

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

Senate Bill 190

BY SENATORS BLAIR, HALL, BOSO, CLINE AND SYPOLT

[Originating in the Committee on Government

Organization; reported on February 28, 2017]

1 A BILL to amend and reenact §5A-3-37 of the Code of West Virginia, 1931, as amended; and to
2 amend and reenact §18B-5-4 of said code, all relating to eliminating preferences for
3 certain vendors bidding on state contracts for commodities or printing; establishing a
4 reciprocal preference that is to be applied to resident vendors against a nonresident
5 vendor from any state that gives or requires a preference to bidders from that state; and
6 providing resident vendor qualifications.

Be it enacted by the Legislature of West Virginia:

1 That §5A-3-37 of the Code of West Virginia, 1931, as amended, be amended and
2 reenacted; and that §18B-5-4 of said code be amended and reenacted, all to read as follows:

CHAPTER 5A. DEPARTMENT OF ADMINISTRATION.

ARTICLE 3. PURCHASING DIVISION.

§5A-3-37. Preference for resident vendors; ~~preference for vendors employing state residents; preference for veteran residents; exceptions~~ reciprocal preference.

1 ~~(a) Effective beginning July 1, 1992, in any instance that a purchase of commodities or~~
2 ~~printing by the director or by a state department is required under the provisions of this article to~~
3 ~~be made upon competitive bids, the successful bid shall be determined as provided in this section.~~
4 ~~The Secretary of the Department of Revenue shall promulgate any rules necessary to: (i)~~
5 ~~Determine that vendors have met the residence requirements described in this section; (ii)~~
6 ~~establish the procedure for vendors to certify the residency requirements at the time of submitting~~
7 ~~their bids; (iii) establish a procedure to audit bids which make a claim for preference permitted by~~
8 ~~this section and to reject noncomplying bids; and (iv) otherwise accomplish the objectives of this~~
9 ~~section. In prescribing the rules, the secretary shall use a strict construction of the residence~~
10 ~~requirements set forth in this section. For purposes of this section, a successful bid shall be~~
11 ~~determined and accepted as follows:~~

12 ~~(1) From an individual resident vendor who has resided in West Virginia continuously for~~

13 ~~the four years immediately preceding the date on which the bid is submitted or from a partnership,~~
14 ~~association, corporation resident vendor, or from a corporation nonresident vendor which has an~~
15 ~~affiliate or subsidiary which employs a minimum of one hundred state residents and which has~~
16 ~~maintained its headquarters or principal place of business within West Virginia continuously for~~
17 ~~four years immediately preceding the date on which the bid is submitted, if the vendor's bid does~~
18 ~~not exceed the lowest qualified bid from a nonresident vendor by more than two and one-half~~
19 ~~percent of the latter bid, and if the vendor has made written claim for the preference at the time~~
20 ~~the bid was submitted: *Provided*, That for purposes of this subdivision, any partnership,~~
21 ~~association or corporation resident vendor of this state, which does not meet the requirements of~~
22 ~~this subdivision solely because of the continuous four year residence requirement, shall be~~
23 ~~considered to meet the requirement if at least eighty percent of the ownership interest of the~~
24 ~~resident vendor is held by another individual, partnership, association or corporation resident~~
25 ~~vendor who otherwise meets the requirements of this subdivision, including the continuous four-~~
26 ~~year residency requirement: *Provided, however*, That the Secretary of the Department of~~
27 ~~Revenue shall promulgate rules relating to attribution of ownership among several resident~~
28 ~~vendors for purposes of determining the eighty percent ownership requirement; or~~

29 (2) ~~From a resident vendor, if, for purposes of producing or distributing the commodities~~
30 ~~or completing the project which is the subject of the vendor's bid and continuously over the entire~~
31 ~~term of the project, on average at least seventy five percent of the vendor's employees are~~
32 ~~residents of West Virginia who have resided in the state continuously for the two immediately~~
33 ~~preceding years, and the vendor's bid does not exceed the lowest qualified bid from a nonresident~~
34 ~~vendor by more than two and one-half percent of the latter bid, and if the vendor has certified the~~
35 ~~residency requirements of this subdivision and made written claim for the preference, at the time~~
36 ~~the bid was submitted; or~~

