

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Committee Substitute

for

Senate Bill 352

SENATORS WELD AND CLINE, *original sponsors*

[Originating in the Committee on Government
Organization; Reported on February 6, 2019]

1 A BILL to amend and reenact §15A-3-14 of the Code of West Virginia, 1931, as amended; and to
2 amend said code by adding thereto a new section, designated §15A-3-14a, all relating to
3 the Division of Corrections and Rehabilitation acquiring and disposing of services, goods,
4 and commodities; clarifying notice requirements; allowing the division to require surety;
5 expanding acceptable forms of surety; allowing the division to utilize best value
6 procurement; providing exception; establishing procedure for best value procurement;
7 allowing for direct award procurement; establishing procedure for direct award
8 procurement; allowing the division to run criminal background checks, financial
9 background checks, licensing background checks, and credit checks to determine
10 eligibility for award of contract; enumerating grounds upon which division shall disqualify
11 vendors from being awarded a contract or having contract renewed; creating special
12 revenue fund; and providing for methods of disposition of surplus property owned by the
13 division.

Be it enacted by the Legislature of West Virginia:

ARTICLE 3. DIVISION OF CORRECTIONS AND REHABILITATION.

§15A-3-14. Exempt from Purchasing Division; purchasing procedures.

1 (a) The provisions established in §5A-3-1 *et seq.* of this code do not apply to the division
2 or any institution under the control of the division.

3 (b) When the cost under any contract or agreement entered into by the division, other than
4 compensation for personal services, involves an expenditure of more than \$2,500 and less than
5 \$25,000, the division shall solicit at least three bids, if possible, from vendors and make a written
6 contract, or agreement, with the lowest responsible bidder. When the cost under any contract or
7 agreement entered into by the division, other than compensation for personal services, involves
8 an expenditure of \$25,000 or more, the division shall make a written contract with the lowest
9 responsive, responsible bidder after public notice is published, ~~as a Class II legal advertisement~~
10 ~~in compliance with the provisions of §59-3-1 et seq. of this code, the publication area for the~~

11 ~~publication to be the county or counties wherein the work is to be performed or which is affected~~
12 ~~by the contract~~ which notice shall state the general character of the work and general character
13 of the materials to be furnished, the place where plans and specifications therefor may be
14 examined, and the time and place of receiving bids. The notice may be published by an
15 advertising medium the division deems advisable. The division may also solicit sealed bids by
16 sending requests by mail or electronic transmission to prospective vendors. But a contract for
17 lease of a correctional facility is not subject to the foregoing requirements and the division may
18 enter into the contract for lease pursuant to negotiation upon the terms and conditions and for the
19 period as it finds to be reasonable and proper under the circumstances and in the best interests
20 of proper operation or efficient acquisition or construction of the projects. The division may reject
21 any and all bids. A bond with good and sufficient surety, approved by the division, ~~shall~~ may be
22 ~~required of all contractors in an amount equal to at least 50 percent of the contract price,~~
23 ~~conditioned upon faithful performance of the contract~~ by the division. The good and sufficient
24 surety may be in the form of a bid bond, performance bond, payment bond, maintenance bond,
25 labor and materials bond, or any other type of surety deemed necessary by the division.

26 (c) The division may use best value procurement to enter into a contract when the
27 commissioner determines in writing that it is advantageous to the state.

28 (1) A solicitation for bids under best value procurement shall be made in the same manner
29 as provided in this section.

30 (2) Best value procurement awards shall be based on criteria set forth in the solicitation
31 and information contained in the proposals submitted in response to the solicitation. Those criteria
32 include, but are not limited to, price and the total cost of acquiring, operating, maintaining, and
33 supporting a commodity or service over its projected lifetime, as well as technical criteria. The
34 technical criteria may include, but are not limited to, the evaluated technical merit of the bidder's
35 bid or proposal, the bidder's past performance, the degree to which a proposal exceeds other
36 proposals in technical merit, the utility of any novel or unrequested items in the proposal, and the

37 evaluated probability of performing the requirements stated in the solicitation on time, with high
38 quality, and in a manner that accomplishes the business objectives set forth in the solicitation.

