

Annual Performance Audit

Institutions of Higher Education

Food Service Contracts that Require the Food Service Vendor to Make Property Investments in the Institution's Dining Service Facilities Entail Risks for the Institution and the State

When West Liberty State College Allowed its Food Service Vendor to be Responsible for Renovating the Campus Dining Facilities, Some Provisions in State Code Were Not Followed



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Aaron Allred
Legislative Auditor

John Sylvia
Director

Michael Midkiff
Research Manager

Gail Higgins, MPA
Acting Senior Research Analyst

**Performance Evaluation and Research
Division**

***Building 1, Room W-314
State Capitol Complex
Charleston, West Virginia 25305
(304) 347-4890***

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Executive Summary

Issue 1: Food Service Contracts that Require the Food Service Vendor to Make Property Investments in the Institution's Dining Service Facilities Entail Risks for the Institution and the State.

As a result of the property investment requirement in food service contracts, four institutions have received over \$1.4 million in property investments on their campuses.

Although such a requirement is not a typical purchasing practice, these contracts do not violate the state code or the state constitution if they are specified properly and reviewed and approved by the Attorney General's Office.

The State Treasurer's Office and the legislative finance committees are not aware of these financial arrangements because such obligations are not reported by the institutions in the annual debt reports.

The Legislative Auditor reviewed the food service contracting process at four residential institutions that required a property investment in addition to the provision of food service. They are Concord University, Glenville State College, West Liberty State College and West Virginia State University. As a result of the property investment requirement in food service contracts, four institutions have received over \$1.4 million in property investments on their campuses. Although such a requirement is not a typical purchasing practice, these contracts do not violate the state code or the state constitution if they are specified properly and reviewed and approved by the Attorney General's Office. Three of the four institutions submitted contracts for approval and two of the contracts required revisions to conform to state requirements. The fourth contract, developed in 2003 by West Virginia State University, was not reviewed by the Attorney General's Office and is void of any legal force.

Property investments have several risks associated with them. Such risks include possible inflated charges for renovations or equipment if the vendor is required to make the renovations or purchase the equipment. Overpayment to the vendor may result if the institution repays the vendor through a surcharge on meal prices and fails to monitor the amounts repaid. The institution may be vulnerable to making concessions to the vendor, accepting poor service or agreeing to unreasonable demands in order to avoid early termination of the contract with the resulting repayment of a lump sum property investment. Finally, the selection process for the food service vendor may be unduly influenced by the amount of the property investment, especially if the amount is revealed to the evaluation committee before the committee conducts the technical evaluation.

A final risk is the possible sudden financial obligation to repay the property investment in a lump sum if the contract is terminated prior to the specified date when the property investment becomes owned by the institution. The State Treasurer's Office and the legislative finance committees are not aware of these financial arrangements because such obligations are not reported by the institutions in the annual debt reports. The amounts are under \$1 million and do not require approval or other involvement by the Higher Education Policy Commission.

Issue 2: When West Liberty State College Allowed its Food Service Vendor to be Responsible for Renovating the Campus Dining Facilities, Some Provisions in State Code Were Not Followed.

West Liberty State College did not take the necessary steps to ensure that state requirements in purchasing, architectural selection and payment of prevailing wage rates were followed when it made the food service vendor responsible for a dining facility renovation project that constituted the vendor's property investment.

West Liberty State College did not take the necessary steps to ensure that state requirements in purchasing, architectural selection and payment of prevailing wage rates were followed when it made the food service vendor responsible for a dining facility renovation project that constituted the vendor's property investment. The vendor was not made aware of applicable state laws and did not follow state requirements in payment of prevailing wages or the competitive selection of an architect or of purchases over \$25,000. Documentation of the resulting investment is inconsistent, and the college does not know how much it paid for various parts of the renovation, and if purchases made by the vendor were economical. West Liberty should have monitored the vendor's activities, and specified the applicable laws to regulate the activities of the vendor during the renovation of the campus food facilities. The result of West Liberty's lack of monitoring and oversight of the facility construction project is failure by the vendor to follow state code provisions for construction and purchasing. In addition, the cost of the project may have been inflated because the college did not require the vendor to make competitive purchases.

The result of West Liberty's lack of monitoring and oversight of the facility construction project is failure by the vendor to follow state code provisions for construction and purchasing. In addition, the cost of the project may have been inflated because the college did not require the vendor to make competitive purchases.

Recommendations

- 1. The Legislature should consider requiring institutions with food service property investments to report the existing obligation to the State Treasurer's Office for inclusion in the Annual Debt Position Report.*
- 2. All food service contracts with property investment agreements should be submitted to the Attorney General's Office.*
- 3. All food service contracts with property investment agreements should include the WV Form 96 to ensure that the agreement is limited to the fiscal year.*
- 4. West Virginia State University should submit its food service contract with AVI Food Systems, Inc. to the Attorney General's Office for*

review.

5. *The Higher Education Policy Commission should require the institutions to monitor all vendor expenditures to verify actual property investment amounts.*

6. *The Higher Education Policy Commission should require all institutions to monitor and verify all property investment repayments to vendors.*

7. *The Higher Education Policy Commission should require all institutions to be directly responsible for all dining service renovations and purchases, and to observe and comply with all pertinent state code requirements.*

8. *The institutions should consider separation of technical information and financial food service bids in order to avoid influencing the evaluation of the vendor during the technical evaluation.*

9. *Institutions should treat all vendor proposals of capital investment amounts that exceed stated amounts in food service Request For Proposals as meeting the capital investment requirement and disregard any amounts over the stated requirement.*

Review Objective, Scope and Methodology

The West Virginia Higher Education Law, Chapter 18B, Article 5, Section 4(n) requires the Legislative Auditor to conduct an independent performance audit of purchasing functions and duties at institutions of higher education each fiscal year. Five institutions were evaluated for this third performance audit. They are West Liberty State College, West Virginia State University, Glenville State College, Concord University and Fairmont State University.

Objective

This review was conducted to confirm that procurement officers at each institution are following the procurement policies and procedures established by the Higher Education Policy Commission. For this review the Legislative Auditor continued the assessment of the food service contracting process at institutions that was issued in January 2005, and evaluated the impact and implementation of property investments required of food service vendors at Concord, West Liberty, West Virginia State and Glenville. Fairmont did not have a property investment requirement in its food service contract.

Scope

This review covers fiscal years 2003-2005. Some contracts that were reviewed were developed prior to 2003.

Methodology

This report was developed from personal interviews and site visits to the four institutions that required a property investment as part of their contracting process for a new food service vendor. They are Concord University, West Virginia State University, West Liberty State College and Glenville State College. The requirement of institutions asking for substantial property investments from food service vendors as part of the criteria for selection in awarding a new food service contract became a focus for this review because it is not a typical purchasing practice in West Virginia state government. The Legislative Auditor examined documents provided by each institution, including the food service Request For Proposals, and the resulting contracts. In addition, the Legislative Auditor contacted the Attorney General's Office, the State Budget Office, the Auditor's Office, the State Treasurer's Office and the Division of Labor. In order to obtain information about the renovation project at West Liberty State College, the Legislative Auditor also contacted the general contractor and the architect on the project. Every aspect of this evaluation complied with **Generally Accepted Government Auditing Standards (GAGAS)**.

Issue 1

Food Service Contracts that Require the Food Service Vendor to Make Property Investments in the Institution's Dining Service Facilities Entail Risks for the Institution and the State.

Issue Summary

Since 1995, these institutions have received over \$1.4 million from food service vendors for capital improvements and equipment.

