

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2772

FISCAL
NOTE

BY DELEGATES MILLER, HARSHBARGER, TOMBLIN, KELLY,

D., LOVEJOY, CANESTRARO, MAYNARD AND LAVENDER-

BOWE

[Introduced January 30, 2019; Referred
to the Committee on Veterans' Affairs and Homeland
Security then Government Organization.]

1 A BILL to amend and reenact §15A-3-14 of the Code of West Virginia , 1931, as amended; and
 2 to amend said code by adding thereto a new section, designated §15A-3-14a, all relating
 3 to the Division of Corrections and Rehabilitations acquiring and disposal of services,
 4 goods and commodities; clarifying the notice requirements; allowing the division to require
 5 surety; allowing the division to utilize best value procurement; clarifying the manner under
 6 which the division is to cancel a contract; clarifying the surety requirement; providing a
 7 method to award a contract after cancellation; allowing for sole source procurement;
 8 disqualification of vendors to whom the division may award a contract; allowing the division
 9 to run criminal background checks, financial background checks, licensing background
 10 checks, and credit checks to ensure the ability to award a contract; creating a special
 11 revenue fund; and providing for methods of disposition of surplus property owned by the
 12 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 3 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 advertising
15 medium the division deems advisable. The division may also solicit sealed bids by sending
16 requests by mail or electronic transmission to prospective vendors. But a contract for lease of a
17 correctional facility is not subject to the foregoing requirements and the division may enter into
18 the contract for lease pursuant to negotiation upon the terms and conditions and for the period as
19 it finds to be reasonable and proper under the circumstances and in the best interests of proper
20 operation or efficient acquisition or construction of the projects. The division may reject any and
21 all bids. A bond with good and sufficient surety, approved by the division, ~~shall~~ may be required
22 ~~of all contractors in an amount equal to at least 50 percent of the contract price, conditioned upon~~
23 ~~faithful performance of the contract~~ by the division. The good and sufficient surety may be in the
24 form of a bid bond, performance bond, payment bond, maintenance bond, labor and materials
25 bond, or any other type of surety deemed necessary by the division.

26 (c)(1) The division may use best value procurement, including, but not limited to, requests
27 for proposal, or expression of interest, to enter into a contract when it is advantageous to the
28 state.

29 (A) A request for proposal must contain provisions for a two-part evaluation, the first part
30 being technical aspects of the proposal and the second part being cost to the state. The two
31 components must then be evaluated based upon the criteria contained in the request for proposal,
32 scored, and combined to form a total score. The highest scoring vendor will be awarded a
33 contract. No proposal may be evaluated using any criteria other than the criteria specified in the
34 request for proposal.

35 (B) Expressions of interest may only be used to procure architectural, engineering, or other
36 services contained within §5G-1-1 et seq. of this code.

37 (2) A solicitation for bids under best value procurement shall be made in the same manner
38 as provided in subdivision (b) of this article.

39 (3) Best value procurement awards shall be based on criteria set forth in the solicitation
40 including, but not limited to, price, the total cost of acquiring, operating, maintaining and
41 supporting a commodity or service over its projected lifetime, the evaluated technical merit of the
42 bidder's bid or proposal, the bidder's past performance, and the evaluated probability of
43 performing the requirements stated in the solicitation on time, with high quality, and in a manner
44 that accomplishes the business objectives set forth in the solicitation.

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

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

50 (d) The division may cancel a purchase or contract immediately under any one of the
51 following conditions including, but not limited to:

52 (1) The vendor agrees to the cancellation;

53 (2) The vendor has obtained the contract by fraud, collusion, conspiracy, or is in conflict
54 with any statutory or constitutional provision of the State of West Virginia;

55 (3) Failure to honor any contractual term or condition or to honor standard commercial
56 practices;

57 (4) The existence of an organizational conflict of interest is identified;

58 (5) Funds are not appropriated or an appropriation is discontinued by the Legislature for
59 the acquisition.

60 (6) Violation of any federal, state, or local law, regulation, or ordinance.

61 (e) The division may cancel a purchase or contract for any reason or no reason, upon
62 providing the vendor with 30 days notice of the cancellation.

