

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

Senate Bill 303

BY SENATORS CARMICHAEL (MR. PRESIDENT), PREZIOSO,
GAUNCH, PLYMALE, AND BOSO

[Introduced January 17, 2018; Referred
to the Committee on Government Organization; and then
to the Committee on the Judiciary]

1 A BILL to amend and reenact §5A-3-33c, §5A-3-33d, §5A-3-33e, and §5A-3-33f of the Code of
 2 West Virginia, 1931, as amended, all relating to debarment of vendors seeking to provide
 3 goods and services to the state and its subdivisions; updating the duties of the Director of
 4 Purchasing; specifying additional grounds for debarment of a vendor; providing that
 5 actions of an individual may be imputed to a vendor under certain circumstances;
 6 providing for the debarment of individuals in addition to vendor businesses; providing for
 7 the debarment of subcontractors; specifying mandatory conditions for the initiation of
 8 debarment proceedings; prohibiting vendor employment of debarred individuals; and
 9 prohibiting the state from contracting with, or soliciting bids from, certain parties related to
 10 debarred vendors.

Be it enacted by the Legislature of West Virginia:

ARTICLE 3. PURCHASING DIVISION.

§5A-3-33c. Duties.

1 The director has primary responsibility for administering the debarment process. The
 2 director's duties include:

3 (a) Obtaining lists of vendors declared ineligible under federal laws and regulations and
 4 lists of vendors who are in default on state obligations;

5 (b) Notification of all contracting officials for the state and its subdivisions regarding
 6 debarred vendors;

7 (c) Compiling and maintaining a current, consolidated list of all vendors that have been
 8 debarred or declared ineligible, the period of such debarment, and the reasons therefor;

9 (d) Investigating complaints about vendors from the officials of the state and its
 10 subdivisions responsible for contracting with vendors for supplies and services;

11 (e) Initiating and conducting debarment procedures;

12 (f) Proposing rules for legislative approval, pursuant to the provisions of §29A-3-1 *et seq.*
 13 of this code, for the operation of the debarment process described in the provisions of sections

14 §5A-3-3a through §5A-3-33f of this article.

§5A-3-33d. Grounds for debarment; scope of vendor responsibility.

1 Grounds for debarment are: (a) The following circumstances are grounds for debarment
2 of a vendor:

3 (1) The vendor’s conviction of, admission to, or other acknowledgement of responsibility
4 for any of the criminal offenses or conduct described below. A formal adjudication of guilt is not
5 required if the vendor has entered a plea of guilty in a court of record to an offense listed here,
6 has acknowledged responsibility for conduct constituting such an offense, or if the vendor, having
7 been charged with such an offense, has entered into an agreement with a prosecuting authority
8 that includes financial consequences, in the form of fines, restitution, or forfeiture, to the vendor,
9 or results in limitations to the vendor’s freedom to operate in any manner:

10 ~~(1) (A) Conviction of an~~ An offense involving fraud or deceit or a any felony offense in
11 connection with obtaining or attempting to obtain a public contract or subcontract;

12 ~~(2) (B) Conviction~~ An offense in violation of any federal or state antitrust statute relating to
13 the submission of offers;

14 ~~(3) (C) Conviction of an~~ An offense involving embezzlement, theft, forgery, bribery,
15 falsification or destruction of records, making false statements, or receiving stolen property in
16 connection with the performance of a contract; or

17 ~~(4) (D) Conviction of a~~ Any felony offense demonstrating a lack of business integrity or
18 business honesty that affects the present responsibility of the vendor; ~~or subcontractor~~

19 ~~(5) (2)~~ (2) Default on obligations owed to the state, including, but not limited to, obligations
20 owed to the workers' compensation funds, as defined in §23-2C-1 *et seq.* of this code, and
21 obligations under the West Virginia Unemployment Compensation Act and West Virginia state tax
22 and revenue laws. For purposes of this ~~subsection~~ subdivision, a vendor is in default when, after
23 due notice, the vendor fails to submit a required payment, interest thereon, or penalty and has
24 not entered into a repayment agreement with the appropriate agency of the state or has entered