The Legislative Auditor reviewed the contracting process for food service at four West Virginia institutions of higher education. They are Concord University, Glenville State College, West Liberty State College and West Virginia State University. Three of these institutions have provisions in their food service contracts that require the food service vendor to fund capital improvements for renovating aging dining facilities and purchasing necessary kitchen and dining hall equipment. The contracts further stipulate that the vendor will recover the investment amount over the time of the contract. If the contract is terminated earlier than the termination date specified in the contract, the institution would have to repay the remaining balance of the investment, generally within 30 days of termination. Since 1995, these institutions have received over \$1.4 million from food service vendors for capital improvements and equipment.

Although this procurement practice is not a typical purchasing practice in West Virginia state government, these contracts do not violate state code or the state constitution if the contracts are specified properly.

Although this procurement practice is not a typical purchasing practice in West Virginia state government, these contracts do not violate state code or the state constitution if the contracts are specified properly. Such contracts must be reviewed by the Attorney General's Office (AG), and if necessary have limiting language. Two of the three contracts that were approved by the AG's Office required revisions to avoid constitutional violations. Although legal, these contracts have the following risks associated with them:

- If the investment repayment is incorporated into the price per meal fee schedule, the institution will have to monitor what is paid to the vendor to ensure that it does not pay an amount that exceeds the actual investment.
- If the vendor is held responsible for making renovations and purchasing equipment, and the institution does not specify the legal requirements the vendor must follow in making the renovations and purchases, and does not monitor the vendor's activities, then the renovations may be in violation of state labor requirements, and the institution may repay a higher amount for the investment because purchases were not competitively purchased as required by law.

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- The selection process to award the contract may be unduly influenced by the proposed investment amount if the selection committee is aware of the amount as it conducts the technical evaluation of prospective vendors.
 - After awarding the contract, the institution may be vulnerable to making concessions to the vendor, accepting poor food service, or complying with unreasonable requests by the vendor, in order to avoid early termination of the contract if it is unable to pay the outstanding investment balance.
 - If either party terminates the contract prior to the specified termination date in the contract, the institution would have to pay the outstanding balance of the investment in one lump sum. The institution may be unable to pay the amount out of its budget, and thus, the unpaid balance would be an unexpected expense to the Legislature.

The way these contracts were set up placed a significant monitoring responsibility on the institutions to reduce the risks associated with this method of applying property investments in the dining facilities.

The way these contracts were set up placed a significant monitoring responsibility on the institutions to reduce the risks associated with this method of applying property investments in the dining facilities. The Legislative Auditor concludes that **there was inadequate monitoring of these contracts**, and the result is that **one institution does not have documentation of how much it actually repaid the vendor for the property investments**, another institution is in dispute as to how much it owes the vendor for property investments, state labor laws were violated, and evidence indicates that **expenditures made by a vendor lack detailed invoices to show that the costs were justified and not inflated.**

Attorney General's Review is Essential to Avoid Problems and Protect the State

Food service vendors who make property investments in addition to providing food service, provide a convenient way to improve campus dining facilities. State institutions support their food service through student fees and some smaller institutions on tight budgets have not been able to repair or replace old equipment, or to renovate dining areas. Such a refurbishment project is too small to be considered for funding by the Higher Education Policy Commission (HEPC), and approval might not be received for funding on the Statewide Master Lease program. Therefore a property investment from the food service vendor, with a stipulation that the vendor will recover its investment over time, is a convenient way to cover the cost of needed physical improvements. However, such agreements must be carefully worded to avoid problems and to conform to the state code and the state constitution since such property investments represent a long term financial obligation on the part of the institution.

A property investment from the food service vendor, with a stipulation that the vendor will recover its investment over time, is a convenient way to cover the cost of needed physical improvements.

The Attorney General’s Office (AG) must review and approve all contracts that have a property investment component.

State institutions are prohibited from incurring liability by state code. The West Virginia Constitution Article 10, Section 4 states:

“No debt shall be contracted by this state, except to meet casual deficits in the revenue, to redeem a previous liability of the State, suppress insurrection, repel invasion or defend the State in time of war...”

Sometimes institutions unintentionally agree to loan terms in property investment contracts with food vendors that are not allowed.

Sometimes institutions unintentionally agree to loan terms in property investment contracts with food vendors that are not allowed. Such agreements require revisions to conform to the state code and the state constitution. During reviews by the AG’s Office of the food service contracts created by Glenville State College and West Liberty State College, the AG’s Office identified property investment sections that did not conform to state requirements. The AG’s Office required the following revisions:

- **Glenville State College** characterized the property investment as a “loan” that would be repaid with principal and interest payments. The AG’s Office required removal of this provision.
- **West Liberty State College** agreed to the payment of interest as a penalty if the contract terminated prior to the length of time of the amortization schedule. The AG’s Office removed this provision from the contract.

In order to conform individual contracts to the provisions of state code and the state constitution, the terms and conditions of state contracts have been developed by the AG’s Office and are pre-printed on the purchase order form which becomes part of the contract. If the agreement between the parties changes these terms, there is an “Agreement Addendum” called WV Form 96 that must be signed by both parties and affixed to the contract. The use of this form is discretionary on the part of the institution, based on whether the final agreement has changed the required terms and conditions. Although use of the form is at the discretion of the institution, the Attorney General (AG) must review each food service property investment agreement to ensure that if such a form is necessary, it has been signed and appended to the document.

One Contract Was Not Reviewed by the AG's Office and Can Be Rendered Void

During the contract review, the Legislative Auditor determined that the August 2003 contract for food service at West Virginia State was not submitted to the AG's Office.

Between 1995 and 2005, four of the five institutions of higher education under review by the Legislative Auditor that entered into new food service contracts with food service vendors required property investments. Fairmont State University did not require a property investment when it sought a food service vendor in 2001. During the contract review, the Legislative Auditor determined that the August 2003 contract for food service at West Virginia State was not submitted to the AG's Office. **West Virginia State University has subsequently operated under an agreement that is "void and to no effect" under state code.** Either party may ignore the contract because it does not exist in law, and has no legal force. In addition, this contract does not have a WV Form 96. Since the AG's Office has not reviewed this contract, it is unknown whether the contract requires this form.

In a letter to the Legislative Auditor dated March 21, 2005, the AG's Office stated:

"According to §18B-5-4(j), the failure to comply with this statute renders the purchase or contract "void and of no effect."... "Specifically, the contract you reference between West Virginia State University and AVI Food Systems, Inc. should have been reviewed and approved by us." (Emphasis added)

It may be that changes made in March 2003 to the Higher Education Law's procurement section (§18B-5-4) that exempted the submission of many types of contracts to the AG's Office, created some confusion for procurement officials at West Virginia State. However, the AG's Office sent a memorandum in April 2003 to higher education procurement officers clarifying the types of documents still needing approval by the Attorney General. This memorandum is also included as an appendix in the West Virginia Higher Education Purchasing Procedures Manual issued by the HEPC for use by all institutional procurement officers. The memorandum lists this type of document as still requiring the Attorney General's approval:

"Lease-purchase agreements for capital improvements, including equipment, which total more than \$100,000 over the life of the agreement."

The AG's Office also participated in a procurement training session for

higher education in November 2004, and discussed the need to submit all contracts with property investment provisions to the AG's Office for review. Although the legislative change in 2003 removed many higher education contracts from the AG's review and approval process, complex contracts that contain property investment provisions are still required to receive oversight by the AG's Office.

None of the contracts requiring repayment or amortization over time were set up to have the institution receive the investment amount from the vendors and then have the institution purchase all necessary equipment and materials.