37 (3) ~~From a nonresident vendor, which employs a minimum of one hundred state residents~~
38 ~~or a nonresident vendor which has an affiliate or subsidiary which maintains its headquarters or~~

39 ~~principal place of business within West Virginia and which employs a minimum of one hundred~~
40 ~~state residents, if, for purposes of producing or distributing the commodities or completing the~~
41 ~~project which is the subject of the vendor's bid and continuously over the entire term of the project,~~
42 ~~on average at least seventy-five percent of the vendor's employees or the vendor's affiliate's or~~
43 ~~subsidiary's employees are residents of West Virginia who have resided in the state continuously~~
44 ~~for the two immediately preceding years and the vendor's bid does not exceed the lowest qualified~~
45 ~~bid from a nonresident vendor by more than two and one-half percent of the latter bid, and if the~~
46 ~~vendor has certified the residency requirements of this subdivision and made written claim for the~~
47 ~~preference, at the time the bid was submitted; or~~

48 ~~(4) From a vendor who meets either the requirements of both subdivisions (1) and (2) of~~
49 ~~this subsection or subdivisions (1) and (3) of this subsection, if the bid does not exceed the lowest~~
50 ~~qualified bid from a nonresident vendor by more than five percent of the latter bid, and if the~~
51 ~~vendor has certified the residency requirements above and made written claim for the preference~~
52 ~~at the time the bid was submitted; or~~

53 ~~(5) From an individual resident vendor who is a veteran of the United States Armed Forces,~~
54 ~~the Reserves or the National Guard and has resided in West Virginia continuously for the four~~
55 ~~years immediately preceding the date on which the bid is submitted, if the vendor's bid does not~~
56 ~~exceed the lowest qualified bid from a nonresident vendor by more than three and one-half~~
57 ~~percent of the latter bid, and if the vendor has made written claim for the preference at the time~~
58 ~~the bid was submitted; or~~

59 ~~(6) From a resident vendor who is a veteran of the United States Armed Forces, the~~
60 ~~Reserves or the National Guard, if, for purposes of producing or distributing the commodities or~~
61 ~~completing the project which is the subject of the vendor's bid and continuously over the entire~~
62 ~~term of the project, on average at least seventy-five percent of the vendor's employees are~~
63 ~~residents of West Virginia who have resided in the state continuously for the two immediately~~
64 ~~preceding years and the vendor's bid does not exceed the lowest qualified bid from a nonresident~~

65 vendor by more than three and one-half percent of the latter bid, and if the vendor has certified
66 the residency requirements of this subdivision and made written claim for the preference, at the
67 time the bid was submitted; or

68 (7) Notwithstanding any provisions of subdivisions (1), (2), (3), (4), (5) or (6) of this
69 subsection to the contrary, if any nonresident vendor that is bidding on the purchase of
70 commodities or printing by the director or by a state department is also certified as a small, women
71 or minority-owned business pursuant to section fifty-nine of this article, the nonresident vendor
72 shall be provided the same preference made available to any resident vendor under the provisions
73 of this subsection.

74 (b) If the Secretary of the Department of Revenue determines under any audit procedure
75 that a vendor who received a preference under this section fails to continue to meet the
76 requirements for the preference at any time during the term of the project for which the preference
77 was received the secretary may: (1) Reject the vendor's bid; or (2) assess a penalty against the
78 vendor of not more than five percent of the vendor's bid on the project.