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

42 (4) The division may not use best value procurement to enter into government construction
43 contracts, including, but not limited to, those set forth in §5-22-1 et seq. of this code.

44 (d)(1) The division may make a direct award of a contract without competitive bidding if:

45 (A) The commissioner shall make a written determination that the direct award is in the
46 best interest of the state;

47 (B) The division documents in writing that competition is not available because there is no
48 other source for the commodity or service, or that no other source would be willing or able to
49 replace the existing source without a detrimental effect on the division, the existence of a
50 detrimental effect being determined by the commissioner in his or her sole discretion;

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

54 (D) No other vendor expresses an interest in providing the commodity or service in
55 question.

56 (2) If a vendor expresses an interest in providing the commodity or service described in
57 the notice of intent to make a direct award, then the division must convert the direct award to a
58 competitive bid, unless the commissioner determines that the interest expressed by a vendor is
59 unreasonable. The competitive bid may, at the discretion of the commissioner, be either a request
60 for quotation or request for proposal.

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

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

63 (B) A time period by which delivery must be made or performance must occur;

64 (C) The price that will be paid for the commodity or service;

65 (D) Any limitations that a competing vendor would need to satisfy;

66 (E) An invitation to all vendors interested in providing the commodity or service to make
67 that interest known; and

68 (F) Contact information for the commissioner or his or her designee, and instructions to
69 submit a statement of interest to the commissioner or his or her designee.

70 (e) The commissioner, or division, shall not award a contract or renew a contract to any
71 vendor or prospective vendor when the vendor or prospective vendor, or a related party to the
72 vendor or prospective vendor, is a debtor and:

73 (1) The debt owed is an amount greater than \$1,000 in the aggregate; or

74 (2) The debtor is in employer default.

75 (f) The division has the authority to run criminal background checks, financial background
76 checks, a licensing check, and a credit check, and any vendor, or any and all principals in a
77 company or corporation, must submit to said checks to be eligible to be awarded a contract for
78 the division. The commissioner, or division, shall not award a contract to a vendor if any of the
79 following are present:

80 (1) Conviction of an offense involving fraud or a felony offense in connection with obtaining
81 or attempting to obtain a public contract or subcontract;

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

83 (3) Conviction of an offense involving embezzlement, theft, forgery, bribery, falsification or
84 destruction of records, making false statements, or receiving stolen property in connection with
85 the performance of a contract;

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

88 (5) Default on obligations owed to the state, including, but not limited to, obligations owed
89 to the Workers' Compensation Fund, as defined in §23-2C-1 et seq. of this code, and obligations
90 under the West Virginia Unemployment Compensation Act and West Virginia state tax and
91 revenue laws. For purposes of this subsection, a vendor is in default when, after due notice, the
92 vendor fails to submit a required payment, interest thereon, or penalty, and has not entered into
93 a repayment agreement with the appropriate agency of the state or has entered into a repayment
94 agreement but does not remain in compliance with its obligations under the repayment
95 agreement. In the case of a vendor granted protection by order of a federal bankruptcy court or a
96 vendor granted an exemption under any rule of the Bureau of Employment Programs or the
97 Insurance Commission, the commissioner may award a contract: *Provided*, That in no event may
98 the contract be awarded to any vendor who has not paid all current state obligations for at least
99 the four most recent calendar quarters, excluding the current calendar quarter, or with respect to
100 any vendor who is in default on a repayment agreement with an agency of the state;

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

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

108 (8) Violation of the terms of public contracts or subcontracts for:

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

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

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

118 (D) A repeated pattern or practice of failure to perform so serious and compelling as to
119 justify disqualification; or

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

123 (g) Unless the context clearly requires a different meaning, for the purposes of this section,
124 the term:

