this subsection.~~

53 (e) *Rule-making authority.* — The Director of the Purchasing Division shall propose rules  
54 for legislative approval in accordance with the provisions of §29A-3-1 *et seq.* of this code to  
55 implement this section, including but not limited to provisions to establish procedures for the  
56 solicitation and authorization of ~~master contracts~~ prequalification agreements, ~~preapproval~~  
57 prequalification of vendors, and implementation of ~~direct ordering~~ delegated prequalification  
58 bidding.

**§5A-3-33d. Grounds for debarment.**

1 (a) Grounds for debarment are:

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

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

5 (3) Conviction of an offense involving embezzlement, theft, forgery, bribery, falsification,

6 or destruction of records, making false statements, or receiving stolen property ~~in connection with~~  
7 related to the performance of a contract;

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

10 (5) Default on obligations owed to the state, including, but not limited to, obligations owed  
11 to the workers' compensation funds, as defined in §23-2C-1 *et seq.* of this code, and obligations  
12 under the West Virginia Unemployment Compensation Act and West Virginia state tax and  
13 revenue laws. For purposes of this subdivision, a vendor is in default when, after due notice, the  
14 vendor fails to submit a required payment, interest thereon, or penalty, and has not entered into  
15 a repayment agreement with the appropriate agency of the state or has entered into a repayment  
16 agreement but does not remain in compliance with its obligations under the repayment  
17 agreement. In the case of a vendor granted protection by order of a federal bankruptcy court or a  
18 vendor granted an exemption under any rule of the Bureau of Employment Programs or the  
19 Insurance Commission, the director may waive debarment under §5A-3-33f of this code:  
20 *Provided*, That in no event may debarment be waived with respect to any vendor who has not  
21 paid all current state obligations for at least the four most recent calendar quarters, excluding the  
22 current calendar quarter, or with respect to any vendor who is in default on a repayment  
23 agreement with an agency of the state;

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

28 (7) The vendor is an active and knowing participant in dividing or planning procurements  
29 to circumvent the \$25,000 threshold requiring a sealed bid or otherwise avoiding the use of a  
30 sealed bid; or

31 (8) Violation of the terms of a public contract or subcontract for:

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

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

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

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

43 ~~(E)~~ (9) Any other cause of a serious and compelling nature amounting to knowing and  
44 willful misconduct of the vendor that demonstrates a wanton indifference to the interests of the  
45 public and that caused, or that had a substantial likelihood of causing, serious harm to the public.

46 (b) For the purposes of this section, the term "conviction" includes, but may not be limited  
47 to, the entering of a deferred prosecution agreement or a plea of guilty or nolo contendere,  
48 including pleading to a lesser or related offense in exchange for some form of prosecutorial  
49 leniency.

**§5A-3-33f. Effects of debarment.**

1 (a) Unless the director determines in writing that there is a compelling reason to do  
2 otherwise, the state and its subdivisions may not solicit offers from, award contracts to, nor  
3 consent to subcontract with a debarred vendor during the debarment period.

4 (b) The contracting officer may not exercise an option to renew or otherwise extend a  
5 current contract with a debarred vendor, nor a contract which is being performed in any part by a  
6 debarred subcontractor, unless the director approves the action in writing, based on compelling  
7 reasons for exercise of the option or extension.

8 (c) The debarment decision may extend to all commodities and services of the vendor, or  
9 may be limited to specific commodities or services, as the director specifically finds, in the  
10 debarment procedure under §5A-3-33e of this code, to be in the public interest based on the  
11 substantial record.

12 (d) The director may extend the debarment to include ~~an affiliate of the vendor upon proof~~  
13 ~~necessary to pierce the corporate veil at common law~~ a related party of the vendor. The director  
14 shall follow the same procedure, and afford the affiliate like notice, hearing, and other rights, for  
15 extending the debarment to the affiliate as provided for under §5A-3-33e of this code for the  
16 debarment of the vendor. For purposes of this section, a “related party” may include:

17 (1) Spouses, parents, children, siblings, grandparents, or grandchildren of a debarred  
18 vendor or individual;

19 (2) Any individual or entity that partially or completely owns, controls, or influences, or is  
20 partially or completely owned, controlled, or influenced by the actions of a debarred vendor or  
21 individual;

22 (3) Entities that are related under common ownership or control with a debarred vendor;  
23 or

24 (4) A business entity or individual that has contracted with or employed a debarred vendor  
25 or individual to perform work on one or more public contracts.

26 (e) The director may reduce the period or extent of debarment, upon the vendor’s request  
27 supported by documentation, for the following reasons:

- 28 (1) Newly discovered material evidence;  
29 (2) Reversal of the conviction or judgment upon which debarment was based;  
30 (3) Elimination of the causes for which the debarment was imposed; or  
31 (4) Other good cause shown, including evidence that the vendor has become responsible.

32 (f) The director may extend the debarment period for an additional period if the director  
33 determines that the extension is necessary to protect the interests of the state. Upon the expiration

34 of a debarment period, the director shall extend the debarment period for any vendor who has not  
35 paid all current state obligations for at least the four most recent calendar quarters, exempting the  
36 current calendar quarter, and for any vendor who is in default on a repayment agreement with an  
37 agency of the state, until such time as the cause for the extended debarment is removed. If the  
38 director extends the debarment period, the director shall follow the same procedures, and afford  
39 the vendor like notice, hearing, and other rights for extending the debarment, as provided for  
40 debarment under §5A-3-33e of this code.

41 (g) A debarment under this article may be waived by the director with respect to a particular  
42 contract if the director determines the debarment of the vendor would severely disrupt the  
43 operation of a governmental entity to the detriment of the general public or would not be in the  
44 public interest.