79 (c) Political subdivisions of the state including county boards of education may grant the
80 same preferences to any vendor of this state who has made a written claim for the preference at
81 the time a bid is submitted, but for the purposes of this subsection, in determining the lowest bid,
82 any political subdivision shall exclude from the bid the amount of business occupation taxes which
83 must be paid by a resident vendor to any municipality within the county comprising or located
84 within the political subdivision as a result of being awarded the contract which is the object of the
85 bid; in the case of a bid received by a municipality, the municipality shall exclude only the business
86 and occupation taxes as will be paid to the municipality: *Provided*, That prior to soliciting any
87 competitive bids, any political subdivision may, by majority vote of all its members in a public
88 meeting where all the votes are recorded, elect not to exclude from the bid the amount of business
89 and occupation taxes as provided in this subsection.

90 (d) If any of the requirements or provisions set forth in this section jeopardize the receipt

91 ~~of federal funds, then the requirement or provisions are void and of no force and effect for that~~
92 ~~specific project.~~

93 ~~(e) If any provision or clause of this section or application thereof to any person or~~
94 ~~circumstance is held invalid, the invalidity shall not affect other provisions or applications of this~~
95 ~~section which can be given effect without the invalid provision or application, and to this end the~~
96 ~~provisions of this section are severable.~~

97 ~~(f) This section may be cited as the "Jobs for West Virginians Act of 1990."~~

98 (a) In any instance that a purchase of commodities or printing by the director or by a state
99 spending unit is required under the provisions of this article to be made upon competitive bids,
100 preference shall be given to resident vendors of West Virginia against a nonresident vendor from
101 any state that gives or requires a preference to bidders from that state. The amount of the
102 preference shall be equal to the amount of the preference given or required by the state of the
103 nonresident vendor for that particular supply.

104 (b) A vendor shall be deemed to be a resident of this state if such vendor:

105 (1) Is registered in accordance with article twelve, chapter eleven of this code to transact
106 business within the State of West Virginia;

107 (2) Maintains its headquarters or principal place of business in the state;

108 (3) Has actually paid, and not just applied to pay, personal property taxes imposed by
109 chapter eleven of this code on equipment used in the regular course of supplying services or
110 commodities of the general type offered; and

111 (4) Has actually paid, and not just applied to pay, all required business taxes imposed by
112 chapter eleven of this code.

113 (c) If any of the requirements or provisions set forth in this section jeopardizes the receipt
114 of federal funds then such requirements or provision shall be void and of no force and effect.

CHAPTER 18B. HIGHER EDUCATION.

ARTICLE 5. HIGHER EDUCATION BUDGETS AND EXPENDITURES.

§18B-5-4. Purchase or acquisition of materials, supplies, equipment, services and printing.

1 (a) The council, commission and each governing board shall purchase or acquire all
2 materials, supplies, equipment, services and printing required for that governing board or the
3 council or commission, as appropriate, and the state institutions of higher education under their
4 jurisdiction, except the governing boards of Marshall University and West Virginia University,
5 respectively, are subject to subsection (d) of this section.

6 (b) The commission and council jointly shall adopt rules governing and controlling
7 acquisitions and purchases in accordance with this section. The rules shall ensure that the
8 following procedures are followed:

9 (1) No person is precluded from participating and making sales thereof to the council,
10 commission or governing board except as otherwise provided in section five of this article.
11 Providing consulting services such as strategic planning services does not preclude or inhibit the
12 governing boards, council or commission from considering a qualified bid or response for delivery
13 of a product or a commodity from the individual providing the services;

14 (2) Specifications are established and prescribed for materials, supplies, equipment,
15 services and printing to be purchased;

16 (3) Purchase order, requisition or other forms as may be required are adopted and
17 prescribed;

18 (4) Purchases and acquisitions in such quantities, at such times and under contract, are
19 negotiated for and made in the open market or through other accepted methods of governmental
20 purchasing as may be practicable in accordance with general law;

21 (5) Bids are advertised on all purchases exceeding \$50,000 and made by means of sealed
22 or electronically submitted bids and competitive bidding or advantageous purchases effected
23 through other accepted governmental methods and practices. Competitive bids are not required
24 for purchases of \$50,000 or less;

25 (6) Notices for acquisitions and purchases for which competitive bids are being solicited
26 are posted either in the purchasing office of the specified institution involved in the purchase or
27 by electronic means available to the public at least five days prior to making the purchases. The
28 rules shall ensure that the notice is available to the public during business hours;

29 (7) Purchases are made in the open market;

30 (8) Vendors are notified of bid solicitation and emergency purchasing; and

31 (9) No fewer than three bids are obtained when bidding is required, except if fewer than
32 three bids are submitted, an award may be made from among those received.