125 (1) "Debt" means any assessment, premium, penalty, fine, tax, or other amount of money
126 owed to the state or any of its political subdivisions because of a judgment, fine, permit violation,
127 license assessment, amounts owed to the Workers' Compensation Fund as defined in §23-2C-1
128 et seq. of this code, penalty, or other assessment or surcharge presently delinquent or due and
129 required to be paid to the state or any of its political subdivisions, including any interest or
130 additional penalties accrued thereon;

131 (2) "Debtor" means any individual, corporation, partnership, association, limited liability
132 company, or any other form of business association owing a debt to the state or any of its political
133 subdivisions, and includes any person or entity that is in employer default;

134 (3) "Employer default" means having an outstanding balance or liability to the Old Fund or
135 to the Uninsured Employers' Fund or being in policy default, as defined in §23-2C-2 of this code,
136 failure to maintain mandatory workers' compensation coverage, or failure to fully meet its
137 obligations as a workers' compensation self-insured employer. An employer is not in employer
138 default if it has entered into a repayment agreement with the Insurance Commissioner and
139 remains in compliance with the obligations under the repayment agreement;

140 (4) "Political subdivision" means any county commission; municipality; county board of
141 education; any instrumentality established by a county or municipality; any separate corporation
142 or instrumentality established by one or more counties or municipalities, as permitted by law; or
143 any public body charged by law with the performance of a government function and whose
144 jurisdiction is coextensive with one or more counties or municipalities; and

145 (5) "Related party" means a party, whether an individual, corporation, partnership,
146 association, limited liability company, or any other form of business association or other entity
147 whatever, related to any vendor by blood, marriage, ownership, or contract through which the
148 party has a relationship of ownership or other interest with the vendor so that the party will actually,
149 or by effect, receive or control a portion of the benefit, profit, or other consideration from
150 performance of a vendor contract with the party receiving an amount that meets or exceeds five
151 percent of the total contract amount.

152 (h) The prohibitions of subdivision (5), subsection (f) of this section do not apply where a
153 vendor has contested any tax administered pursuant to chapter 11 of this code, amount owed to
154 the Workers' Compensation Fund as defined in §23-2C-1 et seq. of this code, permit fee, or
155 environmental fee or assessment and the matter has not become final, or where the vendor has
156 entered into a payment plan or agreement and the vendor is not in default of any of the provisions
157 of such plan or agreement.

158 (i) The division may disqualify a vendor if award to the vendor would jeopardize the safe,
159 secure, and orderly operations of the division.

160 (j) All bids, contract proposals, or contracts with the state or any of its political subdivisions
161 submitted or approved under the provisions of this code shall include an affidavit that the vendor,
162 prospective vendor, or a related party to the vendor or prospective vendor is not in employer
163 default and does not owe any debt in an amount in excess of \$1,000 or, if a debt is owed, that the
164 provisions of subsection (h) of this section apply.

165 ~~(e)~~ (k) If the division has to make a purchase under emergency conditions, or an
166 emergency situation, ~~which~~ that jeopardizes the safe, secure, and orderly operations of the
167 division, as deemed by the ~~Commissioner~~ commissioner, and approved by the Secretary of the
168 Department of Military Affairs and Public Safety, §15A-3-14(a) and subsection (b) of this section
169 shall not apply.

170 ~~(d)~~ (l) The commissioner may enter into agreements with medical schools and institutions
171 of higher education in this state to develop standards for appropriate and innovative medical
172 programming and care for inmates: *Provided*, That the division will follow the procedures set forth
173 in subsection (b) of this section for delivery of regular and normal medical care within the facilities.

§15A-3-14a. Creation of special fund for surplus property revenue; disposal of surplus property.

1 (a) There is hereby created a special revenue fund in the State Treasury known as the
2 Division of Corrections and Rehabilitation Surplus Property Fund. Moneys from this fund shall be
3 used for facility maintenance and repair.