Property Investments Create Added Monitoring Responsibilities for the Institutions

Monitoring the property investment at the institution is essential in order to avoid repaying more than is necessary for equipment and services. None of the contracts requiring repayment or amortization over time were set up to have the institution receive the investment amount from the vendors and then have the institution purchase all necessary equipment and materials. If the institution is responsible for all renovations and purchases, it has complete control and can ensure that it receives the best price, and that the investment amount that it would have to repay would be the least amount. However, these contracts gave the vendor the responsibility of purchasing equipment and materials, and the institution did not impose any purchasing requirements, such as price comparisons, or competitive bidding, that would ensure that the vendor purchased equipment at competitive prices. As a result, the investment amount that the institution is responsible to pay back may be higher than is necessary. If institutions fail to monitor the property investment by the vendor, the following risks are present:

1. The vendor may charge costs that are unduly inflated;
2. The institution may inadvertently overpay the vendor because of a complicated repayment method.

The institution has a fiduciary responsibility to require detailed invoices to ensure that costs are not inflated.

Inflated expenditures can occur when a vendor is responsible for supplying equipment and making renovations. If the vendor is not required to follow state purchasing procedures, the institution may repay a higher amount for the investment than if competitive purchasing occurred. The institution has a fiduciary responsibility to require detailed invoices to ensure that costs are not inflated. Invoices from the food service vendor used by West Liberty State College to verify the amount of the vendor's property investment are not detailed enough to rule out inflated equipment costs or even to determine the details of the renovation or the equipment costs. (Issue 2 discusses West Liberty State College in greater detail.)

Documentation is important because the institution's retirement of the property investment relies on an amortization schedule created from the investment amount.

West Liberty is repaying its food service vendor according to an amortization schedule that does not match the property investment amount originally made by the vendor.

If the investment repayment is incorporated into the price per meal fee that the institution pays the food service vendor, the institution should monitor what is paid to ensure that it does not pay an amount that exceeds the actual investment. However, institutions did not always monitor repayments.

Documentation of the property investment amounts at the three institutions rests completely on invoices submitted by vendors. This documentation is important because the institution's retirement of the property investment relies on an amortization schedule created from the investment amount. When the Legislative Auditor requested amortization schedules from Concord, West Virginia State, and West Liberty, only West Liberty provided such a schedule. The financial officer at Concord stated that an amortization schedule had never been created. West Virginia State gave no explanation for not having an amortization schedule. An amortization schedule shows the reduction of debt as the vendor recovers its investment amount. Such a schedule is necessary for agreement on the actual amount invested, and the actual amount still owed in the event that the contract is terminated.

At West Liberty there is a dispute over the actual amount invested by the food service vendor. West Liberty is repaying its food service vendor according to an amortization schedule that does not match the property investment amount originally made by the vendor. The financial officer at West Liberty noted that there is a \$10,000 disagreement between the vendor and the college. In fact, a review of invoices by the Legislative Auditor suggests a \$21,000 difference, with the college repaying \$21,000 less than the vendor invested.

If the investment repayment is incorporated into the price per meal fee that the institution pays the food service vendor, the institution should monitor what is paid to ensure that it does not pay an amount that exceeds the actual investment. However, institutions did not always monitor repayments. In 1995, Concord University agreed to repay the \$250,000 property investment through a surcharge on meal prices charged to the institution by the vendor. Concord agreed to repay the vendor \$41,667 annually for six years through a surcharge per meal that fluctuated based on the number of students enrolled each week. This amount could change weekly due to a sliding fee scale of meal prices that went up when enrollment decreased and went down when the number of students increased. Despite the complexity of this repayment mechanism, Concord did not determine the separate investment amount that was being repaid each week. Therefore, Concord does not know how much was paid to the vendor in repayment of the property investment. It appears that Concord assumed that at the end of the six-year period that it had repaid the vendor the investment amount of \$250,000.

Building and Purchasing Violations Will Occur Without Proper Specifications and Oversight

The contract between West Liberty State College and its food service vendor made the vendor responsible for all purchases of equipment and all renovations to property. However, the contract did not specify that purchases of equipment and architectural services comply with the HEPC Purchasing Procedures Manual, and that renovations comply with the West Virginia Prevailing Wage Act.

The contract between West Liberty State College and its food service vendor made the vendor responsible for all purchases of equipment and all renovations to property. However, the contract did not specify that purchases of equipment and architectural services comply with the HEPC Purchasing Procedures Manual, and that renovations comply with the West Virginia Prevailing Wage Act. As a result, construction workers in the renovation of the dining facilities were not paid prevailing wage rates, and architectural services and equipment over \$25,000 in value were not purchased through competitive bidding. The vendor used an architecture firm that was presently doing work for it at other colleges, and there is no evidence that other purchases exceeding \$25,000 in value were purchased according to competitive procedures as required by the HEPC. This finding is discussed in greater detail in Issue 2 of this report.

An alternative approach to making the food vendor responsible when seeking a property investment is to require the institution's active involvement in all aspects of the property investment, including purchasing and/or renovation. If the institution is responsible, it has control of the project. This includes knowledge that costs of equipment and materials are not inflated and that the expenditures represent the best value available to the institution. Further, the institution is able to ensure that state code is followed if renovations are part of the investment.

In the consideration of food service contracts with property investment proposals, the state Purchasing Division procedure provides the best practice because if the selection committees are aware of the proposed investment amounts during the technical evaluation, it could cause the selection of a vendor with a high investment amount that is technically inferior to another vendor with a lower investment amount.

Investment Amount May Unduly Influence Vendor Selection

The Legislative Auditor evaluated the selection process of prospective vendors to determine if the investment amounts created an undue influence in the selection process. In particular, the Legislative Auditor evaluated whether the selection committees had knowledge of each vendor's proposed investment amount during the committees' scoring of the vendor's technical information. Also, the Legislative Auditor examined the food service contract awards to determine if there was a pattern of selecting the vendor with the highest investment amount. Under state Purchasing Division requirements for the submission of Request for Proposal (RFP) responses, proposals are requested and received in two distinct parts: 1) technical; and 2) the vendor's cost. Vendors are first evaluated and rated based on their technical proficiency, such as experience, previous engagements, references, financial resources, etc. This technical evaluation is done before cost proposals are opened, in order to ensure an objective evaluation of the vendor's technical ability. The HEPC does not

require this separate evaluation of technical merit and proposed costs. In the consideration of food service contracts with property investment proposals, the state Purchasing Division procedure provides the best practice because if the selection committees are aware of the proposed investment amounts during the technical evaluation, it could cause the selection of a vendor with a high investment amount that is technically inferior to another vendor with a lower investment amount.

Four institutions required a property investment by their food service vendor. Concord allowed the state Purchasing Division to handle the RFP, so the technical and cost proposals were separated. Glenville required separate financial and technical proposals but college officials do not know if proposals were kept separate after they were received. West Liberty State, and West Virginia State received the financial and technical information simultaneously. In summary:

West Virginia State allowed a vendor to revise its property investment offer after the bids were opened.

- Technical and financial information kept separate: Concord and Glenville;
- Technical and financial information combined: West Liberty and West Virginia State.