**§5A-3-37. ~~Preference for resident vendors; preference for vendors employing state residents; preference for veteran residents; exceptions~~ Reciprocal preference.**

1 ~~(a) Effective beginning July 1, 1992, in any instance that a purchase of commodities or~~  
2 ~~printing by the director or by a state department is required under the provisions of this article to~~  
3 ~~be made upon competitive bids, the successful bid shall be determined as provided in this section.~~  
4 ~~The Secretary of the Department of Revenue shall promulgate any rules necessary to: (i)~~  
5 ~~Determine that vendors have met the residence requirements described in this section; (ii)~~  
6 ~~establish the procedure for vendors to certify the residency requirements at the time of submitting~~  
7 ~~their bids; (iii) establish a procedure to audit bids which make a claim for preference permitted by~~  
8 ~~this section and to reject noncomplying bids; and (iv) otherwise accomplish the objectives of this~~  
9 ~~section. In prescribing the rules, the secretary shall use a strict construction of the residence~~  
10 ~~requirements set forth in this section. For purposes of this section, a successful bid shall be~~  
11 ~~determined and accepted as follows:~~

12 ~~(1) From an individual resident vendor who has resided in West Virginia continuously for~~  
13 ~~the four years immediately preceding the date on which the bid is submitted or from a partnership,~~



14 ~~association, corporation resident vendor, or from a corporation nonresident vendor which has an~~  
15 ~~affiliate or subsidiary which employs a minimum of one hundred state residents and which has~~  
16 ~~maintained its headquarters or principal place of business within West Virginia continuously for~~  
17 ~~four years immediately preceding the date on which the bid is submitted, if the vendor's bid does~~  
18 ~~not exceed the lowest qualified bid from a nonresident vendor by more than two and one-half~~  
19 ~~percent of the latter bid, and if the vendor has made written claim for the preference at the time~~  
20 ~~the bid was submitted: *Provided*, That for purposes of this subdivision, any partnership,~~  
21 ~~association or corporation resident vendor of this state, which does not meet the requirements of~~  
22 ~~this subdivision solely because of the continuous four-year residence requirement, shall be~~  
23 ~~considered to meet the requirement if at least eighty percent of the ownership interest of the~~  
24 ~~resident vendor is held by another individual, partnership, association or corporation resident~~  
25 ~~vendor who otherwise meets the requirements of this subdivision, including the continuous four-~~  
26 ~~year residency requirement: *Provided, however*, That the Secretary of the Department of~~  
27 ~~Revenue shall promulgate rules relating to attribution of ownership among several resident~~  
28 ~~vendors for purposes of determining the eighty percent ownership requirement; or~~

29 ~~(2) From a resident vendor, if, for purposes of producing or distributing the commodities~~  
30 ~~or completing the project which is the subject of the vendor's bid and continuously over the entire~~  
31 ~~term of the project, on average at least seventy-five percent of the vendor's employees are~~  
32 ~~residents of West Virginia who have resided in the state continuously for the two immediately~~  
33 ~~preceding years, and the vendor's bid does not exceed the lowest qualified bid from a nonresident~~  
34 ~~vendor by more than two and one-half percent of the latter bid, and if the vendor has certified the~~  
35 ~~residency requirements of this subdivision and made written claim for the preference, at the time~~  
36 ~~the bid was submitted; or~~

37 ~~(3) From a nonresident vendor, which employs a minimum of one hundred state residents~~  
38 ~~or a nonresident vendor which has an affiliate or subsidiary which maintains its headquarters or~~  
39 ~~principal place of business within West Virginia and which employs a minimum of one hundred~~

40 ~~state residents, if, for purposes of producing or distributing the commodities or completing the~~  
41 ~~project which is the subject of the vendor's bid and continuously over the entire term of the project,~~  
42 ~~on average at least seventy-five percent of the vendor's employees or the vendor's affiliate's or~~  
43 ~~subsidiary's employees are residents of West Virginia who have resided in the state continuously~~  
44 ~~for the two immediately preceding years and the vendor's bid does not exceed the lowest qualified~~  
45 ~~bid from a nonresident vendor by more than two and one-half percent of the latter bid, and if the~~  
46 ~~vendor has certified the residency requirements of this subdivision and made written claim for the~~  
47 ~~preference, at the time the bid was submitted; or~~

48 ~~(4) From a vendor who meets either the requirements of both subdivisions (1) and (2) of~~  
49 ~~this subsection or subdivisions (1) and (3) of this subsection, if the bid does not exceed the lowest~~  
50 ~~qualified bid from a nonresident vendor by more than five percent of the latter bid, and if the~~  
51 ~~vendor has certified the residency requirements above and made written claim for the preference~~  
52 ~~at the time the bid was submitted; or~~

53 ~~(5) From an individual resident vendor who is a veteran of the United States Armed Forces,~~  
54 ~~the Reserves or the National Guard and has resided in West Virginia continuously for the four~~  
55 ~~years immediately preceding the date on which the bid is submitted, if the vendor's bid does not~~  
56 ~~exceed the lowest qualified bid from a nonresident vendor by more than three and one-half~~  
57 ~~percent of the latter bid, and if the vendor has made written claim for the preference at the time~~  
58 ~~the bid was submitted; or~~

59 ~~(6) From a resident vendor who is a veteran of the United States Armed Forces, the~~  
60 ~~Reserves or the National Guard, if, for purposes of producing or distributing the commodities or~~  
61 ~~completing the project which is the subject of the vendor's bid and continuously over the entire~~  
62 ~~term of the project, on average at least seventy-five percent of the vendor's employees are~~  
63 ~~residents of West Virginia who have resided in the state continuously for the two immediately~~  
64 ~~preceding years and the vendor's bid does not exceed the lowest qualified bid from a nonresident~~  
65 ~~vendor by more than three and one-half percent of the latter bid, and if the vendor has certified~~

66 ~~the residency requirements of this subdivision and made written claim for the preference, at the~~  
67 ~~time the bid was submitted; or~~