4 (b) The commissioner is hereby authorized to dispose of surplus state property owned by
5 the division in the following manner:

6 (1) Transferring the particular commodities or expendable commodities between
7 departments;

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

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

15 (4) Cannibalizing the commodities pursuant to procedures established under subsection
16 (g) of this section;

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

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

26 (7) Selling the commodities to the highest bidder by means of an internet auction site
27 approved by the division, as set forth in an emergency rule promulgated pursuant to the provisions
28 of §29A-3-15 of this code.

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

33 (d) The division may sell expendable, obsolete, or unused motor vehicles owned by the
34 division to an eligible organization, other than volunteer fire departments. In addition, the division
35 may sell expendable, obsolete, or unused motor vehicles owned by the division with a gross
36 weight in excess of 4,000 pounds to an eligible volunteer fire department. The division, with due
37 consideration given to current market prices, shall set the price to be paid by the receiving eligible
38 organization for motor vehicles sold pursuant to this provision: *Provided*, That the sale price of
39 any motor vehicle sold to an eligible organization may not be less than the “average loan” value,
40 as published in the most recent available eastern edition of the National Automobile Dealers

41 Association (NADA) Official Used Car Guide, if the value is available, unless the fair market value
42 of the vehicle is less than the NADA “average loan” value, in which case the vehicle may be sold
43 for less than the “average loan” value. The fair market value shall be based on a thorough
44 inspection of the vehicle by an employee of the division who shall consider the mileage of the
45 vehicle and the condition of the body, engine, and tires as indicators of its fair market value. If no
46 fair market value is available, the division shall set the price to be paid by the receiving eligible
47 organization with due consideration given to current market prices. The duly authorized
48 representative of the eligible organization, for whom the motor vehicle or other similar surplus
49 equipment is purchased or otherwise obtained, shall cause ownership and proper title to the motor
50 vehicle to be vested only in the official name of the authorized governing body for whom the
51 purchase or transfer was made. The ownership or title, or both, shall remain in the possession of
52 that governing body and be nontransferable for a period of not less than one year from the date
53 of the purchase or transfer. Resale or transfer of ownership of the motor vehicle or equipment
54 prior to an elapsed period of one year may be made only by reason of certified unserviceability.

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

59 (f) The proceeds of the sales or transfers shall be deposited in the State Treasury in the
60 special revenue account created in subsection (a) of this section.

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

63 (2)(A) If the division intends to cannibalize an asset, the division shall document: (i) The
64 commodity identification number; (ii) the commodity’s acquisition date; (iii) the commodity’s
65 acquisition cost; (iv) a description of the commodity; (v) whether the commodity is operable and,
66 if so, how well it operates; (vi) how the division will dispose of the remaining parts of the

67 commodity; and (vii) who will cannibalize the commodity and how the person is qualified to remove
68 and reinstall the parts.

69 (B) If the division has immediate plans to use the cannibalized parts, the division shall
70 document for the commodity or commodities that will receive the cannibalized part or parts: (i)
71 The commodity identification number; (ii) the commodity's acquisition date; (iii) the commodity's
72 acquisition cost; (iv) a description of the commodity; (v) whether the commodity is operable; (vi)
73 whether the part restores the commodity to an operable condition; and (vii) the cost of the parts
74 and labor to restore the commodity to an operable condition without cannibalization.

75 (C) If the division intends to retain the cannibalized parts for future use, it shall document
76 that said parts have been retained for future use.

77 (D) The division shall develop procedures for the disposal of the residual components of
78 cannibalized property.

79 (3) Whenever the division disposes of a commodity in a landfill, or by other lawful means
80 of waste disposal, the division shall notate this on the inventory for the commodity and shall
81 document the reasons why it was disposed of in such manner.

NOTE: The purpose of this bill is to clarify the purchasing authority for Division of Corrections and Rehabilitation, establish a new fund, and provide guidance in the disposal of surplus property.

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