Of the four institutions, West Liberty and West Virginia State violated best practices by combining technical and cost proposals, and including both types of information to be considered by the selection committee at the same time. In addition, during the award process review, the Legislative Auditor determined that West Virginia State University allowed an irregularity that deviated from purchasing procedures established by the HEPC. The irregularity was that West Virginia State allowed a vendor to revise its property investment offer after the bids were opened. The sequence of events that led to the irregularity is as follows. West Virginia State University clearly required in its RFP for vendors to propose a capital investment amount **not to exceed \$300,000**. One vendor complied with the RFP and proposed the amount of \$300,000. The other three vendors disregarded the RFP specification and proposed investment amounts in excess of \$300,000. The University should have disregarded the excess amounts and evaluated all of the vendors at the \$300,000 level. Instead, for no apparent reason, the University gave the vendor that complied with the RFP and that consequently had the lowest proposed investment amount the opportunity to raise its amount above \$300,000. In doing this, it gave the vendor the opportunity to match two vendors and exceed the amount of another vendor. This created an unfair situation because the vendor that was allowed to revise its amount knew the other bid amounts. The University contacted the vendor proposing \$300,000 and allowed the vendor to revise the proposed amount to a higher amount prior to any evaluation of the four vendors. A letter from this vendor to the University stated:

While negotiations are allowed with the selected vendor following the evaluation process, this vendor was allowed to make a change in its investment amount proposal prior to the evaluation process.

By taking this action, the University changed the evaluative criteria for selection of a vendor. Such changes are not allowed by either the state Purchasing Division or the HEPC.

Instead of allowing the vendor to raise its proposed investment amount, the University should have disregarded all amounts above the amount required in the RFP.

“At the direction of [a university official] I am attaching with this letter a formal addendum to our food service proposal...In discussions with [a university official] I expressed concern that your bid specifications described the amount of capital investment, not to exceed \$300,000 over the life of the contract. In our bid response, I felt that [the company] complied exactly with the specific instructions of the RFP. Upon learning the results of the public bid opening, it is evident that all other bidders exceeded the \$300,000 description.”
[emphasis included]

The vendor proposed an unrestricted gift of \$100,000 to be used “*in any appropriate manner to support future dining services needs or the academic and student programming of West Virginia State College.*” This proposal was made on May 23, 2003 after the opening of the vendor’s bids on May 15, 2003 but prior to the evaluation and selection of a food service vendor in June 2003. While negotiations are allowed with the selected vendor *following the evaluation process*, this vendor was allowed to make a change in its investment amount proposal **prior to the evaluation process**. At the conclusion of the evaluation process, this vendor was awarded the contract.

By taking this action, the University changed the evaluative criteria for selection of a vendor. Such changes are not allowed by either the state Purchasing Division or the HEPC. The HEPC purchasing manual states:

*“Factors of evaluative criteria **not stated** in the Request for Proposals shall not be considered in evaluating the proposals.”* (Emphasis added.)

The Legislative Auditor concludes that this action by the University shows that the amount offered for the capital investment can influence the selection process if the institution is not careful. The three vendors that proposed higher amounts may have been attempting to influence the selection process, given that the RFP specification limiting the investment amount was clearly defined. Upon opening the bids, the University allowed the vendor that **complied** with the RFP to raise its amount to the highest amount that had been proposed when the bids were opened. West Virginia State did not handle this situation properly. Instead of allowing the vendor to raise its proposed investment amount, the University should have disregarded all amounts above the \$300,000. West Virginia State did not follow the requirements that it established in its RFP for a food service vendor. Such requirements are established to ensure an objective and unbiased selection process. When established procedures are not followed, the entire selection process becomes questionable in terms of fairness and adherence to state code.

Property Investments May Influence Relationships

The property investment may negatively influence the institution's behavior in overall oversight of the vendor. If there are problems with the food service, the institution may make concessions to the vendor in order to avoid early termination of the contract if it is unable to pay the outstanding investment balance.

When property investments are required as part of the food service contract, the institution can become vulnerable to influence by the terms of the contract and behave differently toward the food service vendor. The property investment may negatively influence the institution's behavior in overall oversight of the vendor. If there are problems with the food service, the institution may make concessions to the vendor in order to avoid early termination of the contract if it is unable to pay the outstanding investment balance. If the vendor is making an annual donation to the institution, this steady revenue may create a reluctance on the part of the institution to require performance standards specified in the contract.

While some institutions may resist any influence as a result of the property investment, others may subconsciously be influenced to accept whatever the food vendor does, and not to monitor the food service contract. If the vendor is not conscientious in following the terms of the contract, the result could be as long as 10 years during which the institution does not receive what it has contracted for in terms of food service.

Property Investments May Create Unexpected Expenses for the Institution or the State

The property investments are considered lease-purchase arrangements with no interest payments, but represent a financial obligation by the institution to the vendor.

Since 1995, when West Virginia institutions of higher education began requesting financial investments on the part of food service vendors, four institutions have received a total of over \$1.4 million. The property investments are considered lease-purchase arrangements with no interest payments, but represent a financial obligation by the institution to the vendor. **If either party terminates the contract prior to the specified termination date in the contract, three of the four institutions would have to pay the outstanding balance of the investment in one lump sum.** The institution may be unable to pay the amount out of its budget, and thus, the unpaid balance would be an unexpected expense to the Legislature.

The amounts agreed upon and received by the following institutions are listed by year, and are as follows:

- In 1995, **Concord University** received a \$250,000 property investment. This amount was repaid through a variable surcharge on individual meal payments to the vendor and did not become amortized and fully owned by the University for six years.

The amount that could suddenly be repaid varies depending on the original amount of the property investment, the length of time that the vendor has provided food service on campus, and the length of time required for the property to be completely owned by the institution.

The State Treasurer's Office compiles information regarding the state's debt for each fiscal year.

None of the institutions reviewed by the Legislative Auditor reported the property investment obligation created by the food service vendor. Since these obligations are not reported, the legislative finance committees are not fully aware of the institutions' obligations.

- In 1999, **Glennville State College** made an agreement whereby its food service vendor would invest \$25,000 annually over the life of the 10-year contract, for a total of \$225,000. **This is the only investment that does not require repayment by the college.**
- In 2000, **West Liberty State College** received a \$771,000 property investment. This property investment originally was to be repaid over seven years, but is now being repaid over 10 years.
- In 2003, **West Virginia State University** received a \$400,000 property investment. This property investment is not being repaid through a separate payment or a surcharge, but will not become fully amortized and owned by the university for 10 years.

A sudden termination of the food service vendor in the first years of the contract could require a substantial repayment for a property investment, whether or not the institution has committed to repaying the investment. Each institution has accepted a different investment amount for a different period of time before the investment becomes the property of the institution. The amount that could suddenly be repaid varies depending on the original amount of the property investment, the length of time that the vendor has provided food service on campus, and the length of time required for the property to be completely owned by the institution. The only agreement that eliminates a repayment requirement is the Glennville agreement where the food service vendor **donates** money to the institution.

Institutional Property Investment Obligations Are Not Reported to the State

The amounts of property investments made by food service vendors at the time of contract awards are not reported to the HEPC, the State Treasurer's Office or the legislative finance committees. The amounts are under \$1 million and do not require approval or other involvement by the HEPC. The HEPC does not track such transactions, although institutions sometimes ask the assistant director of facilities at HEPC to consult about the RFP when a proposal for a multi-million dollar food service contract is initiated.

The State Treasurer's Office compiles information regarding the state's debt for each fiscal year. While institutions contribute information on debt obligations (including lease obligations) for this report, none of the institutions reviewed by the Legislative Auditor reported the property investment obligation created by the food service vendor. Since these obligations are not reported, the legislative finance committees are not fully aware of the institutions' obligations.

Conclusion

When food service vendors make property investments in addition to providing food services, these agreements need to be carefully structured, and always reviewed by the AG's Office.

Property investments, while appealing, can create financial risk and have unexpected consequences if not carefully structured and closely monitored.