33 (c) When a state institution of higher education submits a contract, agreement or other
34 document to the Attorney General for approval as to form as required by this chapter, the following
35 conditions apply:

36 (1) "Form" means compliance with the Constitution and statutes of the State of West
37 Virginia;

38 (2) The Attorney General does not have the authority to reject a contract, agreement or
39 other document based on the substantive provisions in the contract, agreement or document or
40 any extrinsic matter as long as it complies with the Constitution and statutes of this state;

41 (3) Within fifteen days of receipt, the Attorney General shall notify the appropriate state
42 institution of higher education in writing that the contract, agreement or other document is
43 approved or disapproved as to form. If the contract, agreement or other document is disapproved
44 as to form, the notice of disapproval shall identify each defect that supports the disapproval; and

45 (4) If the state institution elects to challenge the disapproval by filing a writ of mandamus
46 or other action and prevails then the Attorney General shall pay reasonable attorney fees and
47 costs incurred.

48 (d) Pursuant to this subsection, the governing boards of Marshall University and West
49 Virginia University, respectively, may carry out the following actions:

50 (1) Purchase or acquire all materials, supplies, equipment, services and printing required

51 for the governing board without approval from the commission or the Vice Chancellor for
52 Administration and may issue checks in advance to cover postage as provided in subsection (f)
53 of this section;

54 (2) Purchase from cooperative buying groups, consortia, the federal government or from
55 federal government contracts if the materials, supplies, services, equipment or printing to be
56 purchased is available from these groups and if this would be the most financially advantageous
57 manner of making the purchase;

58 (3) Select and acquire by contract or lease all grounds, buildings, office space or other
59 space, and capital improvements, including equipment, if the rental is necessarily required by the
60 governing board; and

61 (4) Use purchase cards under terms approved for the commission, the council and
62 governing boards of state institutions of higher education and participate in any expanded
63 program of use as provided in subsection (u) of this section.

64 (e) The governing boards shall adopt sufficient accounting and auditing procedures and
65 promulgate and adopt appropriate rules subject to section six, article one of this chapter to govern
66 and control acquisitions, purchases, leases and other instruments for grounds, buildings, office
67 or other space, and capital improvements, including equipment, or lease-purchase agreements.

68 (f) The council, commission or each governing board may issue a check in advance to a
69 company supplying postage meters for postage used by that board, the council or commission
70 and by the state institutions of higher education under their jurisdiction.

71 (g) When a purchase is to be made by bid, any or all bids may be rejected. However, all
72 purchases based on advertised bid requests shall be awarded to the lowest responsible bidder
73 taking into consideration the qualities of the articles to be supplied, their conformity with
74 specifications, their suitability to the requirements of the governing boards, council or commission
75 and delivery terms. ~~The preference for resident vendors as provided in section thirty-seven, article~~
76 ~~three, chapter five-a of this code applies to the competitive bids made pursuant to this section.~~

77 (h) The governing boards, council and commission shall maintain a purchase file, which
78 shall be a public record and open for public inspection.

79 (1) After the award of the order or contract, the governing boards, council and commission
80 shall indicate upon the successful bid the following information:

81 (A) Designation as the successful bid;

82 (B) The reason any bids were rejected; and

83 (C) The reason for rejection, if the mathematical low vendor was not awarded the order or
84 contract.

85 (2) A record in the purchase file may not be destroyed without the written consent of the
86 Legislative Auditor. Those files in which the original documentation has been held for at least one
87 year and in which the original documents have been reproduced and archived on microfilm or
88 other equivalent method of duplication may be destroyed without the written consent of the
89 Legislative Auditor.

