

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 2521

By Delegates Criss and Householder

[Introduced January 12, 2023; Referred to the
Committee on Economic Development and Tourism
then Finance]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
 2 designated §5A-3-64, relating to establishing the Public/Private Small Business
 3 Enhancement Program to encourage small business development and growth.

Be it enacted by the Legislature of West Virginia:

ARTICLE 3. PURCHASING DIVISION.

§5A-3-64. Public/private small business enhancement program.

1 (a) The Public/Private Small Business Enhancement Program is hereby established and is
 2 to be administered as a program within the Purchasing Division, the State Auditor, and all other
 3 applicable state agencies. The program is established to encourage small business development
 4 and growth.

5 (b) As used in this section the following terms have the following meanings:

6 "Affiliated" means the relationship in which a person directly, or indirectly through one or
 7 more intermediaries, controls, is controlled by or is under common control with another person.

8 "Awarding agency" means a state agency with the power to contract for goods or services
 9 who is participating in the program.

10 "Control" means the power to direct or cause the direction of the management and policies
 11 of any person, whether through the ownership of voting securities, by contract or through any other
 12 direct or indirect means. Control shall be presumed to exist if any person, directly or indirectly,
 13 owns, controls, holds with the power to vote, or holds proxies representing, 20 percent or more of
 14 any voting securities of another person.

15 "Independent" means the viability of the business does not depend upon another person or
 16 entity, as determined by an analysis of the small business's relationship with any other persons or
 17 entities regarding personnel, facilities, equipment, resources, or financial support.

18 "Person" means any individual, corporation, limited liability company, partnership,
 19 association, joint stock company, business trust, unincorporated organization, or other entity.

20 "Small business" means an independent business, owned, or operated by one or more

21 persons who are citizens of the United States or noncitizens who are in full compliance with United
22 States immigration law, which, together with affiliates, has 250 or fewer employees, or average
23 annual gross receipts of \$10 million or less averaged over the previous three years.

24 "State agency" means any branch, department, division, authority, board, instrumentality,
25 institution, agency, spending unit, or other unit of state government with the power to contract for
26 goods or services. "State agency" does not include any local government body such as a county or
27 municipality.

28 (c) Notwithstanding any provisions of this chapter to the contrary and except as may
29 otherwise be set forth in this section, the head of each state agency shall set aside in each fiscal
30 year after July 1, 2024, for awards to small businesses, based on competitive bidding procedures,
31 at least 25 percent of the total value of all contracts let by the head of the state agency in each
32 fiscal year. All contracts below \$150,000 in total consideration shall be exclusively set aside for
33 small businesses if at least one small business competitively bids and is able to perform at a price
34 at or below fair market value. All contracts between \$150,000 and \$700,000 in total consideration
35 shall be set aside for small businesses only if two or more small businesses competitively bid and
36 are able to perform at or below fair market value.

37 (d) In calculating the percentage of contracts to be set aside under subsection (c) of this
38 section, the state agency shall exclude any contract that may not be set aside due to a conflict with
39 a federal law or regulation.

40 (e) The head of any awarding agency may, in lieu of setting aside any contract or portions
41 thereof, require any person, business, or any other entity authorized by the agency to award
42 contracts, to set aside a portion of any contract for subcontractors who are eligible for set-aside
43 contracts under this section. Nothing in this subsection may be construed to diminish the total
44 value of contracts which are required to be set aside by any awarding agency pursuant to this
45 section.

46 (f) The awarding agency shall require that a small business awarded a contract or a portion

47 of a contract under this section perform not less than 30 percent of the work with the workforce of
48 the small business and shall require that not less than 50 percent of the work be performed by
49 small businesses eligible for awards under this section. A small business awarded a contract or a
50 portion of a contract under this section shall not subcontract with any person with whom the small
51 business is affiliated. No person who is affiliated with another person may be eligible for awards
52 under this section if both affiliated persons considered together would not qualify as a small
53 business under subsection (a) of this section. The awarding agency shall require that a small
54 business awarded a contract pursuant to this section submit, in writing, an explanation of any
55 subcontract to the contract that is entered into with any person that is not eligible for the award of a
56 contract pursuant to this section, prior to the performance of any work pursuant to the subcontract.

57 (g) The awarding agency, Purchasing Division, and State Auditor may conduct audits of
58 the financial, corporate, and business records and conduct an investigation of any small business
59 which applies for or is awarded a set-aside contract for the purpose of determining eligibility for
60 awards or compliance with the requirements established under this section.

61 (h) The provisions of this section may not apply to any state agency for which the total
62 value of all contracts or portions of contracts of the types enumerated in subsection (c) of this
63 section is anticipated to be \$100,00 annually or less.

64 (i) Whenever the awarding agency or Purchasing Division has reason to believe that any
65 contractor or subcontractor awarded a state set-aside contract has willfully violated any provision
66 of this section, the awarding agency or Purchasing Division shall send a notice to that contractor or
67 subcontractor by certified mail, return receipt requested. The notice shall include: (1) A reference
68 to the provision alleged to be violated; (2) a short and plain statement of the matter asserted; (3)
69 the maximum civil penalty that may be imposed for the violation; and (4) the time and place for the
70 hearing. The hearing shall be fixed for a date not earlier than 14 days after the notice is mailed.
71 The awarding agency or Purchasing Division shall send a copy of the notice to the State Auditor.