25 into a repayment agreement, but does not remain in compliance with its obligations under the
26 repayment agreement. In the case of a vendor granted protection by order of a federal bankruptcy
27 court or a vendor granted an exemption under any rule of the Bureau of Employment Programs
28 or the Insurance Commission, the director may waive debarment under §5A-3-33f of this code:
29 *Provided*, That in no event may debarment be waived with respect to any vendor who has not
30 paid all current state obligations for at least the four most recent calendar quarters, excluding the
31 current calendar quarter, or with respect to any vendor who is in default on a repayment
32 agreement with an agency of the state;

33 ~~(6)~~ (3) The vendor is not in good standing with a licensing board, in that the vendor is not
34 licensed when licensure is required by the law of this state, or the vendor has been found to be
35 in violation of an applicable licensing law after notice, opportunity to be heard and other due
36 process required by law;

37 ~~(7)~~ (4) The vendor is an active and knowing participant in dividing or planning
38 procurements to circumvent the \$25,000 threshold requiring a sealed bid or otherwise ~~avoid~~
39 avoiding or defeating the use of a sealed bid; or

40 (5) The vendor is an active and knowing participant in any scheme, plan, or attempt to
41 circumvent the purchasing laws of this state;

42 (6) The vendor makes a false or deceptive statement concerning a material matter in
43 connection with obtaining or attempting to obtain a public contract or subcontract; or

44 ~~(8)~~ (7) Violation of the terms of a public contract or subcontract for:

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

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

50 (C) Use of substandard materials on one or more public contracts or defects in

51 construction in one or more public construction projects amounting to intentionally deficient or
52 grossly negligent performance, even if discovery of the defect is subsequent to acceptance of a
53 construction project and expiration of any warranty thereunder;

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

56 ~~(E)~~ (8) Any other cause of a serious and compelling nature amounting to knowing and
57 willful misconduct of the vendor that demonstrates a wanton indifference to the interests of the
58 public and that caused, or that had a substantial likelihood of causing, serious harm to the public.

59 (b) The wrongful conduct of any officer, partner, employee, agent, or other individual
60 associated with a vendor may be imputed to the vendor when the conduct occurred in connection
61 with the individual's performance of duties for, or on behalf of, the vendor or with the vendor's
62 knowledge, approval, or acquiescence. Evidence of the vendor's acceptance of the benefits
63 derived from the conduct establishes a rebuttable presumption of such knowledge, approval, or
64 acquiescence. Individuals acting with a vendor's knowledge, approval, or acquiescence may be
65 charged and debarred in the same manner as vendor businesses.

66 (c) The term "vendor" as defined in §5A-1-1 of this code includes subcontractors providing
67 the state or its subdivisions with commodities or services. In any proceeding for debarment, it
68 shall not be a defense that, at the time of the conduct alleged, the charged party was acting in the
69 role of a subcontractor or third party and was not a named vendor in any contract at issue.

§5A-3-33e. Debarment procedure.

1 ~~(a) The director shall obtain lists of vendors declared ineligible under federal laws and~~
2 ~~regulation and lists of vendors who are in default on state obligations, and shall initiate debarment~~
3 ~~proceedings with respect to such vendors, except when good cause is shown which includes~~
4 ~~evidence that the vendor has become responsible. When the director determines that one or more~~
5 ~~of the grounds for debarment exists with regard to a vendor or vendors, the director shall institute~~
6 ~~proceedings for debarment by written notice to the vendor or vendors. There are three methods~~

7 through which this determination may take place:

8 (1) If a federal agency declares that a vendor is ineligible to contract with, or provide goods
9 and services to that agency, the declaration or listing of the vendor shall constitute probable cause
10 for debarment and the director shall initiate debarment proceedings, except when good cause is
11 shown which includes evidence that the vendor has become responsible. In the case of federal
12 ineligibility restrictions applicable to state agencies, the director shall also notify the appropriate
13 agencies of any ineligibility determined under federal authority.

