

1 **H. B. 2813**

2
3 (By Delegate Guthrie)

4 [Introduced March 4, 2013; referred to the
5 Committee on Government Organization then Finance.]

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10 A BILL to amend and reenact §5A-3-3, §5A-3-4, §5A-3-10, §5A-3-10b
11 and §5A-3-11c of the Code of West Virginia, 1931, as amended,
12 all relating generally to the purchasing division; making
13 technical corrections; requiring that the manner in which
14 spending units may be authorized to make direct purchases must
15 be consistent with the other requirements of this article;
16 requiring that the director of purchasing may not authorize a
17 contract that would allow an agency to circumvent the \$25,000
18 threshold for agency purchases; requiring that best value
19 procurements are subject to the other requirements of this
20 article; and clarifying that an award to multiple vendors
21 remains subject to the other requirements of this article.

22 *Be it enacted by the Legislature of West Virginia:*

23 That §5A-3-3, §5A-3-4, §5A-3-10, §5A-3-10b and §5A-3-11c of
24 the Code of West Virginia, 1931, as amended, be amended and

1 reenacted, all to read as follows:

2 **ARTICLE 3. PURCHASING DIVISION.**

3 **§5A-3-3. Powers and duties of director of purchasing.**

4 The director, under the direction and supervision of the
5 secretary, shall be the executive officer of the Purchasing
6 Division and shall ~~have the power and duty to:~~

7 (1) Direct the activities and employees of the Purchasing
8 Division;

9 (2) Ensure that the purchase of or contract for commodities
10 shall be based, whenever possible, on competitive bid;

11 (3) ~~Purchasing~~ Purchase or contract for, in the name of the
12 state, the commodities and printing required by the spending units
13 of the state government;

14 (4) Apply and enforce standard specifications established in
15 accordance with section five of this article as hereinafter
16 provided;

17 (5) Transfer to or between spending units or sell commodities
18 that are surplus, obsolete or unused as hereinafter provided;

19 (6) Have charge of central storerooms for the supply of
20 spending units, as the director deems advisable;

21 (7) Establish and maintain a laboratory for the testing of
22 commodities and make use of existing facilities in state
23 institutions for that purpose as hereinafter provided, as the
24 director deems advisable;

1 (8) Suspend the right and privilege of a vendor to bid on
2 state purchases when the director has evidence that ~~such~~ the vendor
3 has violated any of the provisions of the purchasing law or the
4 rules and regulations of the director;

5 (9) Examine the provisions and terms of every contract entered
6 into for and on behalf of the State of West Virginia that impose
7 any obligation upon the state to pay any sums of money for
8 commodities or services and approve each ~~such~~ contract as to ~~such~~
9 the provisions and terms; and the duty of examination and approval
10 herein set forth does not supersede the responsibility and duty of
11 the Attorney General to approve ~~such~~ the contracts as to form:
12 *Provided*, That the provisions of this subdivision do not apply in
13 any respect whatever to construction or repair contracts entered
14 into by the Division of Highways of the Department of
15 Transportation: *Provided, however*, That the provisions of this
16 subdivision do not apply in any respect whatever to contracts
17 entered into by the University of West Virginia Board of Trustees
18 or by the Board of Directors of the State College System, except to
19 the extent that ~~such~~ the boards request the facilities and services
20 of the director under the provisions of this subdivision; and

21 (10) Assure that the specifications and commodity descriptions
22 in all "requests for quotations" are prepared so as to permit all
23 potential suppliers-vendors who can meet the requirements of the
24 state an opportunity to bid and to assure that the specifications

1 and descriptions do not favor a particular brand or vendor. If the
2 director determines that any such specifications or descriptions as
3 written favor a particular brand or vendor or if it is decided,
4 either before or after the bids are opened, that a commodity having
5 different specifications or quality or in different quantity can be
6 bought, the director may rewrite the "requests for quotations" and
7 the matter shall be rebid.