72 (j) The State Auditor shall hold a hearing on the violation asserted unless the contractor or

73 subcontractor fails to appear. If, after the hearing, the State Auditor finds that the contractor or
74 subcontractor has willfully violated any provision of this section, all set-aside contract payments to
75 the contractor or subcontractor shall be immediately suspended and the State Auditor may order
76 that a civil penalty not exceeding \$5,000 per violation be imposed on the contractor or
77 subcontractor. If the contractor or subcontractor fails to appear for the hearing, the State Auditor
78 may, as the facts require, order that a civil penalty not exceeding \$5,000 per violation be imposed
79 on the contractor or subcontractor. The State Auditor shall send a copy of any order issued
80 pursuant to this subsection by certified mail, return receipt requested, to the contractor or
81 subcontractor named in the order. The State Auditor may cause proceedings to be instituted for
82 the enforcement of any order imposing a civil penalty issued under this subsection.

83 (k) On or before April 1, 2024, the Purchasing Division shall establish a process for
84 certification of small businesses as eligible for set-aside contracts. Each certification shall be valid
85 for a period not to exceed three years, unless the Purchasing Division determines that an
86 extension of the certification is warranted, but any such extension may not exceed a period of one
87 year from the certification's original expiration date. The Purchasing Division shall maintain on its
88 website an updated directory of small businesses certified under this section. Each certified small
89 business shall file with the division a yearly statement affirming that the business still meets the
90 certification qualifications.

91 (l) The Purchasing Division may deny an application for the initial issuance or renewal of
92 the certification after issuing a written decision to the applicant setting forth the basis for the denial.
93 The Purchasing Division may revoke the certification for cause after notice and an opportunity for
94 a hearing. Any person aggrieved by a decision to deny the issuance or renewal of or to revoke the
95 certification may appeal the decision to the Circuit Court of Kanawha County or any other circuit
96 court where the small business maintains a place of business within the state.

97 (m) Whenever the Purchasing Division, State Auditor, or awarding agency has reason to
98 believe that a small business that has applied for or received certification under this section has

99 included a materially false statement in his or her application, the State Auditor may impose a
100 penalty not exceeding \$25,000 after notice and a hearing. The notice shall include: (1) A reference
101 to the statement or statements contained in the application alleged to be false; (2) the maximum
102 civil penalty that may be imposed for the misrepresentation; and (3) the time and place of the
103 hearing. The hearing shall be fixed for a date not later than 14 days from the date the notice is sent.

104 (n) The State Auditor shall hold a hearing prior to the revocation or denial or the imposition
105 of a penalty, unless the contractor or subcontractor fails to appear. If, after the hearing, the State
106 Auditor finds that the contractor or subcontractor has willfully included a materially false statement
107 in his or her application for certification under this subsection, the Purchasing Division shall revoke
108 or deny the certification and the State Auditor may order that a civil penalty not exceeding \$5,000
109 be imposed on the contractor or subcontractor. If the contractor or subcontractor fails to appear for
110 the hearing, the State Auditor may, as the facts require, revoke or deny the certification and order
111 that a civil penalty not exceeding \$5,000 be imposed on the contractor or subcontractor. The State
112 Auditor shall send a copy of any order issued pursuant to this subsection to the contractor or
113 subcontractor named in the order. The State Auditor may cause proceedings to be instituted for
114 the enforcement of any order imposing a civil penalty issued under this subsection.

115 (o) On or before September 1 of each year, each awarding agency setting aside contractor
116 portions of contracts under this section shall prepare a report establishing Public/Private Small
117 Business Enhancement Program goals for the next fiscal year beginning July 1. Each such report
118 shall be submitted to the Purchasing Division and published on the agency's website.

119 (p) On or before September 1 of each year and on a yearly basis thereafter, each awarding
120 agency setting aside contracts or portions of contracts under subdivision (1) of subsection (c) of
121 this section shall prepare a status report on the implementation and results of its Public/Private
122 Small Business Enhancement Program during the prior fiscal year. Each report shall be submitted
123 to the Purchasing Division on forms specified by the division and containing at a minimum: (1)
124 Details concerning the financial difference between small business bids awarded, small business

125 bids received, and all other bids received; (2) details concerning the business locations of the
126 small business bids awarded, small business bids received, and all other bids received; (3) details
127 concerning the number of employees working both within and out of this state for the small
128 business awarded contracts under this section; (4) details concerning any a low bid not taken for
129 businesses which maintain a place of business in West Virginia; (5) and any other required by the
130 division.

131 The Purchasing Division shall prepare a summary report covering each fiscal year and
132 submit the same to the Joint Committee on Government and Finance on or before January 1 of
133 each year describing the resultant costs of the program to the state government and the effect of
134 the program upon small businesses.

135 (q) The Department of Administration and State Auditor shall propose rules, for legislative
136 approval pursuant to §29A-3-1 et seq. of this code to implement Public/Private Small Business
137 Enhancement Program.

138 (r) This section shall expire and have no further force or effect on July 1, 2027: *Provided,*
139 That certification applications filed before this date and binding contracts enforceable upon this
140 date shall remain valid and in full force and effect beyond July 1, 2027, until the certification
141 applications and contracts are fulfilled, breached, or otherwise expire under their terms.

NOTE: The purpose of this bill is to establish the Public/Private Small Business Enhancement Program to encourage small business development and growth.

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