Property investments by food service vendors entail risks for the institution and the state. The structure of the agreements must be properly set up. When food service vendors make property investments in addition to providing food services, these agreements need to be carefully structured, and always reviewed by the AG's Office. This is necessary to ensure that the agreements conform to the state constitution and state code. Such property investments can represent financial obligations on the part of the institution but there is presently no mechanism in the state debt reporting process to identify these potential financial obligations. Property investments can create complex repayment arrangements that need to be carefully monitored so that the institution does not overpay the vendor. The investment amount can also influence the vendor selection. After an investment is made by the vendor, the institution runs the risk of being influenced by the agreement. The property investment may negatively influence the institution's behavior in oversight of the vendor. Financial donations by the vendor can create a reluctance by the institution to require performance standards specified in the contract. Property investments, while appealing, can create financial risk and have unexpected consequences if not carefully structured and closely monitored. These risks became a reality for some institutions because of a lack of monitoring and specifications for the vendors. The result is that some violations occurred and some institutions likely repaid investment amounts that were higher than necessary.

Recommendations

1. *The Legislature should consider requiring institutions with food service property investments to report the existing obligation to the State Treasurer's Office for inclusion in the Annual Debt Position Report.*
2. *All food service contracts with property investment agreements should be submitted to the Attorney General's Office.*
3. *All food service contracts with property investment agreements should include the WV Form 96 to ensure that the agreement is limited to the fiscal year.*
4. *West Virginia State University should submit its food service contract with AVI Food Systems, Inc. to the Attorney General's Office for review.*

5. *The Higher Education Policy Commission should require the institutions to monitor all vendor expenditures to verify actual property investment amounts.*

6. *The Higher Education Policy Commission should require all institutions to monitor and verify all property investment repayments to vendors.*

7. *The Higher Education Policy Commission should require all institutions to be directly responsible for all dining service renovations and purchases, and to observe and comply with all pertinent state code requirements.*

8. *The institutions should consider separation of technical information and financial food service bids in order to avoid influencing the evaluation of the vendor during the technical evaluation.*

9. *Institutions should treat all vendor proposals of capital investment amounts that exceed stated amounts in food service Requests For Proposals as meeting the capital investment requirement and disregard*

Issue 2

When West Liberty State College Allowed its Food Service Vendor to be Responsible for Renovating the Campus Dining Facilities, Some Provisions in State Code Were Not Followed.

Issue Summary

In 1999 West Liberty State College issued a Request For Proposal for a food service vendor to make a property investment that included renovating the campus dining facilities.

The college did not require the food service vendor to conform the renovation project to state law and Higher Education Policy Commission requirements, such as requiring competitive bids for purchases exceeding \$25,000, the use of a competitive process to obtain architectural services, or requiring construction workers be paid prevailing wage rates.

In the previous issue, the Legislative Auditor noted that if an institution is going to require a vendor to make renovations and purchase equipment as part of a food service property investment, the institution must monitor the vendor's activities, and specify the laws that regulate these activities in order to ensure that the vendor's activities conform with these laws and that the vendor pays competitive prices for purchases. In 1999 West Liberty State College issued a Request For Proposal (RFP) for a food service vendor to make a property investment that included renovating the campus dining facilities. The RFP did not ask for a specified investment amount but required the selected food service vendor to be completely responsible for the renovations and purchases. The total cost of the renovations and purchases by the vendor was \$771,797 in the year 2000. The college agreed to repay the renovation costs to the food service vendor during the life of the 10-year contract, using project invoices to document the investment and determine the amount to be repaid. However, the college did not require the food service vendor to conform the renovation project to state law and Higher Education Policy Commission (HEPC) requirements, such as requiring competitive bids for purchases exceeding \$25,000, the use of a competitive process to obtain architectural services, or requiring construction workers be paid prevailing wage rates. As a result, from the documentation of the construction project, there is no indication these requirements were followed by the food service vendor or the construction contractor. In addition, the college does not know if the purchases that the food service vendor made were economical, since many of the invoices were not itemized. Essentially, **West Liberty did not take necessary steps to ensure that the investment amount that it is required to repay the vendor is a fair or competitive amount for the actual property investment.**

West Liberty State College RFP Required Renovation with Limited Adherence to State Code Provisions

West Liberty State College's 1999 Request For Proposal for a 10-year contract with a food service vendor combined food service specifications with a requirement to renovate the college's campus dining facilities.

The RFP does not identify and require that the vendor comply with all state code provisions relating to such a project, although compliance to state code is a responsibility of the institution under Title 133, Series 30 of the Higher Education Policy Commission Purchasing Rule.

The college did not specify the dollar amount of the renovation project but made clear that the investment amount would be repaid to the food service vendor. The RFP does not identify and require that the vendor comply with all state code provisions relating to such a project, although compliance to state code is a responsibility of the institution under Title 133, Series 30 of the Higher Education Policy Commission Purchasing Rule.

The RFP required that all contractors be licensed but did not specify the payment of prevailing wage rates to construction workers on the project. In addition, competitiveness in architect selection and equipment purchasing was not addressed in the RFP. The RFP for a food service vendor simply stated:

*“The successful vendor, if he is not the current vendor, **will be required to renovate and supply basic equipment ...**”*
(Emphasis added).

The college required the successful food service vendor to perform the construction to renovate the food service facilities. There was also a requirement to supply basic kitchen equipment for the renovated facilities. The total responsibility of the construction/renovation project was placed on the food service vendor. In order to comply with the RFP, the food service vendor became responsible for:

- obtaining a general contractor, subcontractors and laborers to work on the construction;
- obtaining an architect for the design of the dining hall space;
- supplying the construction materials and kitchen equipment; and
- supplying computer equipment to track the use of various types of dining meal tickets.

The West Liberty RFP combined the requirements for the provision of food service on campus with **limited requirements to conform to state code** for the renovation project. For example, the RFP required that the contractor be licensed:

“If the successful Food Service Provider acts as his own contractor or hires sub-contractors to renovate, construct, remove, add to, plumb, attach by device, dig, provide carpentry service, or in any way alter a structure or grounds at West Liberty State College, then the provider of that service must have a contractor’s license and provide a copy of such license(s) to the WLSC Purchasing Department prior to the beginning of the work.”

The college also required that the vendor supply a separate performance bond and labor and material payment bond for the construction/renovation work to be performed in addition to a certificate for general liability insurance and worker's compensation coverage.

After evaluating the vendors who responded to the 1999 food service Request For Proposal, the college selected the Wood Company (since acquired by Sodexo) as its food service vendor. The Wood Company was awarded the college food service contract for one year, with nine renewal options, starting in 2000. The contract will be in effect until 2010.

A copy of the Atlantic Equipment license was supplied to the college, but there is no documentation regarding the subcontractors on the project.

In order to handle the food service renovation project, the Wood Company hired Atlantic Equipment Specialists, a food equipment contractor. Atlantic Equipment, located in Danville, Pennsylvania, holds a "Speciality" contractor license in West Virginia. A copy of the Atlantic Equipment license was supplied to the college, but there is no documentation regarding the subcontractors on the project. The Legislative Auditor requested that Atlantic Equipment supply a list of the subcontractors on this project, but the contractor did not supply the list. Five years after the project was completed, it is not possible to determine whether the subcontractors on the project were properly licensed to do the work.

West Liberty's RFP Omitted Compliance to State Code Requirements in Areas of Purchasing and Labor

The West Liberty RFP omitted specifications relating to the construction renovation in three areas that are covered under state code. The omissions were in the areas of purchasing equipment, architectural services, and payment of prevailing wage rates.