8 **§5A-3-4. Rules of director.**

9 (a) The director shall propose rules for legislative approval
10 in accordance with the provisions of article three, chapter
11 twenty-nine-a of this code to:

12 (1) Authorize a spending unit to purchase specified
13 commodities directly and prescribe the manner in which such
14 purchases shall be made, consistent with the requirements of this
15 article;

16 (2) Authorize, in writing, a spending unit to purchase
17 commodities in the open market for immediate delivery in
18 emergencies, defines emergencies and prescribe the manner in which
19 such purchases shall be made and reported to the director;

20 (3) Prescribe the manner in which commodities shall be
21 purchased, delivered, stored and distributed;

22 (4) Prescribe the time for making requisitions and estimates
23 of commodities, the future period which they are to cover, the form
24 in which they shall be submitted and the manner of their

1 authentication;

2 (5) Prescribe the manner of inspecting all deliveries of
3 commodities, and making chemical and physical tests of samples
4 submitted with bids and samples of deliveries to determine
5 compliance with specifications;

6 (6) Prescribe the amount and type of deposit or bond to be
7 submitted with a bid or contract and the amount of deposit or bond
8 to be given for the faithful performance of a contract;

9 (7) Prescribe a system whereby the director ~~shall be~~ is
10 required, upon the payment by a vendor of an annual fee established
11 by the director, to give notice to such vendor of all bid
12 solicitations for commodities of the type with respect to which such
13 vendor specified notice was to be given, but no such fee ~~shall~~ may
14 exceed the cost of giving the notice to such vendor, nor ~~shall~~ may
15 such fee exceed the sum of \$125 per fiscal year nor ~~shall~~ may such
16 fee be charged to persons seeking only reimbursement from a spending
17 unit;

18 (8) Prescribe that each state contract entered into by the
19 Purchasing Division ~~shall~~ contains provisions for liquidated
20 damages, remedies or provisions for the determination of the amount
21 or amounts which the vendor shall owe as damages, in the event of
22 default under such contract by such vendor, as determined by the
23 director;

24 (9) Prescribe contract management procedures for all state

1 contracts except government construction contracts including, but
2 not limited to, those set forth in article twenty-two, chapter five
3 of this code;

4 (10) Prescribe procedures by which oversight is provided to
5 actively monitor spending unit purchases, including, but not limited
6 to, all technology and software commodities and contractual services
7 exceeding \$1 million, approval of change orders and final acceptance
8 by the spending units;

9 (11) Prescribe that each state contract entered into by the
10 Purchasing Division contain provisions for the cancellation of the
11 contract upon thirty days' notice to the vendor;

12 (12) Prescribe procedures for selling surplus commodities to
13 the highest bidder by means of an Internet auction site;

14 (13) Provide such other matters as may be necessary to give
15 effect to the foregoing rules and the provisions of this article;
16 and

17 (14) Prescribe procedures for encumbering purchase orders to
18 ensure that the proper account may be encumbered before sending
19 purchase orders to vendors.

20 (b) The director shall propose rules for legislative approval
21 in accordance with the provisions of article three, chapter
22 twenty-nine-a of this code to prescribe qualifications to be met by
23 any person who is to be employed in the Purchasing Division as a
24 state buyer. The rules must provide that a person may not be

1 employed as a state buyer unless he or she at the time of employment
2 either is:

3 (1) A graduate of an accredited college or university; or

4 (2) Has at least four years' experience in purchasing for any
5 unit of government or for any business, commercial or industrial
6 enterprise.

7 Persons serving as state buyers are subject to the provisions
8 of article six, chapter twenty-nine of this code.

9 **§5A-3-10. Competitive bids; publication of solicitations for
10 sealed bids; purchase of products of nonprofit
11 workshops; employee to assist in dealings with
12 nonprofit workshops.**

13 (a) A purchase of and contract for commodities, printing and
14 services shall be based, whenever possible, on competitive bids.