90 (3) All files, no matter the storage method, shall be open for inspection by the Legislative
91 Auditor upon request.

92 (i) The commission and council, also jointly, shall promulgate rules to prescribe
93 qualifications to be met by any person who is to be employed as a buyer pursuant to this section.
94 These rules shall require that a person may not be employed as a buyer unless that person, at
95 the time of employment, has one of the following qualifications:

96 (1) Is a graduate of an accredited college or university; or

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

99 (j) Any person making purchases and acquisitions pursuant to this section shall execute
100 a bond in the penalty of \$50,000, payable to the State of West Virginia, with a corporate bonding
101 or surety company authorized to do business in this state as surety thereon, in form prescribed
102 by the Attorney General and conditioned upon the faithful performance of all duties in accordance

103 with this section and sections five through eight, inclusive, of this article and the rules of the
104 governing board and the council and commission. In lieu of separate bonds for these buyers, a
105 blanket surety bond may be obtained. The bond shall be filed with the Secretary of State and the
106 cost of the bond shall be paid from funds appropriated to the applicable governing board or the
107 council or commission.

108 (k) All purchases and acquisitions shall be made in consideration and within limits of
109 available appropriations and funds and in accordance with applicable provisions of article two,
110 chapter five-a of this code relating to expenditure schedules and quarterly allotments of funds.
111 Notwithstanding any other provision of this code to the contrary, only those purchases exceeding
112 the dollar amount for competitive sealed bids in this section are required to be encumbered. Such
113 purchases may be entered into the state's centralized accounting system by the staff of the
114 commission, council or governing boards to satisfy the requirements of article two, chapter five-a
115 of this code to determine whether the amount of the purchase is within the quarterly allotment of
116 the commission, council or governing board, is in accordance with the approved expenditure
117 schedule and otherwise conforms to the article: *Provided, That*, notwithstanding the foregoing
118 provisions of this subsection or any other provision of this code to the contrary, purchases by
119 Marshall University or West Virginia University are not required to be encumbered.

120 (l) The governing boards, council and commission may make requisitions upon the State
121 Auditor for a sum to be known as an advance allowance account, not to exceed five percent of
122 the total of the appropriations for the governing board, council or commission, and the State
123 Auditor shall draw a warrant upon the Treasurer for those accounts. All advance allowance
124 accounts shall be accounted for by the applicable governing board or the council or commission
125 once every thirty days or more often if required by the State Auditor.

126 (m) Contracts entered into pursuant to this section shall be signed by the applicable
127 governing board or the council or commission in the name of the state and shall be approved as
128 to form by the Attorney General. A contract which requires approval as to form by the Attorney

129 General is considered approved if the Attorney General has not responded within fifteen days of
130 presentation of the contract. A contract or a change order for that contract and notwithstanding
131 any other provision of this code to the contrary, associated documents such as performance and
132 labor/material payments, bonds and certificates of insurance which use terms and conditions or
133 standardized forms previously approved by the Attorney General and do not make substantive
134 changes in the terms and conditions of the contract do not require approval as to form by the
135 Attorney General. The Attorney General shall make a list of those changes which he or she
136 considers to be substantive and the list, and any changes to the list, shall be published in the
137 State Register. A contract that exceeds the dollar amount requiring competitive sealed bids in this
138 section shall be filed with the State Auditor. If requested to do so, the governing boards, council
139 or commission shall make all contracts available for inspection by the State Auditor. The
140 governing board, council or commission, as appropriate, shall prescribe the amount of deposit or
141 bond to be submitted with a bid or contract, if any, and the amount of deposit or bond to be given
142 for the faithful performance of a contract.

143 (n) If the governing board, council or commission purchases or contracts for materials,
144 supplies, equipment, services and printing contrary to sections four through seven, inclusive, of
145 this article or the rules pursuant to this article, the purchase or contract is void and of no effect.

