

# **WEST VIRGINIA LEGISLATURE**

## **2024 REGULAR SESSION**

**Introduced**

### **Senate Bill 854**

By Senator Oliverio

[Introduced February 19, 2024; referred  
to the Committee on Government Organization; and  
then to the Committee on 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; providing  
 4 definitions; providing for rule-making authority; providing for exemptions for construction;  
 5 and providing for a sunset date.

*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 "Contract" or "contracts" means an agreement between a state agency and a vendor  
 11 relating to the procurement of commodities or services, or both. Government construction  
 12 contracts solicited pursuant to §5-22-1 et seq. are expressly exempted from the provisions of this  
 13 section.

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

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

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

24 "Small business" means an independent business, owned, or operated by one or more  
25 persons who are citizens of the United States or noncitizens who are in full compliance with United  
26 States immigration law, which, together with affiliates, has 250 or fewer employees, or average  
27 annual gross receipts of \$10 million or less averaged over the previous three years.

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

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

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

44 (e) The head of any awarding agency may, in lieu of setting aside any contract or portions

45 thereof, require any person, business, or any other entity authorized by the agency to award  
46 contracts, to set aside a portion of any contract for subcontractors who are eligible for set-aside  
47 contracts under this section. Nothing in this subsection may be construed to diminish the total  
48 value of contracts which are required to be set aside by any awarding agency pursuant to this  
49 section.

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

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

65 (h) The provisions of this section may not apply to any state agency for which the total  
66 value of all contracts or portions of contracts of the types enumerated in subsection (c) of this  
67 section is anticipated to be \$100,000 annually or less.

68 (i) Whenever the awarding agency or Purchasing Division has reason to believe that any  
69 contractor or subcontractor awarded a state set-aside contract has willfully violated any provision  
70 of this section, the awarding agency or Purchasing Division shall send a notice to that contractor or

71 subcontractor by certified mail, return receipt requested. The notice shall include: (1) A reference  
72 to the provision alleged to be violated; (2) a short and plain statement of the matter asserted; (3)  
73 the maximum civil penalty that may be imposed for the violation; and (4) the time and place for the  
74 hearing. The hearing shall be fixed for a date not earlier than 14 days after the notice is mailed.  
75 The awarding agency or Purchasing Division shall send a copy of the notice to the State Auditor.

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

84 (k) The Purchasing Division may deny an application for the initial issuance or renewal of  
85 the certification after issuing a written decision to the applicant setting forth the basis for the denial.  
86 The Purchasing Division may revoke the certification for cause after notice and an opportunity for  
87 a hearing. Any person aggrieved by a decision to deny the issuance or renewal of or to revoke the  
88 certification may appeal the decision to the Circuit Court of Kanawha County or any other circuit  
89 court where the small business maintains a place of business within the state.

90 (l) Whenever the Purchasing Division, State Auditor, or awarding agency has reason to  
91 believe that a small business that has applied for or received certification under this section has  
92 included a materially false statement in his or her application, the State Auditor may impose a  
93 penalty not exceeding \$25,000 after notice and a hearing. The notice shall include: (1) A reference  
94 to the statement or statements contained in the application alleged to be false; (2) the maximum  
95 civil penalty that may be imposed for the misrepresentation; and (3) the time and place of the  
96 hearing. The hearing shall be fixed for a date not later than 14 days from the date the notice is sent.

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

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

112 (o) On or before September 1 of each year and on a yearly basis thereafter, each awarding  
113 agency setting aside contracts or portions of contracts under subdivision (1) of subsection (c) of  
114 this section shall prepare a status report on the implementation and results of its Public/Private  
115 Small Business Enhancement Program during the prior fiscal year. Each report shall be submitted  
116 to the Purchasing Division on forms specified by the division and containing at a minimum: (1)  
117 Details concerning the financial difference between small business bids awarded, small business  
118 bids received, and all other bids received; (2) details concerning the business locations of the  
119 small business bids awarded, small business bids received, and all other bids received; (3) details  
120 concerning the number of employees working both within and out of this state for the small  
121 business awarded contracts under this section; (4) details concerning any low bid not taken for  
122 businesses which maintain a place of business in West Virginia; (5) and any other required by the

123 division.

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

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

131 (q) This section shall expire and have no further force or effect on July 1, 2027: *Provided,*  
132 That certification applications filed before this date and binding contracts enforceable upon this  
133 date shall remain valid and in full force and effect beyond July 1, 2027, until the certification  
134 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.