15 (b) The director shall solicit sealed bids for the purchase of
16 commodities and printing which is estimated to exceed \$25,000. No
17 spending unit ~~shall~~ may issue a series of requisitions or divide or
18 plan procurements to circumvent this \$25,000 threshold or otherwise
19 avoid the use of sealed bids, and the director may not approve any
20 contract that would allow an agency to make purchases that
21 circumvent the \$25,000 threshold or otherwise avoid the use of
22 sealed bids, unless the contract is otherwise consistent with the
23 requirements of this article. Any spending unit which awards

1 multiple contracts for the same or similar commodity or service to
2 an individual vendor over any twelve-month period, the total value
3 of which exceeds \$25,000, shall file copies of all contracts awarded
4 to the vendor within the twelve preceding months with the director
5 immediately upon exceeding the \$25,000 limit, along with a statement
6 explaining how the multiple contract awards do not circumvent the
7 \$25,000 threshold. If the spending unit does not immediately report
8 to the director, the director may suspend the purchasing authority
9 of the spending unit until the spending unit complies with the
10 reporting requirement of this subsection. The director may conduct
11 a review of any spending unit to ensure compliance with this
12 subsection. Following a review, the director shall complete a
13 report summarizing his or her findings and forward the report to the
14 spending unit. In addition, the director shall report to the Joint
15 Committee on Government and Finance on January 1, and July of each
16 year the spending units which have reported under this subsection
17 and the findings of the director.

18 (c) The director may permit bids by electronic transmission to
19 be accepted in lieu of sealed bids.

20 (d) Bids shall be solicited by public notice. The notice may
21 be published by any advertising medium the director deems advisable.
22 The director may also solicit sealed bids by sending requests by
23 mail or electronic transmission to prospective vendors.

24 (e) The director shall, without competitive bidding, purchase

1 commodities and services produced and offered for sale by nonprofit
2 workshops, as defined in section one, article one of this chapter,
3 which are located in this state: *Provided*, That such commodities
4 and services shall be of a fair market price and of like quality
5 comparable to other commodities and services otherwise available as
6 determined by the director with the advice of the committee on the
7 purchase of commodities and services from the handicapped.

8 To encourage contracts for commodities and services with
9 nonprofit workshops, the director shall employ a person whose
10 responsibilities in addition to other duties shall be to identify
11 all commodities and services available for purchase from nonprofit
12 workshops, to evaluate the need of the state for commodities and
13 services to coordinate the various nonprofit workshops in their
14 production efforts and to make available to such workshops
15 information about available opportunities within state government
16 for purchase of commodities or services which might be produced and
17 sold by such workshops. Funds to employ such a person shall be
18 included annually in the budget.

19 **§5A-3-10b. Best value procurement.**

20 (a) The director may utilize best value procurement to enter
21 into a contract when he or she determines in writing that it is
22 advantageous to the state.

23 (b) A solicitation for bids under best value procurement shall
24 be made in the same manner as provided in section ten of this

1 article.

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

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

15 (e) The director may not use best value procurement to enter
16 into government construction contracts, including, but not limited
17 to, those set forth in article twenty-two, chapter five of this
18 code.

19 (f) The director may not use best value procurement nor allow
20 an agency to use best value procurement to enter into contracts that
21 could later be used to circumvent the requirement in subsection (b)
22 of section ten of this article that the director must solicit sealed
23 bids for the purchase of commodities and printing estimated to
24 exceed \$25,000, or otherwise circumvent the requirements of this

1 article.

2 **§5A-3-11c. Multiple awards.**

3 (a) The director may elect to award a contract to one or more
4 responsive and responsible bidders if the director determines in
5 writing that a single award to an individual bidder would be
6 insufficient: *Provided*, That the basis for the selection among
7 multiple contracts at the time of purchase shall be the most
8 practical and economical alternative and shall be in the best
9 interests of the state.

10 (b) The bidding process and each contract awarded under this
11 section remains subject to all of the requirements of this article
12 that would otherwise apply to a single contract awarded by the
13 director.

NOTE: The purpose of this bill is to make technical corrections to the purchasing division article; to require that the manner in which spending units may be authorized by the director of the Purchasing Division to make direct purchases must be consistent with the other requirements of the purchasing process; to prevent the director of purchasing from authorizing a contract that would allow an agency to circumvent the \$25,000 threshold for agency purchases; and to ensure that contracts awarded under best value procurement and awards to multiple vendors remain subject to the requirements of the purchasing process.

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