68 ~~(7) Notwithstanding any provisions of subdivisions (1), (2), (3), (4), (5) or (6) of this~~  
69 ~~subsection to the contrary, if any nonresident vendor that is bidding on the purchase of~~  
70 ~~commodities or printing by the director or by a state department is also certified as a small, women~~  
71 ~~or minority-owned business pursuant to section fifty-nine of this article, the nonresident vendor~~  
72 ~~shall be provided the same preference made available to any resident vendor under the provisions~~  
73 ~~of this subsection.~~

74 ~~(b) If the Secretary of the Department of Revenue determines under any audit procedure~~  
75 ~~that a vendor who received a preference under this section fails to continue to meet the~~  
76 ~~requirements for the preference at any time during the term of the project for which the preference~~  
77 ~~was received the secretary may: (1) Reject the vendor's bid; or (2) assess a penalty against the~~  
78 ~~vendor of not more than five percent of the vendor's bid on the project.~~

79 ~~(c) Political subdivisions of the state including county boards of education may grant the~~  
80 ~~same preferences to any vendor of this state who has made a written claim for the preference at~~  
81 ~~the time a bid is submitted, but for the purposes of this subsection, in determining the lowest bid,~~  
82 ~~any political subdivision shall exclude from the bid the amount of business occupation taxes which~~  
83 ~~must be paid by a resident vendor to any municipality within the county comprising or located~~  
84 ~~within the political subdivision as a result of being awarded the contract which is the object of the~~  
85 ~~bid; in the case of a bid received by a municipality, the municipality shall exclude only the business~~  
86 ~~and occupation taxes as will be paid to the municipality: *Provided*, That prior to soliciting any~~  
87 ~~competitive bids, any political subdivision may, by majority vote of all its members in a public~~  
88 ~~meeting where all the votes are recorded, elect not to exclude from the bid the amount of business~~  
89 ~~and occupation taxes as provided in this subsection.~~

90 ~~(d) If any of the requirements or provisions set forth in this section jeopardize the receipt~~  
91 ~~of federal funds, then the requirement or provisions are void and of no force and effect for that~~

92 ~~specific project.~~

93 ~~(e) If any provision or clause of this section or application thereof to any person or~~  
94 ~~circumstance is held invalid, the invalidity shall not affect other provisions or applications of this~~  
95 ~~section which can be given effect without the invalid provision or application, and to this end the~~  
96 ~~provisions of this section are severable.~~

97 ~~(f) This section may be cited as the "Jobs for West Virginians Act of 1990."~~

98 (a) In any instance that a purchase of commodities or printing by the director or by a state  
99 spending unit is required under the provisions of this article to be made upon competitive bids,  
100 preference shall be given to resident vendors of West Virginia against a nonresident vendor from  
101 any state that gives or requires a preference to bidders from that state. The amount of the  
102 preference shall be equal to the amount of the preference given or required by the state of the  
103 nonresident vendor for that particular supply.

104 (b) A vendor shall be deemed to be a resident of this state if such vendor:

105 (1) Is registered in accordance with §11-12-1 et seq. of this code to transact business  
106 within the State of West Virginia;

107 (2) Maintains its headquarters or principal place of business in the state;

108 (3) Has actually paid, and not just applied to pay, personal property taxes imposed by  
109 chapter 11 of this code on equipment used in the regular course of supplying services or  
110 commodities of the general type offered; and

111 (4) Has actually paid, and not just applied to pay, all required business taxes imposed by  
112 chapter 11 of this code.

113 (c) If any of the requirements or provisions set forth in this section jeopardizes the receipt  
114 of federal funds then such requirements or provision shall be void and of no force and effect.

**§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 power and authority to make

2 disposition of commodities or expendable commodities now owned or in the future acquired by  
3 the state when the commodities are or become obsolete or unusable or are not being used or  
4 should be replaced.

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

7 The disposition may include:

8 (1) Transferring the particular commodities or expendable commodities between  
9 departments;

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

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

17 (4) Cannibalizing the commodities pursuant to procedures established under §5A-3-45(g)  
18 of this code;

19 (5) Properly disposing of the commodities as waste;

20 (6) Selling the commodities to the general public at the posted price or to the highest  
21 bidder by means of public auctions or sealed bids, after having first advertised the time, terms,  
22 and place of the sale as a Class II legal advertisement in compliance with the provisions of §59-  
23 3-1 *et seq.* of this code. The publication area for the publication is the county in which the sale is  
24 to be conducted. The sale may also be advertised in other advertising media that the agency  
25 considers advisable. The agency may sell to the highest bidder or to any one or more of the  
26 highest bidders, if there is more than one, or, if the best interest of the state will be served, reject  
27 all bids; or

28 (7) Selling the commodities to the highest bidder by means of an Internet auction site  
29 approved by the director, as set forth in ~~an emergency~~ a legislative rule pursuant to the provisions  
30 of chapter 29A of this code.

31 (c) Upon the sale to the general public or transfer of commodities or expendable  
32 commodities between departments, or upon the sale of commodities or expendable commodities  
33 to an eligible organization, the agency shall set the price to be paid by the receiving eligible  
34 organization, with due consideration given to current market prices.

35 (d) The agency may sell expendable, obsolete, or unused motor vehicles owned by the  
36 state to an eligible organization, other than volunteer fire departments. In addition, the agency  
37 may sell expendable, obsolete, or unused motor vehicles owned by the state with a gross weight  
38 in excess of 4,000 pounds to an eligible volunteer fire department. The agency, with due  
39 consideration given to ~~current market prices~~ fair market value as determined by an independent  
40 automotive pricing guide, shall set the price at a fair market price to be paid by the receiving  
41 eligible organization for motor vehicles sold pursuant to this provision. ~~Provided, That the sale~~  
42 ~~price of any motor vehicle sold to an eligible organization may not be less than the "average loan"~~  
43 ~~value, as published in the most recent available eastern edition of the National Automobile~~  
44 ~~Dealer's Association (N.A.D.A.) Official Used Car Guide, if the value is available, unless the fair~~  
45 ~~market value of the vehicle is less than the N.A.D.A. "average loan" value, in which case the~~  
46 ~~vehicle may be sold for less than the "average loan" value~~ The fair market value shall be based  
47 on a thorough inspection of the vehicle by an employee of the agency who shall consider the  
48 mileage of the vehicle and the condition of the body, engine, and tires as indicators of its fair  
49 market value. If no fair market value is available, the agency shall set the price to be paid by the  
50 receiving eligible organization with due consideration given to current market prices. The duly  
51 authorized representative of the eligible organization, for whom the motor vehicle or other similar  
52 surplus equipment is purchased or otherwise obtained, shall cause ownership and proper title to  
53 the motor vehicle to be vested only in the official name of the authorized governing body for whom