14 (2) The director may ~~also~~ independently investigate the actions of any vendor and shall
15 initiate debarment proceedings if, after investigation, he or she finds probable cause for
16 debarment for any ground set forth in section thirty-three d of this article.

17 (3) The director shall initiate debarment proceedings when any state agency requests
18 debarment of a vendor and the director finds that probable cause for debarment exists.

19 (b) The director shall notify the vendor by certified mail, return receipt requested, of the
20 following:

21 (1) The reasons for the proposed debarment in sufficient detail to put the vendor on notice
22 of the conduct or transactions upon which the proposed debarment is based;

23 (2) The causes relied upon for the proposed debarment;

24 (3) That within thirty working days after receipt of the notice, the vendor may submit in
25 writing information and argument in opposition to the proposed debarment;

26 (4) The procedures governing debarment decision-making; and

27 (5) The potential effect of the proposed debarment.

28 (c) In the event a vendor wishes to contest the debarment decision, the director shall
29 decide the matter in accordance with the provisions of §29A-5-1 *et seq.* of this code.

30 (d) In any debarment decision, the director shall make a specific finding, based on the
31 substantial record, whether the public interest requires that the debarment decision extend to all
32 commodities and services of the vendor, or whether the public interest allows the debarment

33 decision to be limited to specific commodities or services.

34 (e) In any debarment decision, the director shall specify the length of the debarment
35 period. The debarment period must be for the period of time that the director finds necessary and
36 proper to protect the public from an irresponsible vendor.

37 (f) Proof of grounds for debarment must be clear and convincing.

§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, or consent
3 to subcontract with a debarred vendor, or a related party, during the debarment period. For
4 purposes of this section, "related party" means a party, whether an individual, corporation,
5 partnership, association, limited liability company, or any other form of business association or
6 other entity, related to any vendor by blood, marriage, ownership, or contract through which the
7 party has a relationship of ownership or other interest with the vendor so that the party will actually,
8 or by effect, receive or control a portion of the benefit, profit, or other consideration from
9 performance of a vendor contract with the party receiving an amount that meets or exceeds five
10 percent of the total contract amount.

11 (b) The contracting officer may not exercise an option to renew or otherwise extend a
12 current contract with a debarred vendor, or a contract which is being performed in any part by a
13 debarred subcontractor, unless the director approves the action in writing, based on compelling
14 reasons for exercise of the option or extension.

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

19 (d) The director may extend the debarment to include an affiliate of the vendor upon proof
20 necessary to pierce the corporate veil at common law. The director shall follow the same

21 procedure, and afford the affiliate like notice, hearing and other rights, for extending the
22 debarment to the affiliate as provided for under §5A-3-33e of this code for the debarment of the
23 vendor.

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

26 (1) Newly discovered material evidence;

27 (2) Reversal of the conviction or judgment upon which debarment was based;

28 (3) Elimination of the causes for which the debarment was imposed; or

29 (4) Other good cause shown, including evidence that the vendor has become responsible.

30 (f) The director may extend the debarment period for an additional period if the director
31 determines that the extension is necessary to protect the interests of the state. Upon the expiration
32 of a debarment period, the director shall extend the debarment period for any vendor who has not
33 paid all current state obligations for at least the four most recent calendar quarters, exempting the
34 current calendar quarter, and for any vendor who is in default on a repayment agreement with an
35 agency of the state, until such time as the cause for the extended debarment is removed. If the
36 director extends the debarment period, the director shall follow the same procedures, and afford
37 the vendor like notice, hearing and other rights for extending the debarment, as provided for
38 debarment under §5A-3-33e of this code.

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

43 (h) Unless otherwise authorized through a written order or waiver from the director, a
44 vendor may not employ a person who has been debarred by order of the director during the period
45 of debarment specified in the order.

NOTE: The purpose of this bill is to specify additional grounds for the debarment of a vendor to the state or its subdivisions, to clarify that vendors may be subject to debarment for the actions of individuals acting on behalf of the vendors, to broaden the scope of persons and business entities that may be subject to debarment, and to further define the duties of the Director of Purchasing.

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