146 (o) A governing board or the council or commission, as appropriate, may request the
147 director of purchasing to make available the facilities and services of that department to the
148 governing boards, council or commission in the purchase and acquisition of materials, supplies,
149 equipment, services and printing. The director of purchasing shall cooperate with that governing
150 board, council or commission, as appropriate, in all such purchases and acquisitions upon that
151 request.

152 (p) Each governing board or the council or commission, as appropriate, may permit private
153 institutions of higher education to join as purchasers on purchase contracts for materials, supplies,
154 services and equipment entered into by that governing board or the council or commission. A

155 private institution desiring to join as purchaser on purchase contracts shall file with that governing
156 board or the council or commission, as appropriate, an affidavit signed by the president or
157 designee of the private institution requesting that it be authorized to join as purchaser on purchase
158 contracts of that governing board or the council or commission, as appropriate. The private
159 institution shall agree that it is bound by such terms and conditions as that governing board or the
160 council or commission may prescribe and that it will be responsible for payment directly to the
161 vendor under each purchase contract.

162 (q) Notwithstanding any other provision of this code to the contrary, the governing boards,
163 council and commission, as appropriate, may make purchases from cooperative buying groups,
164 consortia, the federal government or from federal government contracts if the materials, supplies,
165 services, equipment or printing to be purchased is available from that source, and purchasing
166 from that source would be the most financially advantageous manner of making the purchase.

167 (r) An independent performance audit of all purchasing functions and duties which are
168 performed at any state institution of higher education shall be performed at least once in each
169 three-year period. The Joint Committee on Government and Finance shall conduct the
170 performance audit and the governing boards, council and commission, as appropriate, are
171 responsible for paying the cost of the audit from funds appropriated to the governing boards,
172 council or commission.

173 (1) The governing board shall provide for independent performance audits of all
174 purchasing functions and duties on its campus at least once in each three-year period.

175 (2) Each audit shall be inclusive of the entire time period that has elapsed since the date
176 of the preceding audit.

177 (3) Copies of all appropriate documents relating to any audit performed by a governing
178 board shall be furnished to the Joint Committee on Government and Finance and the Legislative
179 Oversight Commission on Education Accountability within thirty days of the date the audit report
180 is completed.

181 (s) The governing boards shall require each institution under their respective jurisdictions
182 to notify and inform every vendor doing business with that institution of section fifty-four, article
183 three, chapter five-a of this code, also known as the Prompt Pay Act of 1990.

184 (t) Consultant services, such as strategic planning services, do not preclude or inhibit the
185 governing boards, council or commission from considering any qualified bid or response for
186 delivery of a product or a commodity because of the rendering of those consultant services.

187 (u) Purchasing card use may be expanded by the council, commission and state
188 institutions of higher education pursuant to this subsection.

189 (1) The council and commission jointly shall establish procedures to be implemented by
190 the council, commission and any institution under their respective jurisdictions using purchasing
191 cards. The procedures shall ensure that each meets the following conditions:

192 (A) Appropriate use of the purchasing card system;

193 (B) Full compliance with article three, chapter twelve of this code relating to the purchasing
194 card program; and

195 (C) Sufficient accounting and auditing procedures for all purchasing card transactions.

196 (2) Notwithstanding any other provision of this code to the contrary, the council,
197 commission and any institution authorized pursuant to subdivision (3) of this subsection may use
198 purchasing cards for the following purposes:

199 (A) Payment of travel expenses directly related to the job duties of the traveling employee,
200 including, but not limited to, fuel and food; and

201 (B) Payment of any routine, regularly scheduled payment, including, but not limited to,
202 utility payments and real property rental fees.

203 (3) The commission and council each shall evaluate the capacity of each institution under
204 its jurisdiction for complying with the procedures established pursuant to subdivision (2) of this
205 subsection. The commission and council each shall authorize expanded use of purchasing cards
206 pursuant to that subdivision for any institution it determines has the capacity to comply.

NOTE: The purpose of this bill is to eliminate the 5% bidders' preference for in-state vendors on state contracts.

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