54 the purchase or transfer was made. The ownership or title, or both, shall remain in the possession  
55 of that governing body and be nontransferable for a period of not less than one year from the date  
56 of the purchase or transfer. Resale or transfer of ownership of the motor vehicle or equipment  
57 prior to an elapsed period of one year may be made only by reason of certified unserviceability.

58 (e) The agency shall report to the Legislative Auditor, semiannually, all sales of  
59 commodities or expendable commodities made during the preceding six months to eligible  
60 organizations. The report shall include a description of the commodities sold, the price paid by  
61 the eligible organization which received the commodities, and to whom each commodity was sold.

62 (f) The proceeds of the sales or transfers shall be deposited in the State Treasury to the  
63 credit on a pro rata basis of the fund or funds out of which the purchase of the particular  
64 commodities or expendable commodities was made: *Provided*, That the agency may charge and  
65 assess fees reasonably related to the costs of care and handling with respect to the transfer,  
66 warehousing, sale, and distribution of state property disposed of or sold pursuant to the provisions  
67 of this section. Notwithstanding §5A-3-45(e) of this code, if the fund or funds out of which the  
68 purchase was made no longer exist, the spending unit may designate an alternate fund within  
69 which the proceeds must be deposited.

70 (g)(1) For purposes of this section, “cannibalization” means the removal of parts from one  
71 commodity to use in the creation or repair of another commodity.

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

76 (3)(A) Under circumstances prescribed by the procedures, state agencies shall be  
77 required to submit a form, in writing or electronically, that, at a minimum, elicits the following  
78 information for the commodity the agency is requesting to cannibalize:

79 (i) The commodity identification number;

- 80 (ii) The commodity's acquisition date;
- 81 (iii) The commodity's acquisition cost;
- 82 (iv) A description of the commodity;
- 83 (v) Whether the commodity is operable and, if so, how well it operates;
- 84 (vi) How the agency will dispose of the remaining parts of the commodity; and
- 85 (vii) Who will cannibalize the commodity and how the person is qualified to remove and
- 86 reinstall the parts.

87 (B) If the agency has immediate plans to use the cannibalized parts, the form shall elicit

88 the following information for the commodity or commodities that will receive the cannibalized part

89 or parts:

- 90 (i) The commodity identification number;
- 91 (ii) The commodity's acquisition date;
- 92 (iii) The commodity's acquisition cost;
- 93 (iv) A description of the commodity;
- 94 (v) Whether the commodity is operable;
- 95 (vi) Whether the part restores the commodity to an operable condition; and
- 96 (vii) The cost of the parts and labor to restore the commodity to an operable condition
- 97 without cannibalization.

98 (C) If the agency intends to retain the cannibalized parts for future use, it shall provide

99 information justifying its request.

100 (D) The procedures shall provide for the disposal of the residual components of

101 cannibalized property.

102 (h)(1) The Director of the Purchasing Division shall propose for promulgation legislative

103 rules to establish procedures that allow state agencies to dispose of commodities in a landfill, or

104 by other lawful means of waste disposal, if the value of the commodity is less than the benefit that

105 may be realized by the state by disposing of the commodity using another method authorized in



106 this section. The procedures shall specify circumstances where the state agency for surplus  
107 property shall inspect the condition of the commodity prior to authorizing the disposal and those  
108 circumstances when the inspection is not necessary prior to the authorization.

109 (2) Whenever a state agency requests permission to dispose of a commodity in a landfill,  
110 or by other lawful means of waste disposal, the state agency for surplus property has the right to  
111 take possession of the commodity and to dispose of the commodity using any other method  
112 authorized in this section.

113 (3) If the state agency for surplus property determines, within 15 days of receiving a  
114 commodity, that disposing of the commodity in a landfill or by other lawful means of waste disposal  
115 would be more beneficial to the state than disposing of the commodity using any other method  
116 authorized in this section, the cost of the disposal is the responsibility of the agency from which it  
117 received the commodity.

**§5A-3-61. Standardization.**

1 (a) Notwithstanding any provision in this article to the contrary, a spending unit may utilize  
2 the process described in this section to standardize purchases of commodities used by the  
3 spending unit on a repeated basis. Such standardization may result in a determination that only  
4 a specific brand name for the commodity in question will be used.

5 (b) Standardization is limited to commodities that represent a core function of the spending  
6 unit's mission; would yield a savings of time and money if standardized; and either require testing  
7 or evaluation to determine accuracy or consistency or require interoperability in a larger system  
8 or network. Savings of time and money must be shown without considering the traditional  
9 procurement process or the standardization process.

10 (c) Any standardization established under this section shall be valid for no more than four  
11 years. Upon expiration, the spending unit establishing the standardization may either take no  
12 action, which would allow the standardization to end, or undertake the process outlined in this  
13 section to establish a new standard.

14 (d) A spending unit desiring to establish a standard must use the following procedure:

15 (1) The head of the spending unit must identify the commodity to be standardized and  
16 request approval from the director to establish a standard. The head of the spending unit shall  
17 provide to the director written certification and supporting evidence verifying that the requirements  
18 for standardization have been met.