The West Liberty RFP omitted specifications relating to the construction renovation in three areas that are covered under state code. The omissions were in the areas of purchasing equipment, architectural services, and payment of prevailing wage rates. Specifically, West Liberty failed to require:

- competitive purchases for goods and services over \$25,000;
- competitive selection of architectural services;
- payment of prevailing wage rates for construction workers.

Chapter 18b-5-4 of the West Virginia State Code requires competitiveness for purchases over \$25,000 by institutions of higher education. The West Virginia Higher Education Policy Commission Purchasing Procedures Manual states:

"Competitive sealed bidding is the preferred method for purchase and acquisition of materials, supplies, equipment, services and printing greater than \$25,000."

There is no evidence that the vendor used competitive bidding at any time during its procurement of a general contractor, equipment and signs. However, it is clear, based on invoices provided by the vendor to the college, that signs purchased for the dining areas exceeded \$55,000 and should have been competitively bid.

The RFP did not require competitive bidding under the appropriate conditions, and there is no evidence that the vendor used competitive bidding at any time during its procurement of a general contractor, equipment and signs. It is not possible to determine what each item purchased cost, since **the equipment supplied by Atlantic Equipment to the Wood Company for the West Liberty renovation was not itemized.** The contractor simply provided a non-itemized invoice of \$288,000 that also incorporated building materials and labor costs. It is possible that the invoice included several items that should have been competitively purchased. In addition, it is possible that equipment items could have been obtained at a lower cost from a vendor other than Atlantic Equipment. However, it is clear, based on invoices provided by the vendor to the college, that signs purchased for the dining areas exceeded \$55,000 and should have been competitively bid.

West Liberty's Architectural Services Were not Competitively Selected

There is also no requirement in the RFP for competitive selection of architectural services, despite the HEPC requirement that Chapter 5G of the West Virginia State Code be followed when obtaining architectural services. Chapter 5G-1-3 states:

“In the procurement of architectural and engineering services for projects estimated to cost two hundred fifty thousand dollars or more, the director of purchasing shall encourage such firms engaged in the lawful practice of the profession to submit an expression of interest... . A committee of three to five representatives of the agency initiating the request shall evaluate the statements of qualifications and performance data...and select three firms which...are best qualified to perform the desired service.”

The food service renovation at West Liberty cost \$771,000 and required an architect. However, the college did not competitively select the architect. Instead, the college allowed the Wood Company to provide the architect.

The food service renovation at West Liberty cost \$771,000 and required an architect. However, the college did not competitively select the architect. Instead, the college allowed the Wood Company to provide the architect. The Wood Company selected an architect with whom they had a prior working relationship to do the work for West Liberty College. College officials do not know exactly what services the architect rendered for this project despite an architectural services invoice for \$26,730. The college is unable to provide any information, designs or drawings by the architect.

Connor Architecture, a firm located in Arlington, Massachusetts, provided the architectural services at West Liberty State College. The Legislative Auditor contacted the architectural firm and a spokesman described the West Liberty renovation as part of a series of projects undertaken by the architect for the Wood Company in 1999 and 2000. The architectural firm developed proprietary branding concepts for college cafes and food courts. According to the spokesman, the Wood Company treated this as a “sole source” contract due to the development of the proprietary branding designs. However, this architectural firm also provided design services for the redesign of the main cafeteria space at West Liberty. In any event, the architect was retained by the food service vendor and the college did not require a competitive selection process.

West Liberty Knew That Prevailing Wage Rates Should be Paid But Failed to Require Them on Project

Finally, the RFP did not require that the construction workers be paid prevailing wage rates and no wage rate schedule was included. By failing to include specifications to inform the vendor that state fair minimum wage rates were required to be paid to construction workers in its RFP, West Liberty did not conform to the requirements of the West Virginia Prevailing Wage Act. The Legislative Auditor asked the college if it submitted certified statements regarding the payment of workers to the Commissioner of Labor, as required by Legislative Rule §42-7. The college did not reply to this question and did not produce any documentation that it had submitted this information. The Commissioner of Labor has no record of a submission by West Liberty College. No wage complaints were brought to the Division of Labor, and the three-year time period has passed to initiate an investigation.

Despite the omission of prevailing wage specifications in the RFP, the college was aware that prevailing wage rates should be paid. However, following the contract award, the college apparently did not require documentation that workers were paid prevailing wage rates.

Despite the omission of prevailing wage specifications in the RFP, the college was aware that prevailing wage rates should be paid. Prior to a mandatory Pre-Bid/Proposal meeting, a vendor asked “*Will the construction contractors need to be awarded to a union shop or on an open bid process?*” The college replied that “*The state of West Virginia is under prevailing wage rates.*” There were 71 written questions submitted to the college and **this response to a question is the only mention of prevailing wage rates** in the RFP. However, following the contract award, the college apparently did not require documentation that workers were paid prevailing wage rates. The contractor, Atlantic Equipment, stated to the Legislative Auditor that it was not aware of the requirement to pay prevailing wages to its construction workers.

Even though the college's food service vendor, the Wood Company, entered into a contract with Atlantic Equipment Specialists to perform the construction/renovation project of the dining facilities, **West Liberty had a responsibility to ensure that prevailing wage rates were paid.** West Liberty did not carry out this responsibility despite its written reply to a vendor's question that prevailing wage rates are required to be paid on construction projects of public facilities.

West Liberty awarded the food service contract to the Wood Company in 1999. All college representatives (students and employees) who were directly involved with the food service contract award and the dining service property renovation have either graduated, left the college for other employment, or retired.

Renovation Invoices Provide Incomplete Information

West Liberty awarded the food service contract to the Wood Company in 1999. All college representatives (students and employees) who were directly involved with the food service contract award and the dining service property renovation have either graduated, left the college for other employment, or retired. The Wood Company employed Atlantic Equipment Specialists to perform the construction work and provide equipment for the college. Following the completion of the project, the food service vendor submitted 31 invoices to West Liberty State College to document the work completed and the \$771,797 amount invested. The invoices comprise the record of the renovation project. The Legislative Auditor reviewed all other documents related to the food service vendor selection and food service renovation at West Liberty State College. The only documents related directly to the physical renovation consist of the 31 invoices submitted to verify the costs of the project. Other documents, such as architectural drawings, either do not exist, are unable to be located by the college, or were not provided to the college by the vendor.

Examination of the 31 invoices shows the following:

- lack of detail on some invoices;
- lack of invoices to verify some equipment;
- signs costing over \$55,000 not competitively bid.

Lack of Detail on Some Invoices

Some of the invoices from Atlantic Equipment to the Wood Company do not contain specific details. One such invoice dated August 15, 2000 simply stated:

*“To invoice you deposit for the West Liberty State College contract - student union building - Toppers
For the sum of\$125,000 ”*

In addition, the college accepted as project documentation a “blanket” invoice from Atlantic Equipment to the Wood Company that includes workmen’s wages but contains no specific information such as the hourly rates of pay or the number of hours worked by construction workers.

“To invoice you for food service equipment for “Toppers” Food Court as per drawing FS-1 and the attached equipment list, including all building material, sub-contractors and laborers, for the total sum of.....\$288,710.00 ”

This invoice also showed a payment received amount, and a balance due of \$163,710. This is the only invoice that specifically refers to costs of subcontractors and laborers. Other invoices from Atlantic Equipment reference labor costs as “supply and install” the materials or equipment such as carpeting, or a hand sink.

