

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

House Bill 4190

BY DELEGATES HOWELL, HAMRICK, ZATEZALO, KELLY,
IAQUINTA, HOLLEN, ATKINSON, KESSINGER, JENNINGS
AND SYPOLT

[Introduced January 18, 2018; Referred
to the Committee on Government Organization then
the Judiciary.]

1 A BILL to amend and reenact §5A-3-33d, §5A-3-33e, and §5A-3-33f of the Code of West Virginia,
 2 1931, as amended, all relating to the debarment of vendors providing goods and services
 3 to the state and its subdivisions; providing for vendor debarment for fraudulent acts of an
 4 employee; specifying a period of debarment; and prohibiting contracts with vendors who
 5 employ debarred individuals.

Be it enacted by the Legislature of West Virginia:

ARTICLE 3. PURCHASING DIVISION.

§5A-3-33d. Grounds for debarment.

1 Grounds for debarment are:

2 (1) Conviction of an offense involving fraud or a felony offense in connection with obtaining
 3 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 or
 6 destruction of records, making false statements or receiving stolen property in connection with
 7 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 article two-c of chapter twenty-three of this
 12 code, and obligations under the West Virginia Unemployment Compensation Act and West
 13 Virginia state tax and revenue laws. For purposes of this subsection, a vendor is in default when,
 14 after due notice, the vendor fails to submit a required payment, interest thereon or penalty, and
 15 has not entered into a repayment agreement with the appropriate agency of the state or has
 16 entered into a repayment agreement but does not remain in compliance with its obligations under
 17 the repayment agreement. In the case of a vendor granted protection by order of a federal
 18 bankruptcy court or a vendor granted an exemption under any rule of the Bureau of Employment

19 Programs or the Insurance Commission, the director may waive debarment under section thirty-
20 three-f of this article: *Provided*, That in no event may debarment be waived with respect to any
21 vendor who has not paid all current state obligations for at least the four most recent calendar
22 quarters, excluding the current calendar quarter, or with respect to any vendor who is in default
23 on a repayment 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 avoid the use of a sealed
30 bid; or

31 (8) An employee of the vendor is convicted of an offense involving fraud against a state
32 or federal government agency committed when the employee was acting within the scope of his
33 or her employment with that vendor; or

34 ~~(8)~~ (9) Violation of the terms of a public contract or subcontract for:

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

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

40 (C) Use of substandard materials on one or more public contracts or defects in
41 construction in one or more public construction projects amounting to intentionally deficient or
42 grossly negligent performance, even if discovery of the defect is subsequent to acceptance of a

43 construction project and expiration of any warranty thereunder;

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

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

§5A-3-33e. Debarment procedure.

49 (a) The director shall obtain lists of vendors declared ineligible under federal laws and
50 regulation and lists of vendors who are in default on state obligations, and shall initiate debarment
51 proceedings with respect to such vendors, except when good cause is shown which includes
52 evidence that the vendor has become responsible.

53 (1) In the case of federal ineligibility restrictions applicable to state agencies, the director
54 shall also notify the appropriate agencies of any ineligibility determined under federal authority.

55 (2) The director may also initiate debarment proceedings if he or she finds probable cause
56 for debarment for any ground set forth in §5A-3-33d of this code.

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

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

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

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

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

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

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

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

70 (d) In any debarment decision, the director shall make a specific finding, based on the
71 substantial record, whether the public interest requires that the debarment decision extend to all
72 commodities and services of the vendor, or whether the public interest allows the debarment
73 decision to be limited to specific commodities or services.

74 (e) In any debarment decision, the director shall specify the length of the debarment
75 period. The debarment period must be for the period of time that the director finds necessary and
76 proper to protect the public from an irresponsible vendor: Provided, That if the vendor is debarred
77 for unlawful acts of an employee described in §5A-3-33d(8) of this code, the initial period of
78 debarment shall be two years.

79 (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 during the debarment period. The state and its subdivisions
4 may not solicit offers from, award contracts to, or consent to subcontract with any vendor who
5 employs a debarred individual while that individual is under debarment.

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

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

14 (d) The director may extend the debarment to include an affiliate of the vendor upon proof
15 necessary to pierce the corporate veil at common law. The director shall follow the same
16 procedure, and afford the affiliate like notice, hearing, and other rights, for extending the
17 debarment to the affiliate as provided for under §5A-3-33e of this code for the debarment of the
18 vendor.

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

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

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

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

NOTE: The purpose of this bill is to prevent the state from contracting with vendors who employ or have employed debarred individuals and to provide for the debarment of a vendor for the fraudulent acts of an employee.

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