19 (2) The spending unit must identify the individual or individuals that will be evaluating the  
20 commodity for standardization. Each individual must certify that he or she has no conflict of  
21 interest and can evaluate the information used to standardize without favoritism or bias. At least  
22 one individual involved in the standardization evaluation must be the spending unit's procurement  
23 officer. If the spending unit has no procurement officer, the individual responsible for the spending  
24 unit's procurement must participate in the evaluation.

25 (3) The spending unit must advertise the intent to standardize as a request for information  
26 in the system used at that time to solicit competitive bids. The spending unit should also identify  
27 all known entities that would have an interest in providing a commodity for evaluation and ensure  
28 that they receive notice of the request for information. The request for information must be  
29 advertised and allow for responses for no less than 30 calendar days. The request for information  
30 must notify the vendor community of the following:

31 (A) That the spending unit is attempting to standardize state procurements for the  
32 commodity in question;

33 (B) That any entity interested in having its products considered for standardization should  
34 provide information on the benefits and drawbacks of that entity's products;

35 (C) Any evaluation criteria that the spending unit will use in the standardization decision;

36 (D) The date and time by which documentation must be provided; and

37 (E) The approximate date and time by which a decision will be made.

38 (4) If the spending unit desires to conduct product testing, it must notify vendors in the  
39 request for information and establish a time period during which tests will be performed. Vendors

40 may provide commodities for demonstration, testing, and evaluation so long as such items are  
41 provided at no cost and no risk to the state. A written record describing the nature of the testing  
42 performed and a written record of the results of that testing shall be produced pursuant to any  
43 testing conducted on all the commodities being considered. The written record of testing and  
44 results shall be provided to the Purchasing Division and preserved.

45 (5) The spending unit will evaluate the information received in response to the request for  
46 information, information the spending unit has obtained from its own research, the results of any  
47 product testing, and anything else the spending unit finds relevant to establish a pending  
48 standardization.

49 (6) The spending unit must advertise the pending standardization as a request for  
50 information in the system used at that time to solicit competitive bids for a minimum of 15 calendar  
51 days. The request for information must notify the vendor community and any vendor who has  
52 participated in the standardization evaluation process of the following:

53 (A) The pending decision to standardize, including any brand name that has been  
54 tentatively selected the standard;

55 (B) The rationale for the selection made in the pending standardization;

56 (C) That comments may be submitted for review for a period of 15 calendar days from the  
57 date of the advertisement;

58 (D) The date and time by which a final decision will be made, which will be no less than  
59 three days after the comment period has ended; and

60 (E) The location where the final decision will be posted.

61 (7) The spending unit must review the comments submitted in response to the pending  
62 standardization advertisement and make any adjustments that it deems necessary.

63 (8) The head of the spending unit shall notify the director of a selection of the standard  
64 commodity, and the director shall post the results of the standardization decision on the  
65 Purchasing Division's website. The spending unit shall also specifically notify any vendor who

66 participated in the standardization evaluation process of the results in writing, within five business  
67 days of the final standardization selection.

68 (e) Any vendor that participated in the standardization process may appeal the  
69 standardization decision to the head of the spending unit. The head of the spending unit shall  
70 consider the appeal in accordance with the administrative procedures established in chapter 29A  
71 of this code.

72 (f) Once a standard has been established, the Purchasing Division is authorized to solicit  
73 competitive bids on behalf of the spending unit in the form of a request for quotation for the  
74 standardized commodity.

75 (g) The director may develop any necessary forms and reporting templates for use in  
76 standardization approval, testing, reporting, or any other forms necessary to carry out the  
77 provisions of this section. Such forms and reports shall be maintained by the Purchasing Division.

## **CHAPTER 5G. PROCUREMENT OF ARCHITECT-ENGINEER**

### **SERVICES BY STATE AND ITS SUBDIVISIONS.**

#### **ARTICLE 1. PROCUREMENT OF ARCHITECT-ENGINEER SERVICES.**

##### **§5G-1-3. Contracts for architectural and engineering services; selection process where total project costs are estimated to cost \$250,000 or more.**

1 In the procurement of architectural and engineering services for projects estimated to cost  
2 \$250,000 or more, the director of purchasing shall encourage firms engaged in the lawful practice  
3 of the profession to submit an expression of interest, which shall include a statement of  
4 qualifications and performance data, and may include anticipated concepts and proposed  
5 methods of approach to the project. All jobs shall be announced by public notice published as a  
6 Class II legal advertisement in compliance with the provisions of §59-3-1 *et seq.* of this code. A  
7 committee of three to five representatives of the agency initiating the request shall evaluate the  
8 statements of qualifications and performance data and other material submitted by interested

9 firms and select three firms which, in their opinion, are best qualified to perform the desired  
10 service: Provided, That if such circumstances exist, such that seeking competition could result in  
11 a compromise to public safety, significantly increase costs, or an extended interruption of  
12 essential services, the agency may, with the prior approval of the director of purchasing, select a  
13 firm on the basis of previous satisfactory performance and knowledge of the agency's facilities  
14 and needs: Provided, however, That on projects funded, wholly or in part, by School Building  
15 Authority moneys, in accordance with §18-9D-15 and §18-9D-16 of this code, two of said three  
16 firms shall have had offices within this state for a period of at least one year prior to submitting an  
17 expression of interest regarding a project funded by School Building Authority moneys. Interviews  
18 with each firm selected shall be conducted and the committee shall conduct discussions regarding  
19 anticipated concepts and proposed methods of approach to the assignment. The committee shall  
20 then rank, in order of preference, no less than three professional firms deemed to be the most  
21 highly qualified to provide the services required, and shall commence scope of service and price  
22 negotiations with the highest qualified professional firm for architectural or engineering services  
23 or both. Should the agency be unable to negotiate a satisfactory contract with the professional  
24 firm considered to be the most qualified, at a fee determined to be fair and reasonable, price  
25 negotiations with the firm of second choice shall commence. Failing accord with the second most  
26 qualified professional firm, the committee shall undertake price negotiations with the third most  
27 qualified professional firm. Should the agency be unable to negotiate a satisfactory contract with  
28 any of the selected professional firms, it shall select additional professional firms in order of their  
29 competence and qualifications and it shall continue negotiations in accordance with this section  
30 until an agreement is reached: Provided however, further, That county boards of education may  
31 either elect to start the selection process over in the original order of preference, or it may select  
32 additional professional firms in order of their competence and qualifications, and it shall continue  
33 negotiations in accordance with this section until an agreement is reached: And provided further,  
34 That for any water or wastewater construction project the engineering design and construction