Lack of Invoices to Verify Some Costs and Equipment

The Legislative Auditor received a list of 37 invoices relating to the investment project. Five invoices for computer equipment, a food service van, and unspecified labor charges totaling \$37,644 were listed under food service vendor expenses. However, no invoices for these items were included by the vendor with the other project invoices to document the project cost. It is unclear whether the vendor claimed the \$37,644 as part of the total project cost because this amount is not included in the overall project cost of \$771,797.

Signs Costing Over \$55,000 Not Competitively Bid

The group of 31 project invoices contained 11 invoices from 21st Century Signs of Montoursville, Pennsylvania for a total cost of \$27,268.78 for signs and related services. Another sign company, SRP Sign Company of Waltham, Massachusetts invoiced \$27,927 for millwork, signs and a sneeze guard at one location of the campus dining facility. The cost of signs from each company alone was over \$25,000 and the combined cost of signs for the project was over \$55,000. The sign company services were provided through Atlantic Equipment and not competitively secured.

West Liberty Renovation May Have Cost More Than Was Necessary

The renovation that West Liberty accepted from its food service vendor

The renovation that West Liberty accepted from its food service vendor may have cost more than was necessary because the college did not require competitive selection in purchasing goods and services related to the dining service renovation. It is possible that if these services and items had been competitively obtained, the college dining facility renovation would have cost less.

may have cost more than was necessary because the college did not require competitive selection in purchasing goods and services related to the dining service renovation. The college also did not participate in the purchasing process, and does not now have detailed documentation of some items and costs related to the renovation. The lack of itemized invoices does not allow the college to know the details of what it paid for some goods and services. Areas in which the costs might have been reduced include:

- the general contractor;
- the architect; and
- equipment, signs and materials.

It is possible that if these services and items had been competitively obtained, the college dining facility renovation would have cost less.

Conclusion

The Legislative Auditor concludes that property investments requiring substantial renovations are complex, and require significant evaluation and oversight in order to conform to state code, HEPC purchasing rules, and to be financially responsible in conserving the fiscal resources of the State.

In 1999, West Liberty State College gave a food service vendor complete responsibility to provide food service and to renovate its campus dining facilities. The RFP did not specify the laws that regulate these activities in order to ensure that the vendor's activities conform with these laws and that the vendor pay competitive prices for purchases. As a result, there is no evidence that the food service vendor complied to state law and HEPC requirements, such as requiring competitive bids for purchases exceeding \$25,000, the use of a competitive process to obtain architectural services, or requiring construction workers be paid prevailing wage rates. State institutions are responsible for following these state requirements in purchasing and payment of prevailing wages on construction projects at their facilities. These requirements also apply even when outside vendors are engaged to perform the work on state property. Since the college did not clarify the vendor's responsibilities, the project did not comply to some areas of state code. West Liberty also did not provide adequate oversight in the renovation of its dining facilities. A significant oversight deficiency of this project is the college's acceptance of non-itemized invoices of the project costs. The total cost of the renovations and purchases by the vendor was \$771,797. Given the acceptance of non-itemized invoices, and the lack of appropriate competitive purchases, the renovation project may have cost more than was necessary. Therefore, the college may be repaying an amount that is higher than was necessary.

The Legislative Auditor concludes that property investments requiring substantial renovations are complex, and require significant evaluation and

oversight in order to conform to state code, HEPC purchasing rules, and to be financially responsible in conserving the fiscal resources of the State. Therefore, the Legislative Auditor makes the following recommendation.

Recommendation

See Recommendation 7 in Issue 1.

7. *The Higher Education Policy Commission should require all institutions to be directly responsible for all dining service renovations and purchases, and to observe and comply with all pertinent state code requirements.*

Appendix A: Transmittal Letter

WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

July 19, 2005

Dr. J. Michael Mullen, Chancellor
Higher Education Policy Commission
1018 Kanawha Blvd., East, Suite 700
Charleston, WV 25301-2827

Dear Dr. Mullen:

Pursuant to §18B-5-4(n) of the West Virginia code, this is to transmit a draft copy of the completed report for 2005 of the Legislative Auditor's review of the purchasing functions at higher education institutions. This report concerns food service contracts at West Liberty, West Virginia State, Concord and Glenville that require property investments by the food service vendor. Draft copies of the report have also been submitted to these four institutions. At this time we do not know when the report will be heard by the Legislative Oversight Committee on Education Accountability, but we will notify you when they desire to schedule it to be heard by the committee.

We would like to schedule an exit conference with you at your convenience no later than Friday, August 5, 2005 to discuss any concerns you may have with the report. Please contact Gail Higgins to set up a meeting time and location. We plan to exit only with the Higher Education Policy Commission, and not with individual institutions' administrations. Therefore, we expect that the HEPC will gather institutional responses and comments for the agency's written response. At the exit conference we will discuss the date when we will need a copy of the written response in order to be included in the final report.

Thank you for your cooperation.

Sincerely,

Handwritten signature of John Sylvia in cursive script.
John Sylvia

Joint Committee on Government and Finance

Appendix B: Agency Response

Issue 1: Food Service Contracts that Require the Food Service Vendor to Make Property Investments in the Institution's Dining Service Facilities Entail Risks for the Institution and the State.

Attorney general's review is essential to avoid problems and protect the state.

Responses:

1. Concord University

- o No finding, therefore no response.

2. Glenville State College

- o College followed proper procedures in requesting attorney general review of contract and followed attorney general's recommendations.

3. West Liberty State College

- o College followed proper procedures in requesting attorney general review of contract and followed attorney general's recommendations.

4. West Virginia State University:

- o No finding, therefore no response.

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PERFORMANCE EVALUATION AND
RESEARCH DIVISION

One contract was not reviewed by the AG's office and can be rendered void.

Responses:

5. Concord University

- o No finding, therefore no response.

6. Glenville State College

- o No finding, therefore no response.

7. West Liberty State College

- o No finding, therefore no response.

8. West Virginia State University:

- o West Virginia State University has submitted the food services contract with AVI Foodsystems, Inc. to Ms. Dawn E. Warfield, Deputy Attorney General of the Appellate Division, State of West Virginia, Attorney General's Office for her review. As soon as her comments are received by our office the University will follow her instructions in order to be in compliance with the Legislative Auditors. Included with the contract were change orders numbers 1 through 4 and the charges for the new school year.

Property investments create added monitoring responsibilities for the institutions.

Responses:

9. Concord University

- o The current contract contains clear language related to a contribution to dining facilities by the vendor. The contribution is in the form of an annual donation for institution directed renovations and equipment purchases to

help cover the depreciation of equipment and facilities used by the contractor. No repayment is involved.

10. Glenville State College

- o Glenville is under no contractual obligation to repay any of vendor's investment.

11. West Liberty State College

- o The food service contract was bided and awarded by previous administrators no long employed by the college. It is current administration's belief that this contract, as well as all other contracts, is properly administered.

12. West Virginia State University:

- o West Virginia State University delivered to the Legislative Auditors on May 19, 2005, a schedule from AVI Foodsystems, Inc that listed everything either purchased or built for the University cafeteria.

Building and purchasing violations will occur without proper specifications and oversight.

Responses:

13. Concord University

- o No finding, therefore no response.

14. Glenville State College

- o No finding, therefore no response.

15. West Liberty State College

- o No finding. The auditor's report devotes much space to a discussion of prevailing wage rates. The report speculates that "[the] West Liberty renovation *may* have cost more than was necessary" [emphasis added]. We wish to make the point that, assuming *arguendo* that Wood Dining Services' general contractor did *not* pay prevailing wages, then paying prevailing wages *definitely* would have cost the College more. In any event, there is no evidence that the general contractor did not pay the prevailing wage rate. Currently, it is WLSC practice to adhere to WV Code and all pertinent regulations regarding contractors and subcontractors paying prevailing wage rates.

