

# WEST VIRGINIA LEGISLATURE

## 2018 REGULAR SESSION

**Introduced**

### **House Bill 4261**

**FISCAL  
NOTE**

BY MR. SPEAKER (MR. ARMSTEAD) AND DELEGATE MILEY

[BY REQUEST OF THE EXECUTIVE]

[Introduced January 23, 2018; Referred  
to the Committee on Government Organization then  
Finance.]

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, and §5A-3-33f of said code;  
3 to amend said code by adding thereto a new section, designated §5A-3-37a; to amend  
4 and reenact §5A-3-45 of said code; to amend said code by adding thereto a new section,  
5 designated §5A-3-61; to amend and reenact §5G-1-3 of said code; and to amend and  
6 reenact §6D-1-1 of said code, all relating generally to procurement by state agencies;  
7 establishing direct award procurement requirements; authorizing awarding contracts  
8 without competitive bidding if certain requirements are met; establishing prequalification  
9 agreements and their requirements; authorizing agency delegated bidding and its  
10 procedure; increasing certain cost limits from \$50,000 to \$1 million; establishing the  
11 concept of “reciprocal preference” for an in-state vendor over an out-of-state vendor from  
12 any state that gives or requires a preference to bidders from that state, and setting forth  
13 its requirements; modifying the value determination of certain motor vehicles that are to  
14 be sold; permitting spending units to use a standardization process to purchase  
15 commodities and setting forth its requirements; expanding the scope of those who may be  
16 debarred; permitting an architectural or engineering firm to be selected without bidding if  
17 certain conditions exist; permitting alternate funds to be substituted if the original fund no  
18 longer exists; increasing certain contract limits from \$100,000 to \$1 million; defining terms;  
19 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, as 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. Work of a recurring or ongoing nature that is not fully identified or known  
25 at any one time shall be considered a construction project and procured according to this article  
26 on an open-ended basis, if the work to be performed under the contract falls into a generally  
27 accepted single class or type, bidders are notified of the open-ended nature of the work in the  
28 solicitation, and the resulting contract is expressly limited to repair and maintenance of existing  
29 public improvements.

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. A vendor who has  
32 been debarred pursuant to §5A-3-33b through §5A-3-33f, inclusive, of this code may not bid on or  
33 be awarded a contract under this section. All bids submitted pursuant to this chapter shall include  
34 a valid bid bond or other surety as approved by the State of West Virginia or its subdivisions.

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

38 (e) Any solicitation of bids shall include no more than seven alternates. Alternates, if  
39 accepted, shall be accepted in the order in which they are listed on the bid form: *Provided*, That  
40 a public entity may accept an alternate out of the listed order if acceptance would not affect  
41 determination of the lowest qualified responsible bidder. Any unaccepted alternate contained  
42 within a bid shall expire one hundred fifty days after the date of the opening of bids for review.

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

45 (f) The apparent low bidder on a contract valued at more than \$250,000 for the  
46 construction, alteration, decoration, painting or improvement of a new or existing building or  
47 structure with a state spending unit shall submit a list of all subcontractors who will perform more

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

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

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

63 (2) The state spending unit refuses to approve a subcontractor in the original bid because  
64 the subcontractor is under a debarment pursuant to §5A-3-33d of this code or a suspension under  
65 §5A-3-32 of this code; or

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

68 (h) The contracting public entity may not award the contract to a bidder which fails to meet  
69 the minimum requirements set out in this section. As to a prospective low bidder which the  
70 contracting public entity determines not to have met one or more of the requirements of this  
71 section or other requirements as determined by the public entity in the written bid solicitation, prior  
72 to the time a contract award is made, the contracting public entity shall document in writing and  
73 in reasonable detail the basis for the determination and shall place the writing in the bid file. After

74 the award of a bid under this section, the bid file of the contracting public agency and all bids  
75 submitted in response to the bid solicitation shall be open and available for public inspection.

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

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

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

92 (l) All bids shall be open in accordance with the provisions of §5-22-2 of this code, except  
93 design-build projects which are governed by §5-22A-1 *et seq.* of this code and are exempt from  
94 these provisions.01

95 (m) Nothing in this section applies to:

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

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

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

105 (4) A situation where the state or subdivision thereof reaches an agreement with  
106 volunteers, or a volunteer group, in which the governmental body will provide construction or  
107 repair materials, architectural, engineering, technical or other professional services and the  
108 volunteers will provide the necessary labor without charge to, or liability upon, the governmental  
109 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. That criteria includes, but is not limited to, price and the total cost of  
8 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 is 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 ten 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. The competitive bid may, at the discretion of the director, be either a request  
29 for quotation or request for proposal.

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

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

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

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

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

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

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

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

41 (e) On an annual basis, the director shall report to the Governor and the Legislature on  
42 the spending units who have requested a direct award for their commodities or services, the type  
43 of commodity or service 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 master contract.

49 (4) The ~~direct ordering process~~ delegated prequalification bidding may not be utilized for  
50 any request for information technology anticipated to cost more than \$1 million, unless approved

51 in writing by the Director of Purchasing. The state may not issue a series of orders each  
52 anticipated to cost less than \$1 million to circumvent the monetary limitation in this subsection.  
53 The limit expressed herein applies to each delegated prequalification bid conducted under the  
54 prequalification agreement and not to total spending under the master contract.