35 inspection costs may not exceed the amount calculated pursuant to the compensation curves for  
36 consulting engineering services based upon project construction costs published by the American  
37 Society of Civil Engineers manual of practice, unless granted a variance by the Infrastructure and  
38 Jobs Development Council established pursuant to §31-15A-1 *et seq.* of this code.

## CHAPTER 6D. PUBLIC CONTRACTS.

### ARTICLE 1. DISCLOSURE OF INTERESTED PARTIES.

#### §6D-1-1. Definitions.

1 For purposes of this article:

2 (a) "Applicable contract" means a contract of a state agency that has an actual or  
3 estimated value of at least ~~\$100,000~~ \$1 million; *Provided*, That this shall include a series of related  
4 contracts or orders in which the cumulative total exceeds ~~\$100,000~~ \$1 million.

5 (b) "Business entity" means any entity recognized by law through which business is  
6 conducted, including, but not limited to, a sole proprietorship, partnership, limited liability  
7 company, or corporation. For purposes of this article, "business entity" does not include publicly  
8 traded companies listed on a national or international stock exchange.

9 (c) "Disclosure" shall mean a form prescribed and approved by the Ethics Commission  
10 pursuant to §6D-1-3 of this code.

11 (d) "Interested party" or "interested parties" means: (1) A business entity performing work  
12 or service pursuant to, or in furtherance of, the applicable contract, including ~~specifically~~ sub-  
13 contractors; (2) ~~the person(s)~~ any person who have has an ownership interest equal to or greater  
14 than ~~25%~~ 25 percent in the business entity performing work or service pursuant to, or in  
15 furtherance of, the applicable contract; and (3) the person or business entity, if any, that served  
16 as a compensated broker or intermediary to actively facilitate the applicable contract or negotiated  
17 the terms of the applicable contract with the state agency: ~~*Provided*, That subdivision (2) shall be~~  
18 ~~inapplicable if a business entity is a publicly traded company: *Provided*, however, That §6D-1-~~

19 1(d)(3) of this code shall not include persons or business entities performing legal services related  
20 to the negotiation or drafting of the applicable contract.

21 (e) "State agency" means a board, commission, office, department, or other agency in the  
22 executive, judicial, or legislative branch of state government, including publicly funded institutions  
23 of higher education: *Provided*, That for purposes of this article, the West Virginia Investment  
24 Management Board shall not be deemed a state agency nor subject to the requirements of this  
25 article.

## CHAPTER 18B. HIGHER EDUCATION.

### ARTICLE 5. HIGHER EDUCATION BUDGETS AND EXPENDITURES.

#### §18B-5-4. Purchase or acquisition of materials, supplies, equipment, services, and printing.

1 (a) The council, commission and each governing board shall purchase or acquire all  
2 materials, supplies, equipment, services and printing required for their respective needs:  
3 *Provided*, That the governing boards under the jurisdiction of the commission, including the  
4 exempted schools, are subject to §18B-5-4(d) of this code.

5 (b) The commission and council jointly shall adopt rules governing and controlling  
6 acquisitions and purchases in accordance with this section: *Provided*, That these rules do not  
7 apply to the exempted schools and the governing boards of the exempted schools shall adopt  
8 their own rules consistent with this section: *Provided, however*, That the joint rules shall provide  
9 for appropriate deference to the value judgments of governing boards under the jurisdiction of the  
10 commission. The rules shall ensure that the following procedures are followed:

11 (1) No person is precluded from participating and making sales thereof to the council,  
12 commission or governing board except as otherwise provided in §18B-5-5 of this code. Providing  
13 consulting services such as strategic planning services does not preclude or inhibit the governing  
14 boards, council, or commission from considering a qualified bid or response for delivery of a

15 product or a commodity from the individual providing the services;

16 (2) Specifications are established and prescribed for materials, supplies, equipment,  
17 services, and printing to be purchased;

18 (3) Purchase order, requisition, or other forms as may be required are adopted and  
19 prescribed;

20 (4) Purchases and acquisitions in such quantities, at such times and under contract, are  
21 negotiated for and made in the open market or through other accepted methods of governmental  
22 purchasing as may be practicable in accordance with general law;

23 (5) Bids are advertised on all purchases exceeding \$50,000 and made by means of sealed  
24 or electronically submitted bids and competitive bidding or advantageous purchases effected  
25 through other accepted governmental methods and practices. Competitive bids are not required  
26 for purchases of \$50,000 or less;

27 (6) Notices for acquisitions and purchases for which competitive bids are being solicited  
28 are posted either in the purchasing office of the specified institution involved in the purchase or  
29 by electronic means available to the public at least five days prior to making the purchases. The  
30 rules shall ensure that the notice is available to the public during business hours;

31 (7) Purchases are made in the open market;

32 (8) Vendors are notified of bid solicitation and emergency purchasing; and

33 (9) No fewer than three bids are obtained when bidding is required, except if fewer than  
34 three bids are submitted, an award may be made from among those received.