63 (f) The division may award the cancelled contract to the next lowest responsible bidder (or
64 next highest scoring bidder if best value procurement) without a subsequent solicitation if the
65 following conditions are met:

66 (1) The next lowest responsible bidder (or next highest scoring bidder if best value
67 procurement) is able to perform at the price contained in its original bid submission; and

68 (2) The contract is an open-end contract, a one-time purchase contract, or a contract for
69 work which has not yet commenced.

70 (3) Award to the next lowest responsible bidder (or next highest scoring bidder if best value
71 procurement) will not be an option if the vendor's failure has in any way increased or significantly
72 changed the scope of the original contract. The vendor failing to honor contractual and legal
73 obligations is responsible for any increase in cost the state incurs as a result of the reaward.

74 (g) The division may make a purchase of commodities, services or printing directly from a
75 vendor as a sole source procurement without competitive bidding, if:

76 (1) The commodities, services, or printing can only be purchased from one source. The
77 commissioner may use sole source procurement if he or she puts forth in writing the basis for the
78 sole source procurement and the specific efforts made to determine the availability of other
79 sources.

80 (2) Sole source items shall include, but not be limited to:

81 (A) Advertising: This exemption includes any advertisement placed directly with
82 newspapers, trade magazines, Internet publications, social media or billboards. This exemption
83 includes broadcast television and radio advertisements placed directly with the broadcaster or
84 publisher. Additionally, this exemption includes participation fees for trade shows, conferences or
85 conventions. This exemption does not include any indirect placement, promotional items or
86 advertising consultant services.

87 (B) Artwork and Historical Items: This exemption includes the purchase of and service to
88 artwork and historical items, i.e. restoring governors' portraits, refurbishing chandeliers, etc.

89 (C) Attorneys and Law Firms: This exemption includes hiring attorneys and law firms in an
90 official attorney-client capacity. Nothing in this exemption eliminates the approval or oversight
91 residing within the Attorney General's office.

92 (D) Governmental Agencies: This exemption only includes: (i) Contracts between
93 governmental agencies and spending units when a state or federal law requires the commodity
94 or service be obtained from the governmental agency (any contract or purchase order issued
95 must cite the law and maintain a copy on file); and (ii) regulatory fees legally imposed by
96 government agencies.

97 (E) Entertainers: This exemption includes individuals and/or groups contracted at the
98 request of the state to entertain or to assist in the production of entertainment.

99 (F) Hospitality: This exemption includes expenses for food, beverages, facility rental and
100 entertainment relating to conducting state business.

101 (G) Media License Fees: This exemption includes program license fees for radio or
102 television.

103 (H) Medical Fees: Included in this exemption are fees for medical services (behavioral and
104 physical) from individual doctors, dentists, clinics, hospitals, laboratory testing facilities,
105 audiologists, county medical examiners, physical and occupational therapists, behavioral
106 counseling and evaluations, etc. for individual patients, inmates, students and clients where the
107 state is responsible for payment for this one-time service. This exemption also includes programs
108 designed for low income / uninsured patient care on an individual basis provided that the program
109 is open to all service providers. Also, included in this exemption is body transportation for corpses
110 and indigent burial expenses This exemption does not include inmate health care management,
111 hospital management, consulting services or agreements to provide services for groups of
112 patients, inmates, students or clients, etc. for state agencies.

113 (I) Postage: This exemption includes stamps and other noncompetitive mailing services
114 from the United States Postal Service, but this does not include services available from statewide
115 contracts.

116 (J) Professional Association Dues: This exemption includes membership fees or
117 association dues for professional associations that perform a licensing, certification or
118 accreditation function for state employees or agencies (i.e., West Virginia State Bar, West Virginia
119 Board of Accountancy, etc.).

120 (K) Resale Items: This exemption includes items that are acquired specifically for resale
121 by the state agency to the general public that should be selected on the basis of quality and
122 delivery constraints due to customer demand.