16. West Virginia State University:

- o No finding, therefore no response.

Investment amount may unduly influence vendor selection.

Responses:

17. Concord University

- o As the auditor's concerns became evident in early 2005, they were built into the development of Concord's new RFP and the new dining contract which took effect July 1st 2005.
- o The RFP for the new contract was prepared, a dining contract committee

was formed, and technical and cost proposals were submitted and evaluated separately. The bid award was made and a contract has been written for dining services at Concord. The RFP contained clear and concise language that addressed all the issues and concerns addressed by the legislative auditor in their report of January 2005. The new contract clearly specifies that annual contributions for dining facilities by the vendor are in no way subject to repayment.

18 Glenville State College

- It is my opinion that these findings will have little effect on the current contractual obligations entered into between the institutions and the food service vendors. However, several good points have been raised which warrant consideration. These points can be incorporated into a template to assist institutions in the development of future RFP's and contracts with food service vendors.

19 West Liberty State College

- In the matter of WLSC's selection of Wood Dining Services, one bidder – Aladdin Food Management Services (the incumbent vendor) – offered an investment that far exceeded the actual contract specification. The selection committee was unmoved by this show of false bravado, ignored it, and selected Wood Dining.

20 West Virginia State University:

- West Virginia State University's students, staff and faculty who attended the open house invitations by the four different vendors on campus were overwhelmingly pleased by AVI's display of their offerings and also by the number of their staff who attended the open house. The amount of funds offered by the other companies was dwarfed by the quality of the staff and food that AVI presented the campus. In other words, the investment amount did not influence the committee, the presentation from AVI did. The University could have chosen not to accept the addendum from AVI, but the unfairness of the other companies of exceeding the bid requirements provoked the acceptance of the amendment.

Property investment may influence relationships.

Responses:

21 Concord University

- Financial proposals and technical proposals were considered separately.
- The existing food service vendor has been retained based on the quality of their technical proposal and the quality of their past service.

22 Glenville State College

- GSC required separation of technical and financial food service bids. These were treated separately in the evaluation and selection process.

23 West Liberty State College

- With respect to auxiliary contracts at WLSC, it is not uncommon for a bidder that offered a donation *smaller* than its competitors to win a contract. It is not uncommon for a bidder that did not offer a donation of any kind to prevail over bidders who did offer donations. Simply put, I

place a premium on the quality of the service being tendered; donations, if any, take a back seat in deliberations for which I have responsibility as Vice President of Administration.

- o There is no proof or even evidence that WLSC's relationship with Wood Dining (now, Sodexo) has been impacted adversely by Wood Dining's \$700,000-plus investment. Indeed, if the College chose to terminate its relationship with Sodexo, a large balloon payment would come due. However, it is common practice today for successor vendors to foot the bill for such payments, i.e. as a condition of the new contract award. I, personally, have been approached by food service vendors offering promises that they would "donate" \$300,000-\$350,000 to WLSC if I would orchestrate Sodexo's ouster. So, as a practical matter, institutions confronted by the specter of a balloon payment likely could find a new vendor willing to cover that payment.

24. West Virginia State University:

- o West Virginia State University is not being influenced by the vendor. The staff of Student Affairs monitors the vendor's services on a daily basis, either by eating there almost on a daily basis, as in the case of the Vice President of Student Affairs, or constant monitoring by the University's staff member whose job is to do just that. Students also monitor and report to the staff member, the Vice President and the Assistant Vice President.

Property investments may create unexpected expenses for the institution or the state.

Responses:

25. Concord University

- o The current contract specifies annual vendor contributions for institution directed renovations and equipment purchases to help cover the depreciation of equipment and facilities used by the vendor. The annual contributions are not amortized property investments requiring repayment by the institution.

26. Glenville State College

- o Glenville State College has no obligation to repay the annual property investment

27. West Liberty State College

- o See previous comments under audit point, *property investment may influence relationships.*

28. West Virginia State University:

- o When entering into a contract with a vendor the institution tries to receive the best deal that it can possibly get in order not to raise prices of the commodity to an unreasonable amount that it would cause the institution to be unmarketable. Thus, the institution enters into a long term contract with the vendor. The vendor and the institution have to work together to have the best deal for the ultimate customer, the student. Should the

institution not have the length of time as in the case of this contract, the institution's foodservices will become unmarketable.

Institutional property investment obligations are not reported to the state.

Response:

1 Higher Education Policy Commission:

- o There are no requirements either in statute or by state agencies that address the necessity to report property investment obligations. In discussing these audit findings with external auditors, there are no requirements to report through financial audit disclosures.

Issue 2: When West Liberty State College Allowed its Food Service Vendor to be Responsible for Renovating the Campus Dining Facilities, Some Provisions in State Code Were Not Followed.

Response:

2 West Liberty State College:

- o First and foremost, it is imperative that we point out that neither Mr. Henry (Chief Financial Officer) nor I (John L. Davis, VP of Administration), nor Dr. Owens (President), for that matter were employed at West Liberty at the time (1999) the college put to bid its food service contract and awarded it.
- o Neither Mr. Henry nor I feel obligated to try to explain, justify, or otherwise excuse the shortcomings of previous administrators. He and I, in our respective areas, have made substantial efforts to improve *all* contracting practices at West Liberty since we arrived. In Mr. Henry's capacity as Chief Procurement Officer, he has overall responsibility for purchasing. The letting of auxiliary contracts, though, is part of my bailiwick; Mr. Henry and I collaborate on such contracts as needed.
- o The report speculates that "[the] West Liberty renovation *may* have cost more than was necessary" [emphasis added]. We wish to make the point that, assuming *arguendo* that Wood Dining Services' general contractor did *not* pay prevailing wages, then paying prevailing wages *definitely* would have cost the College more. In any event, there is no evidence that the general contractor did not pay the prevailing wage rate. Currently, it is WLSC practice to adhere to WV Code and all pertinent regulations regarding contractors and subcontractors paying prevailing wage rates.
- o WLSC's award of its food service contract to Wood Dining (circa 2000) included a sizeable "investment package" relating to capital improvements. As the auditor points out, those improvements were made under the vendor's guidance, not the College's. As far as Mr. Henry and I have been able to determine, the Attorney General did not object to this turnkey arrangement back in 1999 or 2000. Moreover, we suppose that Atlantic Equipment, Wood Dining's partner-general contractor, *did* use competitive bidding in sourcing kitchen appliances and other expensive equipment. It is not likely that Atlantic (established in 1985) or any company could survive in business without knowing how to purchase the best product at the best price. Mr. Henry and I are not

aware of any evidence that Atlantic did *not* avail itself of competitive bidding.

- In closing, I want to mention that one area of concern that *I have* and that I mentioned to the auditors did not make it into the report you received. This is the matter of – what I call – “the unchecked power of the individual”. Individual administrators in the public sector enjoy less autonomy than they would in the public sector. Presumably, this is because of the fiduciary duty each of us owes to the taxpayers. It is my personal belief that the Legislature should consider steps that would safeguard against an individual nullifying contract “decisions” (actually, contract recommendations) made by a selection committee.

Final Comments:

1 Higher Education Policy Commission:

- ○ Several of the legislative comments are very valid and duly noted. Most importantly, the auditor’s points about having standard contracts and term are especially pertinent. The staff will work with institutions to develop standardized contracts.
- ○ Included in these contracts should be language that puts the food service vendor at risk and not the higher education institution. Equally important language should be included that the vendor must comply with all state requirements including competitive bidding procedures and payment of construction working at prevailing wage rate.