35 (c) When a state institution of higher education submits a contract, agreement, or other  
36 document to the Attorney General for approval as to form as required by this chapter, the following  
37 conditions apply:

38 (1) "Form" means compliance with the Constitution and statutes of the State of West  
39 Virginia;

40 (2) The Attorney General does not have the authority to reject a contract, agreement, or



41 other document based on the substantive provisions in the contract, agreement, or document or  
42 any extrinsic matter as long as it complies with the Constitution and statutes of this state;

43 (3) Within 15 days of receipt, the Attorney General shall notify the appropriate state  
44 institution of higher education in writing that the contract, agreement, or other document is  
45 approved or disapproved as to form. If the contract, agreement, or other document is disapproved  
46 as to form, the notice of disapproval shall identify each defect that supports the disapproval; and

47 (4) If the state institution elects to challenge the disapproval by filing a writ of mandamus  
48 or other action and prevails, then the Attorney General shall pay reasonable attorney fees and  
49 costs incurred.

50 (d) Pursuant to this subsection, the governing boards under the jurisdiction of the  
51 commission, including the exempted schools, respectively, may carry out the following actions:

52 (1) Purchase or acquire all materials, supplies, equipment, services, and printing required  
53 for the governing board without approval from the commission or the Vice Chancellor for  
54 Administration and may issue checks in advance to cover postage as provided in §18B-5-4(f) of  
55 this code;

56 (2) Purchase from cooperative buying groups, consortia, the federal government or from  
57 federal government contracts, or from West Virginia public institution of higher education  
58 contracts, if the materials, supplies, services, equipment, or printing to be purchased is available  
59 from these groups and if this would be the most financially advantageous manner of making the  
60 purchase;

61 (3) Select and acquire by contract or lease all grounds, buildings, office space, or other  
62 space, and capital improvements, including equipment, if the rental is necessarily required by the  
63 governing board; and

64 (4) Use purchase cards.

65 (e) The governing boards shall adopt sufficient accounting and auditing procedures and  
66 promulgate and adopt appropriate rules subject to §18B-1-6 of this code to govern and control

67 acquisitions, purchases, leases, and other instruments for grounds, buildings, office, or other  
68 space, and capital improvements, including equipment, or lease-purchase agreements.

69 (f) The council, commission, or each governing board may issue a check in advance to a  
70 company supplying postage meters for postage used by that board, the council, or commission  
71 and by the state institutions of higher education under their jurisdiction.

72 (g) When a purchase is to be made by bid, any or all bids may be rejected. However, all  
73 purchases based on advertised bid requests shall be awarded to the lowest responsible bidder  
74 taking into consideration the qualities of the articles to be supplied, their conformity with  
75 specifications, their suitability to the requirements of the governing boards, council, or commission  
76 and delivery terms. ~~The preference for resident vendors as provided in section thirty-seven, article~~  
77 ~~three, chapter five-a of this code applies to the competitive bids made pursuant to this section.~~

78 (h) The governing boards, council, and commission shall maintain a purchase file, which  
79 shall be a public record and open for public inspection.

80 (1) After the award of the order or contract, the governing boards, council, and commission  
81 shall indicate upon the successful bid the following information:

82 (A) Designation as the successful bid;

83 (B) The reason any bids were rejected; and

84 (C) The reason for rejection, if the mathematical low vendor was not awarded the order or  
85 contract.

86 (2) A record in the purchase file may not be destroyed without the written consent of the  
87 Legislative Auditor. Those files in which the original documentation has been held for at least one  
88 year and in which the original documents have been reproduced and archived on microfilm or  
89 other equivalent method of duplication may be destroyed without the written consent of the  
90 Legislative Auditor.

91 (3) All files, no matter the storage method, shall be open for inspection by the Legislative  
92 Auditor upon request.

93 (i) The commission and council, also jointly, shall promulgate rules to prescribe  
94 qualifications to be met by any person who is to be employed as a buyer at a state college and  
95 university or community and technical college pursuant to this section. These rules shall require  
96 that a person may not be employed as a buyer unless that person, at the time of employment,  
97 has one of the following qualifications:

98 (1) Is a graduate of an accredited college or university; or

99 (2) Has at least four years' experience in purchasing for any unit of government or for any  
100 business, commercial, or industrial enterprise.

101 (j) Any person making purchases and acquisitions pursuant to this section shall execute  
102 a bond in the penalty of \$50,000, payable to the State of West Virginia, with a corporate bonding  
103 or surety company authorized to do business in this state as surety thereon, in form prescribed  
104 by the Attorney General and conditioned upon the faithful performance of all duties in accordance  
105 with this section and sections five through eight, inclusive, of this article and the rules of the  
106 governing board and the council and commission. In lieu of separate bonds for these buyers, a  
107 blanket surety bond may be obtained. The bond shall be filed with the Secretary of State and the  
108 cost of the bond shall be paid from funds appropriated to the applicable governing board or the  
109 council or commission.

110 (k) All purchases and acquisitions shall be made in consideration and within limits of  
111 available appropriations and funds and in accordance with applicable provisions of §5A-2-1 *et*  
112 *seq.* of this code relating to expenditure schedules and quarterly allotments of funds.  
113 Notwithstanding any other provision of this code to the contrary, only those purchases exceeding  
114 the dollar amount for competitive sealed bids in this section are required to be encumbered. Such  
115 purchases may be entered into the state's centralized accounting system by the staff of the  
116 commission, council, or governing boards to satisfy the requirements of §5A-2-1 *et seq.* of this  
117 code to determine whether the amount of the purchase is within the quarterly allotment of the  
118 commission, council, or governing board, is in accordance with the approved expenditure

119 schedule and otherwise conforms to the article: *Provided*, That, notwithstanding the foregoing  
120 provisions of this subsection or any other provision of this code to the contrary, purchases by  
121 exempted schools are not required to be encumbered.

122 (l) The governing boards, council, or commission may make requisitions upon the State  
123 Auditor for a sum to be known as an advance allowance account, not to exceed five percent of  
124 the total of the appropriations for the governing board, council, or commission, and the State  
125 Auditor shall draw a warrant upon the Treasurer for those accounts. All advance allowance  
126 accounts shall be accounted for by the applicable governing board or the council or commission  
127 once every 30 days or more often if required by the State Auditor.