123 (L) Investigative Services: Subject Matter Experts and Witnesses for Administrative
124 Hearing and Legal Proceedings: This exemption includes obtaining investigative services and the
125 services of a subject matter expert or witness. This exemption does not include agency consulting
126 services or former employees retained by their agency or hired by another agency.

127 (M) Subscriptions and publications: This exemption includes newspapers, textbooks and
128 publications – electronic and hard copy – purchased directly from the publisher.

129 (N) Training Activities: This exemption includes lecturers, honorariums, copyrighted test
130 and training materials, test monitors/examination proctors, registration fees, etc., where
131 competition is not available.

132 (O) Utilities Regulated by the Public Service Commission: This exemption includes natural
133 gas, water, sewage, electric, telephone, garbage, cable television service, connection fees, trash
134 hauling and dumpster rental [if only one PSC approved hauler is in the area]. This exemption
135 does not include propane gas, coal and satellite television, all of which must be competitively bid.

136 (P) Court Ordered Payments: This exemption includes court order payment. A copy of the
137 court order must be maintained in the agency file, unless sealed and restricted by the respective
138 judge. If the order is sealed and restricted, an explanation must be maintained in the agency file

139 referencing the court order. Court ordered payments are exempt from the vendor registration
140 requirement.

141 (Q) Intellectual Property: This exemption includes purchase of licenses to intellectual
142 property, such as copyrighted or trademarked material, for creative use in the development of
143 products, promotions or advertising when the license can be obtained from only one source. This
144 exemption in no way applies to software.

145 (R) Vaccines: This exemption includes vaccines purchased through contracts issued by
146 the Centers for Disease Control (CDC).

147 (S) Transcripts from Court Reporters Employed by Court, Judge or Opposing Counsel:
148 This exemption includes transcripts procured from court reporters who are employed by the court,
149 judge or opposing counsel.

150 (T) Commodities or services for a shared facility arrangement with the U.S. Government:
151 Effective July 1, 2018, commodities or services contracted by the U.S. Government and provided
152 to a state agency when those commodities or services are: (i) Offered as part of a shared facility
153 arrangement; and (ii) those commodities or services for the state cannot be easily separated from
154 those for the U.S. Government.

155 (U) Any other item, commodity, or service not available from another source.

156 (h) The division has the authority to run criminal background checks, financial background
157 checks, a licensing check, and a credit check, and any vendor, or any and all principals in a
158 company or corporation, must submit to said checks, to be eligible to be awarded a contract for
159 the division. The commissioner, or division, shall, in no instance, award a contract to a vendor if
160 any of the following are present:

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

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

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

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

169 (5) Default on obligations owed to the state, including, but not limited to, obligations owed
170 to the Workers' Compensation funds, as defined in §23-2C-1 et seq., of this code, and obligations
171 under the West Virginia Unemployment Compensation Act and West Virginia State Tax and
172 Revenue laws. For purposes of this subsection, a vendor is in default when, after due notice, the
173 vendor fails to submit a required payment, interest thereon or penalty, and has not entered into a
174 repayment agreement with the appropriate agency of the state or has entered into a repayment
175 agreement but does not remain in compliance with its obligations under the repayment
176 agreement. In the case of a vendor granted protection by order of a federal bankruptcy court or a
177 vendor granted an exemption under any rule of the Bureau of Employment Programs or the
178 Insurance Commission, the director may waive debarment under §5A-3-33f of this code:
179 Provided, That in no event may debarment be waived with respect to any vendor who has not
180 paid all current state obligations for at least the four most recent calendar quarters, excluding the
181 current calendar quarter, or with respect to any vendor who is in default on a repayment
182 agreement with an agency of the state;

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

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

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

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

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

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

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

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

205 (i). Unless the context clearly requires a different meaning, for the purposes of this section,
206 the terms:

207 (1) "Deb" means any assessment, premium, penalty, fine, tax or other amount of money
208 owed to the state or any of its political subdivisions because of a judgment, fine, permit violation,
209 license assessment, amounts owed to the Workers' Compensation Funds as defined in §23-2C-
210 1 et seq. of this code, penalty or other assessment or surcharge presently delinquent or due and
211 required to be paid to the state or any of its political subdivisions, including any interest or
212 additional penalties accrued thereon.