55 (e) *Rule-making authority.* -- The Director of the Purchasing Division shall propose rules  
56 for legislative approval in accordance with the provisions of §29A-3-1 *et seq.* of this code to  
57 implement this section, including but not limited to provisions to establish procedures for the  
58 solicitation and authorization of ~~master contracts~~ prequalification agreements, ~~preapproval~~  
59 prequalification of vendors and implementation of ~~direct ordering~~ delegated prequalification  
60 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 or  
6 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 subsection, 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 a  
15 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 avoid the use of a sealed  
30 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 guilty plea, including pleading guilty to a  
48 lesser or related offense in exchange for some form of prosecutorial 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, or consent  
3 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, or 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 own, control, or influence, or may  
20 be 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-3-37a. Reciprocal Preference.**

1           (a) In any instance that a purchase of commodities or printing by the director or by a state  
2 spending unit is required under the provisions of this article to be made upon competitive bids,  
3 preference shall be given to resident vendors of West Virginia against a nonresident vendor from  
4 any state that gives or requires a preference to bidders from that state. The amount of the  
5 preference shall be equal to the amount of the preference given or required by the state of the  
6 nonresident vendor for that particular commodity or service.

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

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

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

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

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

16          (c) If any of the requirements or provisions set forth in this section jeopardizes the receipt  
17 of federal funds then such requirements or provisions 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;

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 subsection  
18 (g) of this section;

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 rule pursuant to the provisions of chapter  
30 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 four thousand 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 subsection (e) of this section, 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; (ii) the commodity's acquisition date; (iii) the  
80 commodity's acquisition cost; (iv) a description of the commodity; (v) whether the commodity is  
81 operable and, if so, how well it operates; (vi) how the agency will dispose of the remaining parts  
82 of the commodity; and (vii) who will cannibalize the commodity and how the person is qualified to  
83 remove and reinstall the parts.

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

85 the following information for the commodity or commodities that will receive the cannibalized part  
86 or parts: (i) The commodity identification number; (ii) the commodity's acquisition date; (iii) the  
87 commodity's acquisition cost; (iv) a description of the commodity; (v) whether the commodity is  
88 operable; (vi) whether the part restores the commodity to an operable condition; and (vii) the cost  
89 of the parts and labor to restore the commodity to an operable condition without cannibalization.

90 (C) If the agency intends to retain the cannibalized parts for future use, it shall provide  
91 information justifying its request.

92 (D) The procedures shall provide for the disposal of the residual components of  
93 cannibalized property.

94 (h)(1) The director of the Purchasing Division shall propose for promulgation legislative  
95 rules to establish procedures that allow state agencies to dispose of commodities in a landfill, or  
96 by other lawful means of waste disposal, if the value of the commodity is less than the benefit that  
97 may be realized by the state by disposing of the commodity using another method authorized in  
98 this section. The procedures shall specify circumstances where the state agency for surplus  
99 property shall inspect the condition of the commodity prior to authorizing the disposal and those  
100 circumstances when the inspection is not necessary prior to the authorization.

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

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

**§5A-3-61. Standardization.**

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

5 (b) Standardization is limited to commodities that would yield a savings of time and money  
6 if standardized; represent a core function of the spending unit's mission; 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 thirty calendar days. The request for  
30 information 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 fifteen  
51 calendar days. The request for information must notify the vendor community and any vendor  
52 who has 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 fifteen calendar days from  
57 the 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) Once a standard has been established, the Purchasing Division is authorized to solicit  
69 competitive bids on behalf of the spending unit in the form of a request for quotation for the  
70 standardized commodity.

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

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 increased cost or an extended interruption of essential  
12 services, the agency may, with the prior approval of the director of purchasing, select a firm on  
13 the basis of previous satisfactory performance and knowledge of the agency's facilities and  
14 needs: Provided, however, That on projects funded, wholly or in part, by School Building Authority  
15 moneys, in accordance with §18-9D-15 and §18-9D-16 of this code, two of said three firms shall  
16 have had offices within this state for a period of at least one year prior to submitting an expression  
17 of interest regarding a project funded by School Building Authority moneys. Interviews with each  
18 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 ~~\$400,000~~ \$1 million; *Provided,* That this shall include a series of related  
 4 contracts or orders in which the cumulative total exceeds ~~\$400,000~~ \$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 company  
7 or corporation. For purposes of this article, "business entity" does not include publicly traded  
8 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%~~ twenty-five 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 subdivision~~  
19 (3) shall not include persons or business entities performing legal services related to the  
20 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.

NOTE: The purpose of this bill is to modify the procurement by state agencies. The bill establishes direct award procurement requirements. The bill authorizes awarding contracts without competitive bidding if certain requirements are met. The bill establishes prequalification agreements and their requirements. The bill authorizes agency delegated bidding and its procedure. The bill increases certain cost limits from \$50,000 to \$1 million. The bill establishes the concept of "reciprocal preference" for an in-state vendor over an out-of-state vendor from any state that gives or requires a preference to bidders from that state, and sets forth its requirements. The bill modifies the value determination of certain

motor vehicles that are to be sold. The bill permits spending units to use a standardization process to purchase commodities and sets forth its requirements. The bill expands the scope of those who may be debarred. The bill permits an architectural or engineering firm to be selected without bidding if certain conditions exist. The bill increases certain contract limits from \$100,000 to \$1 million. The bill defines terms. The bill authorizes rulemaking.

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