128 (m) Contracts entered into pursuant to this section shall be signed by the applicable  
129 governing board or the council or commission in the name of the state and shall be approved as  
130 to form by the Attorney General. A contract which requires approval as to form by the Attorney  
131 General is considered approved if the Attorney General has not responded within 15 days of  
132 presentation of the contract. A contract or a change order for that contract and notwithstanding  
133 any other provision of this code to the contrary, associated documents such as performance and  
134 labor/material payments, bonds, and certificates of insurance which use terms and conditions or  
135 standardized forms previously approved by the Attorney General and do not make substantive  
136 changes in the terms and conditions of the contract do not require approval as to form by the  
137 Attorney General. The Attorney General shall make a list of those changes which he or she  
138 considers to be substantive and the list, and any changes to the list, shall be published in the  
139 State Register. A contract that exceeds the dollar amount requiring competitive sealed bids in this  
140 section shall be filed with the State Auditor. If requested to do so, the governing boards, council,  
141 or commission shall make all contracts available for inspection by the State Auditor. The  
142 governing board, council, or commission, as appropriate, shall prescribe the amount of deposit or  
143 bond to be submitted with a bid or contract, if any, and the amount of deposit or bond to be given  
144 for the faithful performance of a contract.

145 (n) If the governing board, council, or commission purchases or contracts for materials,  
146 supplies, equipment, services and printing contrary to §18B-5-4 through §18B-5-4 of this code or  
147 the rules pursuant to this article, the purchase or contract is void and of no effect.

148 (o) A governing board or the council, or commission, as appropriate, may request the  
149 director of purchasing to make available the facilities and services of that department to the  
150 governing boards, council, or commission in the purchase and acquisition of materials, supplies,  
151 equipment, services, and printing. The director of purchasing shall cooperate with that governing  
152 board, council, or commission, as appropriate, in all such purchases and acquisitions upon that  
153 request.

154 (p) Each governing board or the council, or commission, as appropriate, may permit  
155 affiliated organizations, state institutions of higher education, or private institutions of higher  
156 education to join as purchasers on purchase contracts for materials, supplies, services, and  
157 equipment entered into by that governing board or the council, or commission. An affiliated  
158 organization, state institution of higher education, or private institution desiring to join as  
159 purchaser on purchase contracts shall file with that governing board or the council or commission,  
160 as appropriate, an affidavit signed by the president or designee of the affiliated organization, state  
161 institution of higher education, or private institution requesting that it be authorized to join as  
162 purchaser on purchase contracts of that governing board or the council, or commission, as  
163 appropriate. The affiliated organization, state institution of higher education, or private institution  
164 shall agree that it is bound by such terms and conditions as that governing board or the council,  
165 or commission may prescribe and that it will be responsible for payment directly to the vendor  
166 under each purchase contract.

167 (q) Notwithstanding any other provision of this code to the contrary, the governing boards,  
168 council, and commission, as appropriate, may make purchases from cooperative buying groups,  
169 consortia, the federal government or from federal government contracts if the materials, supplies,  
170 services, equipment, or printing to be purchased is available from that source, and purchasing

171 from that source would be the most financially advantageous manner of making the purchase.

172 (r) An independent performance audit of all purchasing functions and duties which are  
173 performed at any state institution of higher education shall be performed at least once in each  
174 three-year period. The Joint Committee on Government and Finance shall require a performance  
175 audit and the governing boards, council, and commission, as appropriate, are responsible for  
176 paying the cost of the audit from funds appropriated to the governing boards, council, or  
177 commission.

178 (1) The governing board shall provide for independent performance audits of all  
179 purchasing functions and duties on its campus at least once in each three-year period.

180 (2) Each audit shall be inclusive of the entire time period that has elapsed since the date  
181 of the preceding audit.

182 (3) Copies of all appropriate documents relating to any audit performed by a governing  
183 board shall be furnished to the Joint Committee on Government and Finance and the Legislative  
184 Oversight Commission on Education Accountability within 30 days of the date the audit report is  
185 completed.

186 (s) The governing boards shall require each institution under their respective jurisdictions  
187 to notify and inform every vendor doing business with that institution of §5A-3-54 of this code,  
188 also known as the Prompt Pay Act of 1990.

189 (t) Consultant services, such as strategic planning services, do not preclude or inhibit the  
190 governing boards, council, or commission from considering any qualified bid or response for  
191 delivery of a product or a commodity because of the rendering of those consultant services.

192 (u) Purchasing card use may be expanded by the council, commission, and state  
193 institutions of higher education pursuant to this subsection.

194 (1) The council and commission jointly shall establish procedures to be implemented by  
195 the council, commission, and any state college and university or community and technical college  
196 using purchasing cards. The governing boards of the exempted schools shall establish

197 procedures to be implemented by their respective institutions. The procedures shall ensure that  
198 each meets the following conditions:

199 (A) Appropriate use of the purchasing card system;

200 (B) Full compliance §12-3-1 *et seq.* of this code relating to the purchasing card program;

201 and

202 (C) Sufficient accounting and auditing procedures for all purchasing card transactions.

203 (2) Notwithstanding any other provision of this code to the contrary, the council,  
204 commission and any institution authorized pursuant to §18B-5-4(u)(3) of this code may use  
205 purchasing cards for the following purposes:

206 (A) Payment of travel expenses directly related to the job duties of the traveling employee,  
207 including, but not limited to, fuel and food; and

208 (B) Payment of any routine, regularly scheduled payment, including, but not limited to,  
209 utility payments and real property rental fees.

210 (3) The commission and council each shall evaluate the capacity of each state college  
211 and university and community and technical college under its jurisdiction for complying with the  
212 procedures established pursuant to §18B-5-4(u)(2) of this code. The commission and council  
213 each shall authorize expanded use of purchasing cards pursuant to that subdivision for any state  
214 college and university and community and technical college it determines has the capacity to  
215 comply.

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