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

216 (3) "Employer default" means having an outstanding balance or liability to the old fund or
217 to the uninsured employers' fund or being in policy default, as defined in §23-2C-2 of this code,
218 failure to maintain mandatory workers' compensation coverage, or failure to fully meet its
219 obligations as a workers' compensation self-insured employer. An employer is not in employer
220 default if it has entered into a repayment agreement with the Insurance Commissioner and
221 remains in compliance with the obligations under the repayment agreement.

222 (4) "Political subdivision" means any county commission; municipality; county board of
223 education; any instrumentality established by a county or municipality; any separate corporation
224 or instrumentality established by one or more counties or municipalities, as permitted by law; or
225 any public body charged by law with the performance of a government function and whose
226 jurisdiction is coextensive with one or more counties or municipalities.

227 (5) "Related party" means a party, whether an individual, corporation, partnership,
228 association, limited liability company or any other form or business association or other entity
229 whatsoever, related to any vendor by blood, marriage, ownership or contract through which the
230 party has a relationship of ownership or other interest with the vendor so that the party will actually
231 or by effect receive or control a portion of the benefit, profit or other consideration from
232 performance of a vendor contract with the party receiving an amount that meets or exceeds five
233 percent of the total contract amount.

234 (j) (1) The commissioner, or division, may not award a contract or renew a contract to any
235 vendor or prospective vendor when the vendor or prospective vendor or a related party to the
236 vendor or prospective vendor is a debtor and:

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

238 (B) The debtor is in employer default.

239 (2) The prohibition of §5A-3-14(h)(5) of this code does not apply where a vendor has
240 contested any tax administered pursuant to chapter 11 of this code, amount owed to the Workers'
241 Compensation funds as defined in §23-2C-1 et seq. of this code, permit fee or environmental fee

242 or assessment and the matter has not become final or where the vendor has entered into a
243 payment plan or agreement and the vendor is not in default of any of the provisions of such plan
244 or agreement.

245 (k) The division may disqualify a vendor if award to the vendor would jeopardize the safe,
246 secure, and orderly operations of the division.

247 (l) All bids, contract proposals or contracts with the state or any of its political subdivisions
248 submitted or approved under the provisions of this code shall include an affidavit that the vendor,
249 prospective vendor or a related party to the vendor or prospective vendor is not in employer
250 default and does not owe any debt in an amount in excess of \$1,000 or, if a debt is owed, that the
251 provisions of subsection (c) of this section apply.

252 ~~(e)(m)~~ If the division has to make a purchase under emergency conditions, or an
253 emergency situation, which jeopardizes the safe, secure, and orderly operations of the division,
254 as deemed by the commissioner, and approved by the secretary, §15A-3-14(a)(b) and §15A-3-
255 14(b)(c) of this code shall not apply.

256 ~~(d)(n)~~ The commissioner may enter into agreements with medical schools and institutions
257 of higher education in this state to develop standards for appropriate and innovative medical
258 programming and care for inmates: *Provided*, That the division will follow the procedures set forth
259 in §15A-3-14(b) of this code 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 in the
5 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 agency
23 considers advisable. The agency 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 director, as set forth in an emergency rule pursuant to the provisions of chapter
28 29A 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 agency shall set the price to be paid by the receiving eligible
32 organization, with due consideration given to current market prices.

33 (d) The agency may sell expendable, obsolete or unused motor vehicles owned by the
34 agency to an eligible organization, other than volunteer fire departments. In addition, the agency
35 may sell expendable, obsolete or unused motor vehicles owned by the state with a gross weight
36 in excess of 4,000 pounds to an eligible volunteer fire department. The agency, 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 Dealer's
41 Association (N.A.D.A.) Official Used Car Guide, if the value is available, unless the fair market
42 value of the vehicle is less than the N.A.D.A. "average loan" value, in which case the vehicle may
43 be sold 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 agency 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 agency 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 agency 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 which 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 specified 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 it has 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 as such.

NOTE: The purpose of this bill is to clarify the purchasing authority for Division of Corrections and Rehabilitation, establish 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.